AMERICAN BANKRUPTCY INSTITUTE

2019 Southeast Bankruptcy Workshop

PLENARY SESSION

Consumer Law Developments

Nisha R. Patel, Moderator
Samuel I. White, P.C.; Richmond, Va.

Hon. Benjamin A. Kahn
U.S. Bankruptcy Court (M.D.N.C.); Greensboro

Hon. Rebecca B. Connelly
U.S. Bankruptcy Court (W.D. Va.); Harrisonburg

Prof. Bruce A. Markell
Northwestern University School of Law; Chicago

2019

CONSUMER LAW DEVELOPMENTS

Honorable Rebecca B. Connelly, Chief Judge, U.S. Bankruptcy Court for the Western District of Virginia

Honorable Benjamin A. Kahn, U.S. Bankruptcy Court for the Middle District of North Carolina

Professor Bruce A. Markell, Northwestern University Pritzker School of Law

July 20, 2019

ROOKER-FELDMAN DOCTRINE ISSUES

ROOKER-FELDMAN ISSUES

- Davis v. Bank of Am., N.A. (In re Davis), 597 B.R. 770 (Bankr. M.D. Pa. 2019).
  - Pro se debtor brought adversary proceeding to challenge prepetition foreclosure judgment for lack of standing, lack of service, and violation of the automatic stay
  - BANA filed Motion to Dismiss for lack of subject matter jurisdiction
  - Bankruptcy Court held that the Complaint – filed almost 3 years after the state court judgment – was barred by the Rooker-Feldman doctrine

ROOKER-FELDMAN ISSUES

- Wohleber v. Skurko (In re Wohleber), 596 B.R. 554 (B.A.P. 6th Cir. 2019).
  - Bankruptcy Court held that debtor's ex-wife and her attorney had not violated the automatic stay by allowing domestic relations court to proceed with sentencing in prepetition contempt proceeding
  - B.A.P. found that Rooker-Feldman doctrine did not prohibit Bankruptcy Court from adjudicating stay violations
  - B.A.P. reversed Bankruptcy Court and found that the ex-wife and her counsel had a duty to take affirmative action to stop domestic relations court from proceeding with sentencing

FRAUDULENT TRANSFERS: TUITION AND §544, §548, AND §550

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- Geltzer v. Oberlin College (In re Sterman), 594 B.R. 229 (Bankr. S.D.N.Y. 2018)
  - Chapter 7 trustee sought to avoid tuition and other payments made by the debtors to/for the benefit of their daughters as constructively fraudulent transfers
  - Bankruptcy Court found that debtors received both "reasonably equivalent value" under §548(a)(1)(b) and "fair consideration" under §544 for payments made when the daughters were minors but not for payments made while they were adults

FRAUDULENT TRANSFERS: TUITION AND §544, §548, §550

- Pergament v. Brooklyn Law School, 595 B.R. 6 (E.D.N.Y. 2019).
  - Bankruptcy Court denied a Chapter 7 trustee's motion to avoid tuition payments made for debtor's adult children, finding that the children were the initial transferees and that the schools, as subsequent transferees, were entitled to the good faith defense of §550(b)
  - District Court remanded to the Bankruptcy Court to investigate the specific timing of the transfers and to determine whether or not they were paid early enough to be refundable (and therefore avoidable)

FRAUDULENT TRANSFERS: TUITION AND §544, §548, §550

- Mangan v. Univ. of Conn. (In re Hamadi), 597 B.R. 67 (Bankr. D. Conn. 2019).
  - Chapter 7 trustee brought suit under §548, §550, and §551 to recover payments made to UConn for debtors' adult son
  - UConn asserted that it took the payments as a subsequent transferee for value, in good faith, and without knowledge of voidability
  - Bankruptcy Court held that UConn was an initial transferee ("mere conduit") and an immediate transferee, depending on the timing of the payments

LIEN AVOIDANCE UNDER §522(F)

§522(F) LIEN AVOIDANCE

- CRP Holdings A-1, LLC v. O'Sullivan (In re O'Sullivan), 914 F.3d 1162 (8th Cir. 2019).
  - Chapter 7 debtor sought to avoid judicial lien arising from foreign judgment solely against the debtor on property owned with non-filing spouse as tenants by the entirety
  - Bankruptcy Court granted the motion and the appellate panel affirmed, but the Court of Appeals vacated
  - On remand, Bankruptcy Court found that there was a lien that could be avoided, and the Court of Appeals affirmed
  - Court of Appeals held that the foreign judgment created a cloud against title, which in turn constituted a "lien" that could be avoided even if the lien was unenforceable under state law

§522(F) LIEN AVOIDANCE

- In re Kenney, Case No. 1:10-bk-11635-GM, 2018 WL 6039094 (Bankr. C.D. Cal. Nov. 16, 2018).
  - Chapter 7 debtor moved to reopen 2010 discharged case to avoid a prepetition judgment lien pursuant to §522(f)
  - The debtor did not own real property for the judgment lien to attach
  - Bankruptcy Court denied the motion because the property and obligation had to coexist under California law, so there was no valid lien for the debtor to avoid

§522(F) LIEN AVOIDANCE

- In re Cannon, No. 08-11098C-7G, 2008 WL 6745379 (Bankr. M.D.N.C. Aug. 26, 2008).
  - Chapter 7 debtor filed motions to avoid two judicial liens solely against the debtor on property owned with his non-filing spouse as tenants by the entirety
  - Bankruptcy Court held because that the liens could not reach the entireties property, they could not be avoided as impairing exemptions

§522(F) LIEN AVOIDANCE

- In re Corey, Case No. 13-03081-8-RDD, 2013 WL 3788239 (Bankr. E.D.N.C. July 18, 2013).
  - Debtor filed §522(f) motion on property owned with her non-filing spouse as tenants by the entirety
    - The judgment was only against the debtor, but under North Carolina law, would attach to the property upon severance of the tenancy
  - Bankruptcy Court held that the lien could be avoided so that it would not attach to any future interest in the property

TERMINATION OF THE STAY UNDER §362(C)(3)

§362(C)(3) STAY TERMINATION

- In re Smith, 596 B.R. 872 (Bankr. E.D. Tenn. 2019).
  - Chapter 13 Debtor failed to timely request extension of the stay in his second filing within one year
  - Secured creditor moved for relief, arguing that the stay terminated in its entirety on the 30th day after filing
  - Debtor argued that the stay terminated with respect to the debtor and his property, but not property of the estate
  - Bankruptcy Court compared §362(c)(3) to (c)(4) and noted that (c)(4) provided for complete termination while (c)(3) did not, and held that the stay remained in effect as to property of the estate

§362(C)(3) STAY TERMINATION

- Smith v. Me. Bureau of Revenue Servs. (In re Smith), 910 F. 3d 576 (1st Cir. 2018).
  - In a debtor's third case between August 2011 and December 2016, a creditor sought a comfort order pursuant to §362(j), arguing that the stay had terminated on the 30th day after filing
  - Bankruptcy Court agreed and District Court affirmed
  - Court of Appeals affirmed, holding that a complete termination of the stay was consistent with the legislative purpose of deterring serial filers

§362(C)(3) STAY TERMINATION

- In re Dev, 593 B.R. 435 (Bankr. E.D.N.C. 2018).
  - In a debtor's third case between January 2015 and February 2018, a secured creditor moved for relief from stay in order to proceed with foreclosure
  - Debtor's ex-husband also moved for relief in order to proceed with equitable distribution
  - Bankruptcy Court questioned whether stay was even in effect, and Debtor argued under existing case law (Jones), stay remained in effect as to property of the estate
  - Bankruptcy Court rejected Jones and adopted the complete termination approach, noting that partial termination would provide no meaningful relief to creditors in chapter 13 cases

§1328: "PAYMENTS UNDER THE PLAN" AND "PROVIDING FOR" OBLIGATIONS IN THE PLAN

§1328 "PAYMENTS UNDER THE PLAN"

- In re Rivera, 599 B.R. 335 (Bankr. D. Ariz. 2019).
  - Confirmed Chapter 13 plan provided that debtors would make their post-petition mortgage payments directly to the secured creditor
  - Trustee filed Notice of Final Payment in April 2018 and secured creditor responded, alleging the debtors were in default on their post-petition direct payments
  - Trustee moved to dismiss because the Debtors had not completed "all payments under the plan" pursuant to §1328(a)
  - Bankruptcy Court determined that "payments under the plan" only refers to payments to the Trustee

§1328: "PROVIDED FOR" BY THE PLAN

- Dukes v. Suncoast Credit Union (In re Dukes), 909 F.3d 1306 (11th Cir. 2018).
  - Confirmed Chapter 13 Plan provided that the debtor would make post-petition payments on two mortgages directly to the credit union
  - Debtor defaulted on both mortgages in 2011 and received her discharge in March 2012
  - Credit union foreclosed in 2013 and moved to reopen the bankruptcy, seeking a declaratory judgment that the debtor's personal liability on the first mortgage had not been discharged
  - Bankruptcy Court and District Court held that the debtor remained personally liable because the mortgages were not "provided for" in the plan
  - Court of Appeals affirmed, noting that in order for a debt to be "provided for" in a plan, the plan must make a provision for or stipulate to the debt

§1328: COMPLETION OF PLAN PAYMENTS

- Davis v. Holman (In re Holman), 594 B.R. 769 (D. Kan. 2018).
  - Debtors' first amended plan was confirmed in June 2012
  - In April 2015, debtors filed fourth motion to modify and Trustee objected
  - The day before trial, debtors moved to modify for a fifth time and the trustee objected again
  - Before the Bankruptcy Court issued a ruling, debtors and trustee entered into an order resolving both motions
  - Trustee moved to dismiss in July 2016 and trial was set for March 2017
  - In December 2016, debtors completed their plan payments
  - Bankruptcy Court noted the debtors' disregard for the bankruptcy process, but held that completion of plan payments warranted a mandatory discharge pursuant to §1328(a)
  - On appeal, District Court found that the word "shall" in §1328(c) unambiguously required the Bankruptcy Court to grant a discharge upon the completion of all plan payments

ADDITIONAL CASES OF INTEREST

HURLBURT

- Hurlburt v. Black, No. 17-2449, 2019 WL 2237966 (4th Cir. May 24, 2019).
  - Debtor purchased home in 2004 for $136,000 with a loan that matured with a balloon in May 2014
  - After he was unable to refinance the balloon and the seller began foreclosure proceedings, debtor filed a Chapter 13 in April 2016, valuing his home at $40,000
  - Seller objected, arguing that her claim could not be bifurcated into secured and unsecured claims under existing case law (Witt)
  - Bankruptcy Court held that it was bound by Witt and the District Court and Fourth Circuit affirmed
  - Debtor's petition for rehearing en banc was granted
  - Fourth Circuit held that short-term mortgages are exempted from the anti-modification provisions of §1322(b)(2), and the debtor could modify both the amount and payment of the claim

TAGGART

- Taggart v. Lorenzen, 139 S. Ct. 1795 (2019).
  - Taggart sold his interest in an Oregon LLC to his attorney
  - The LLC members sued Taggart and his attorney for breach of the operating agreement
  - On the eve of trial, Taggart filed a Chapter 7 and obtained a discharge
  - The state court entered judgment against Taggart in the breach matter, and the LLC members sued for the attorney's fees incurred after Taggart filed his bankruptcy
  - Ninth Circuit found that that a creditor's good faith belief – even an unreasonable one - that the discharge order does not apply to the creditor's claim precluded a finding of contempt
  - Supreme Court vacated, noting that the standard for civil contempt is generally objective

2019 ABI Southeast Bankruptcy Workshop
Consumer Case Update[1]

1. Rooker-Feldman Issues

A. **Rooker-Feldman Doctrine Bars Bankruptcy Court Review of State Foreclosure Judgment.** Davis v. Bank of Am., N.A. (In re Davis), 597 B.R. 770 (M.D. Pa. 2019). A pro se chapter 13 debtor filed an adversary proceeding challenging a prepetition mortgage foreclosure judgment claiming that the mortgagee had lacked standing to foreclose and that service had been insufficient. The mortgagee filed a motion to dismiss the complaint for lack of subject matter jurisdiction. The bankruptcy court held that the complaint challenging the state foreclosure judgment, filed three years after the state court foreclosure judgment, was barred by the Rooker-Feldman doctrine. The court further held that the debtor's discharge had no effect on the foreclosure judgment or the mortgagee's interest in the property, noting that the discharge had no effect on the *in rem* liability. The debtor also attempted to reintroduce an action for violation of the automatic stay which was denied based on an earlier, unappealed order denying the alleged violation of automatic stay. The court grated the motion to dismiss with prejudice, denying leave to amend as all the claims asserted by the pro se debtor were barred by the Rooker-Feldman doctrine.

B. **Creditor Has Duty of Affirmative Action Ensuring Automatic Stay Not Violated.** Wohleber v. Skurko (In re Wohleber), 596 B.R. 554 (B.A.P. 6th Cir. 2019). The debtor filed an action against his ex-wife and her attorney for violation of the automatic stay. The debtor claimed the ex-wife and her attorney permitted the post-petition sentencing portion of a pre-petition, domestic relations court contempt proceeding to continue despite their knowledge of the bankruptcy case and the imposition of the automatic stay. The bankruptcy court ruled from the bench and found that the parties had not violated the automatic stay through their conduct and thus dismissed the complaint. On appeal, the bankruptcy appellate panel first clarified that the bankruptcy court could properly adjudicate whether a stay violation occurred and was not prohibited from doing so by the Rooker-Feldman doctrine. The BAP also found that the contempt proceeding was civil in nature and thus did not fall into the criminal action exception to the automatic stay. The state court could not except itself from the automatic stay to enforce a dischargeable debt against the debtor. Reversing the decision of the bankruptcy court, the BAP concluded that the ex-wife and her attorney had a duty to take affirmative action to prevent the domestic relations court from moving forward with the contempt proceeding to compel the debtor to pay the dischargeable, prepetition property settlement. The duty to stop the action falls to

[1] These materials were prepared by Harris M. Watkins, law clerk to Benjamin A. Kahn, United States Bankruptcy Judge for the Middle District of North Carolina, and Caleb Chaplain, career law clerk to Rebecca Connelly, United States Bankruptcy Judge for the Western District of Virginia. Mr. Watkins received a Bachelor of Arts degree from Wofford College and a Juris Doctor with Honors from the University of North Carolina School of Law. Mr. Chaplain received a Bachelor of Arts degree from Dartmouth College and a Juris Doctor from Indiana University Maurer School of Law where he was Senior Managing Editor of the Indiana Law Journal.

the creditor and not to the debtor. The case was remanded for the bankruptcy court to determine whether the ex-wife and her attorney in fact violated this duty

2. **Fraudulent Transfers; Tuition and Sections 544, 548, and 550**

A. **Debtor's College Tuition and Expense Payments for Adult Children Subject to Avoidance.** Geltzer v. Oberlin College (In re Sterman), 594 B.R. 229 (Bankr. S.D.N.Y. 2018). The chapter 7 trustee filed a complaint to avoid college tuition and other payments made by the debtors on behalf of their daughters. The chapter 7 trustee argued that the payments were constructively fraudulent transfers, because under section 548(a)(1)(b) the debtors did not receive "reasonably equivalent value." Further, the trustee used section 544 to argue that the payments were avoidable because, under New York's fraudulent transfer law, the debtors did not receive "fair consideration." The parties cross-moved for summary judgment.

The bankruptcy court focused on the age of the daughters when the payments were made. The court found that the debtors did not receive "reasonably equivalent value" or "fair consideration" for the payments made on behalf of the daughter while *adults*. Love and affection from the daughters, as well as peace of mind that the daughters had food and a place to live while attending school, were not sufficient value or consideration. More easily, the court found that payments made for one adult daughter after she graduated were subject to avoidance. The court, however, found that the debtors did receive both "reasonably equivalent value" and "fair consideration" for the payments on behalf of one daughter made while she was a minor, because under New York law the parents had an obligation to provide for the minor's necessities.

B. **Timing Is Everything; Refundable Nature of Payments Matters for Whether Transferee Qualifies as an "Initial Transferee."** Pergament v. Brooklyn Law School, 595 B.R. 6 (E.D.N.Y. 2019). In a case converted to chapter 7, the trustee sought to avoid tuition payments to two undergraduate schools and one law school paid by the debtor for his adult children. Both parties filed motions for summary judgment. The bankruptcy court denied the trustee's motion. The trustee appealed. The district court held that the schools were not "initial transferees" to the extent that each school had received the payments early enough so that the schools would have to refund the tuition if the student withdrew. However, the schools were initial transferees to the extent that the schools accepted tuition payments after the time when the school would be required to issue a refund if the student withdrew. This distinction hinged on the timing of when the schools exercised dominion and control over the payments and when the funds were received for an existing debt. The district court vacated the bankruptcy court decision and remanded for the bankruptcy court to further evaluate the precise timing of the transfers to determine whether the payments were or were not made early enough to be refundable (and thus whether or not each transfer was avoidable).

C. **University May Have Good Faith Defense to Trustee's Avoidance Actions for Return of Tuition and Expense Payments.** Mangan v. Univ. of Conn. (In re

Hamadi), 579 B.R. 67 (Bankr. D. Conn. 2019). The chapter 7 trustee brought actions to recover as constructive fraudulent transfers payments made by chapter 7 debtors to a university for tuition and other expenses paid on behalf of the debtors' adult son. The trustee filed the actions pursuant to section 548, 550, and 551 of the Bankruptcy Code. The university filed a motion for summary judgment. The bankruptcy court looked to the "mere conduit" test to determine if the university was an initial transferee from which the trustee could recover as to the refundable portions of the payments made. The court held that the university was a mere conduit and thus not an initial transferee for refundable portions (which the university held in an account and was unable to accept until the son enrolled). Furthermore, the court held that the trustee could not avoid the refundable payments because the undisputed facts showed that the university received the payments in good faith, for value, and without knowledge. As to the nonrefundable payments, although the university was an initial transferee, the court determined that the university had established the elements of an affirmative defense. A genuine issue of material fact existed as to whether the nonrefundable portions were accepted by the university for value and in good faith. Accordingly, the court denied summary judgment on the nonrefundable issue.

3. **Section 522(f) Lien Avoidance**

A. **Unenforceable Liens May Be Avoided.** CRP Holdings A-1, LLC v. O'Sullivan (In re O'Sullivan), 914 F.3d 1162 (8th Cir. 2019). The chapter 7 debtor filed a motion to avoid a purported judicial lien pursuant to section 522(f) on property owned by him as a tenancy by the entirety with his non-filing spouse. The purported "lien" was based upon the registration of a foreign judgment solely against the debtor. The bankruptcy court granted the motion, and the bankruptcy appellate panel affirmed. The Court of appeals vacated and remanded for decision on whether the creditor had a judicial lien, either enforceable or unenforceable.

On remand, the bankruptcy court found there was a lien that could be avoided. On subsequent appeal, the Court of Appeals affirmed. The Court of Appeals noted that the registration of the foreign judgment created cloud against title even if it did not create a "lien" under state law. The Court of Appeals found that the creation of cloud against title constituted a "lien" under federal bankruptcy law. Thus, the registration of the foreign judgment created a lien that could be avoided. The Court of Appeals reasoned that even if the lien was unenforceable under state law it may still be avoided under section 522(f).

B. **Lien Avoidance Requires An Enforceable Lien.** In re Kenney, Case No. 1:10-bk-11635-GM, 2018 WL 6039094 (Bankr. C.D. Cal. Nov. 16, 2018). The chapter 7 debtor received a discharge in a 2010 bankruptcy case. Eight years later, the debtor moved to reopen her case to avoid a judgement lien, which had been recorded prior to the filing of her 2010 petition, pursuant to section 522(f). The impetus of the debtor to reopen had been that she was seeking financing to purchase property. The judgment lien however had not attached to any property at the time the debtor filed her bankruptcy petition because she owned no real property at that time. The court found that no valid lien existed for the debtor to avoid, because both the property and the obligation needed to coexist for the lien to exist under California law. The court thus denied the motion to avoid the lien.

C. **Judicial Liens Must Attach for Avoidance.** In re Cannon, No. 08-11098C-7G, 2008 WL 6745379 (Bankr. M.D.N.C. Aug. 26, 2008). The debtor filed motions pursuant to section 522(f)(1)(A) seeking avoid two judicial liens which purportedly impaired exemptions. The debtor owned the property as a tenancy by the entirety with his wife. The judgments however were entered against the debtor alone. Because the liens were against him alone, the judgment liens could not reach the entireties property. The court thus concluded that the judicial liens did not attach against the debtor's homestead and thus could not be avoided as impairing an exemption.

D. **Tenant by the Entirety May Protect Future Interest Through Avoidance.** In re Corey, Case No. 13-03081-8-RDD, 2013 WL 3788239 (Bankr. E.D.N.C. July 18, 2013). The debtor filed a motion to avoid a judicial lien pursuant to section 522(f) on property owned by the debtor as a tenancy by the entirety with her non-filing spouse. The judgment did not attach to the property as it was against her individually. The Court was faced with the question whether the debtor may nonetheless avoid a judicial lien as to her potential future interest in the property after the tenancy by the entirety has severed. Under North Carolina law, the judgment would attach upon severance of the tenancy. The Court found that the debtor as a tenant by the entirety was entitled to the whole title interest of the property and thus that she could avoid the lien as to her interest in the residence so that the lien would not attach to any future interest she had in the property.

4. **Termination of the Stay Under § 362(c)(3)**

A. **Limited termination of the stay**. In re Smith, 596 B.R. 872 (Bankr. E.D. Tenn. 2019). The debtor filed two bankruptcy petitions within one year. In the second case, no party in interest timely requested that the court extend the stay. A secured creditor moved for relief from the stay, arguing that the stay terminated in its entirety on the 30th day after filing. The debtor conceded that the stay terminated with respect to the debtor and the debtor's property, but the debtor argued that the stay remained in effect with respect to the property of the estate. The court found that a complete termination of the stay would be consistent with the legislative intent of § 362(c)(3)—deterring serial filers—but inconsistent with the actual language of the statute. The court looked to § 362(c)(4) and observed that Congress knew how to provide for a complete termination of the stay. Because Congress did not use the same language in § 362(c)(3), the court determined that under § 362(c)(3), the automatic stay terminates with respect to the debtor and the debtor's property—but not with respect to the property of the estate—on the 30th day after filing, unless the court extends the stay.

B. **Complete termination of the stay.** In re Smith, 910 F.3d 576 (1st Cir. 2018). The debtor filed three bankruptcy petitions between August 2011 and December 2016. The last two cases were pending within a year. In the third case, no party in interest timely moved to extend the stay. A creditor moved pursuant to § 362(j) for an order confirming that the stay had been terminated. The creditor asserted that the stay terminated in its entirety on the 30th day after filing. The debtor conceded that the stay had terminated in certain respects but not with respect to the property of the estate. The bankruptcy court held that the stay terminated in its entirety on the 30th day after filing. The district court affirmed the bankruptcy court. On appeal before the First Circuit, both parties argued that the plain meaning of the statute supported their respective interpretation of § 362(c)(3). After conducting a lengthy examination of the text of § 362(c)(3) and the parties' textual arguments, the court of appeals concluded that the language of the statute was ambiguous. The court of appeals then looked to the legislative history of the statute and determined that the creditor's interpretation—a complete termination of the stay on the 30th day after filing—is consistent with the legislative purpose of deterring serial filers. Therefore, the court of appeals affirmed the bankruptcy court and the district court.

C. **Complete termination of the stay, creating a split of authority within a district.** In re Dev, 593 B.R. 435 (Bankr. E.D.N.C. 2018). Between January 2015 and February 2018, the debtor filed three bankruptcy petitions. The last two cases were pending within the same year. In the third case, a secured creditor moved for relief from the stay so that it could foreclose on the debtor's home. The debtor's ex-husband also moved for relief from the stay so that he could proceed with an equitable distribution proceeding pending in state court. At a hearing on the ex-husband's motion for relief from the stay, the court questioned whether the stay was even in effect, given that the third case was filed within a year of the debtor's previous case and no party in interest timely moved for an extension of the stay. The debtor argued that under existing case law from the court, the stay remained in effect with respect to the property of the estate. See In re Jones, 339 B.R. 360 (Bankr. E.D.N.C. 2006). The court began its analysis by reviewing Jones, which sets forth the majority interpretation of § 362(c)(3)(A). Under Jones, if no party in interest timely moves for an extension of the stay, the stay terminates on the 30th day after filing with respect to the debtor and the property of the debtor, but not with respect to property of the estate. The court then reviewed In re Jupiter, 344 B.R. 754 (Bankr. D.S.C. 2006), which sets forth the minority interpretation of § 362(c)(3)(A). Under Jupiter, if no party in interest timely moves for an extension of the stay, the stay terminates in its entirety on the 30th day after filing. The court, citing In re Reswick, 446 B.R. 362, 368 (B.A.P. 9th Cir. 2011), noted that the majority interpretation provides no meaningful relief to creditors in a chapter 13 case because all of a debtor's property becomes property of the estate upon filing. As such, the court found that the majority interpretation is inconsistent with the legislative purpose of § 362(c)(3)(A). The court rejected Jones and adopted the minority interpretation of § 362(c)(3)(A), creating a split of authority within the district.

5. **Under § 1328, what are "payments under the plan," and when are obligations "provided for" by a plan?**

A. **Direct mortgage payments are not "payments under the plan."** In re Rivera, Case No. 13-20842, 599 B.R. 335, 2019 WL 1430273 (Bankr. D. Ariz. Mar. 28, 2019). The debtors filed a chapter petition in December 2013. At the time of filing, a creditor held an outstanding mortgage on the debtors' home. The debtors' plan, which the court confirmed in November 2014, provided that the mortgage creditor's pre-petition arrearage claim would be paid by the chapter 13 trustee through the debtors' plan. The debtors' plan further provided that the debtors would make all post-petition mortgage payments directly to the mortgage creditor. In April 2018, the trustee filed a Notice of Final Cure Payment, indicating that the mortgage creditor's pre-petition arrearage claim had been paid in full. In response to the trustee's Notice of Final Cure Payment, the mortgage creditor indicated that its pre-petition arrearage claim had been satisfied, but the mortgage creditor alleged that the debtors were in default on their direct mortgage payments. The trustee then moved to dismiss the debtors' case on the grounds that the debtors failed to comply with a material term of their plan and were ineligible for a discharge because they had not completed all "payments under the plan," as required by § 1328(a). Accordingly, the issue in this case was whether the debtors' direct mortgage payments were "payments under the plan." After describing the different approaches adopted by other courts, the court determined that "payments under the plan" only refers to payments to the trustee. The court found that this interpretation of § 1328(a) is consistent with other sections of chapter 13—mainly §§ 1325(b) and 1329(a)—and with the overall purpose of chapter 13. Therefore, the court denied the trustee's motion to dismiss and concluded that the debtors had made all of the required "payments under the plan."

B. **Mortgage obligations were not "provided for" by a chapter 13 plan.** <u>In re Dukes</u>, 909 F.3d 1306 (11th Cir. 2018). The debtor filed a chapter 13 petition in 2009. At the time of filing, a credit union held two outstanding mortgages on the debtor's principal residence. The debtor was current on both mortgages and her plan provided that the debtor would continue to make mortgage payments directly to the credit union. In 2011, the debtor stopped making direct payments to the credit union and defaulted on both mortgages. In March 2012, the debtor completed her plan and received a discharge. The following year, the credit union foreclosed on the debtor's home and sought a deficiency judgment against the debtor on the first mortgage. After moving to reopen the debtor's bankruptcy case, the credit union sought a declaratory judgment that the debtor's discharge had not discharged her personal liability on the first mortgage. Section 1328(a), in relevant part, provides that upon completion of a chapter 13 plan, "the court shall grant the debtor a discharge of all debts provided for by the plan." Both the bankruptcy court and the district court determined that the debtor remained personally liable on the first mortgage because the credit union's mortgages were not "provided for" in the debtor's chapter 13 plan. The court of appeals rejected the debtor's argument that her plan "provided for" the mortgages by providing that the debtor would make mortgage payments directly to the credit union. The court of appeals held that a debt is "provided for" by a plan if the terms of the plan affect or govern the repayment of the debt in some way. In this case, the plan did not affect the repayment of the mortgage obligations in any way. Therefore, the mortgages were not "provided for" by the debtor's plan and the debtor remained personally liable on the first mortgage. In re Dukes, 909 F.3d 1306 (11th Cir. 2018).

C. **Direct mortgage payments are "payments under such plan" with respect to § 1329(a).** Derham-Burk v. Mrdutt (In re Mrdutt), Case No. 17-1256, ___ B.R. ___, 2019 WL 2265030 (B.A.P. 9th Cir. May 6, 2019). The debtors filed a chapter 13 petition in November 2011. At the time of filing, a bank held two outstanding mortgages on the debtor's home and the debtors owed $65,000 in pre-petition arrears on the primary mortgage. The debtors' confirmed plan, which had a term of 60 months, "provided that all prepetition mortgage arrears would be cured if [the bank] approved the loan modification; if [the bank] disapproved it, the [debtors] would file a modified plan to pay the arrears." Id. at 3. The plan also required the debtors to make all post-petition mortgage payments directly to the bank. The debtors made their final plan payment to the trustee in October 2016. The bank moved for relief from the stay in January 2017, alleging that the debtors had failed to pay approximately $123,819 of post-petition direct mortgage payments. The trustee, who filed notices of plan completion in June 2017, requested that the case be closed without entry of a discharge because the debtors failed to cure their pre-petition mortgage arrears. Sixty-seven (67) months after the debtors' first payment to the trustee was due, the debtors moved to modify their plan to surrender their home. The trustee opposed the motion to modify as untimely. The bankruptcy court found that the motion to modify was timely because, given the outstanding pre-petition arrears, the debtors had not completed all payments under the plan. The bankruptcy court granted the motion to modify and the trustee appealed.

Section 1329(a), in relevant part, provides that a plan may be modified "[a]t any time after confirmation of the plan but before the completion of payments under such plan[.]" The trustee argued that the debtors could not modify their plan because they had already completed all required payments to the trustee. Thus, the first issue was whether the phrase "payments under such plan," as used in § 1329(a), only refers to payments to the trustee. The BAP began by acknowledging that there was no controlling authority on this issue. But the BAP noted that a number of courts have interpreted a similar phrase—"payments under the plan"—in determining whether a debtor was eligible for a discharge under § 1328(a) when the debtor failed to make all required post-petition direct mortgage payments. The BAP found that the "overwhelming majority" of courts have held that direct mortgage payments are "payments under the plan" for purposes of § 1328(a). In fact, the BAP only found two cases in which a court determined that a debtor's direct payments were not "payments under the plan;"[2] In re Gibson, 582 B.R. 15 (Bankr. C.D. Ill. 2018) and In re Rivera, 2019 WL 1430273 (Bankr. D. Ariz. Mar. 28, 2019). Although the BAP found Gibson and Rivera to be "thoughtful and well-intended decisions," the BAP

[2] As discussed, supra., In re Dukes, 909 F.3d 1306, 1313-20 (11th Cir. 2018), held that a debt is not "provided for by the plan" as contemplated by § 1328(a) when the plan provides for the debtor to make direct payments "outside the plan." See Mrdutt, 2019 WL 2265030 at *4 n.7 (distinguishing Dukes, but also disagreeing with its rationale and conclusion).

ultimately rejected their reasoning. After reviewing cases interpreting § 1328(a), the BAP concluded that direct mortgage payments are both "payments under the plan" with respect to § 1328(a) and "payments under such plan" with respect to § 1329(a). The BAP found that the plan's provisions regarding the curing of the pre-petition arrears and the maintenance of direct post-petition payments were both "payments under such plan." The BAP then affirmed the bankruptcy court's holding that the motion to modify was timely since the debtors failed to cure their pre-petition arrears and maintain their direct post-petition mortgage payments. Although the BAP found that the motion to modify was timely, the BAP reversed the bankruptcy court's decision to grant the motion. Specifically, the BAP rejected the debtors' argument that surrendering their home was not a "payment" for purposes of § 1329(c). Therefore, the BAP held that the bankruptcy court abused its discretion in allowing the plan, as modified, to provide for payments beyond sixty (60) months in violation of § 1329(c).

D. Code and Rule provisions to consider.

i. **§ 524(i).** "The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the <u>creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan)</u>, shall constitute a violation of an injunction under subsection (a)(2) . . . ." (emphasis added).

ii. **§ 1301(c)(2).** "[T]he court shall grant relief from the [co-debtor] stay . . . with respect to a creditor, to the extent that . . . the plan filed by the debtor proposes not to pay such claim . . . ."

iii. **§ 1322(b)(5).** "[T]he plan may . . . <u>provide for</u> the curing of any default within a reasonable time and maintenance of <u>payments</u> while the case is pending . . . ." (emphasis added).

iv. **§ 1328(a)(1).** "[A]fter completion by the debtor of all payments under the plan . . . the court shall grant the debtor a discharge of all debts provided for by the plan . . . except any debt . . . provided for under section 1322(b)(5) . . . ."

v. **Rule 3002.1(a).** "This rule applies in a chapter 13 case to claims . . . for which the plan provides that either the trustee <u>or the debtor</u> will make contractual installment payments." (emphasis added).

vi. **Rule 3002.1(b)(2).** "A party in interest who objects to the payment change may file a motion to determine whether the change is required to maintain payments <u>in accordance with § 1322(b)(5) of the Code</u>." (emphasis added).

vii. **Rule 3002.1(e).** "On motion of a party in interest . . . the court shall . . . determine whether payment of any claimed fee, expense or charge is required by the underlying agreement and applicable nonbankrutpcy law to . . . maintain payments in accordance with § 1322(b)(5) of the Code." (emphasis added).

viii. **Rule 3002.1(f).** "Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder of the claim . . . a notice stating that the debtor has paid in full the amount required to cure any default on the claim." (emphasis added).

ix. **Rule 3002.1(g).** "Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve . . . a statement indicating . . . whether the debtor is otherwise current on all payments consistent with § 1325(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts . . . that the holder contends remain unpaid . . . ." (emphasis added).

x. **Rule 3002.1(h).** "[T]he court shall . . . determine whether the debtor has cured the default and paid all required postpetition amounts." (emphasis added).

E. **A court must grant a discharge when a debtor completes all payments under the plan despite debtor's bad faith.** In re Holman, 594 B.R. 769 (D. Kan. 2018). The debtors filed a chapter 13 petition in November 2011. In June 2012, the bankruptcy court confirmed the debtors' amended plan, which required the debtors to make fifty-seven (57) monthly payments of $1,517.00. In April 2015, the debtors moved to modify their plan for the fourth time. The debtors alleged that their income had decreased and they sought a reduction of their plan payment. The trustee objected to the proposed modification on the grounds that the modification was not proposed in good faith. The trustee alleged that the debtors could afford a higher plan payment than the payment proposed by the debtors. One day before the fourth motion to modify went to trial, the debtors moved to modify their plan again. The trustee also objected to the fifth motion to modify on the grounds that the modification was not proposed in good faith. The bankruptcy court held a trial on the fourth motion to modify in October 2015, but the court did not immediately rule on the motion. While the court was considering the fourth motion to modify, the trustee and the debtors entered into an agreed order, which resolved the trustee's objections to both pending motions to modify. The trustee moved to dismiss the case in July 2016, alleging that the debtors had defaulted on plan payments and failed to pay post-petition taxes. The trustee subsequently added a lack of good faith as an additional basis for dismissal. In August 2016, the United States also moved to dismiss the case. The debtors completed the plan payments as provided for in their originally confirmed plan in December 2016. The bankruptcy court held a trial on the trustee's motion to dismiss in March 2017. Although the bankruptcy court "found that there was ample cause to dismiss the case under § 1307(c) because of unreasonable delay by [the debtors], material default by [the debtors], and lack of good faith," the court declined to dismiss the case. 594 B.R. at 771–72. The bankruptcy court set forth two bases for its decision, but only one basis is relevant here. The bankruptcy court held that "[b]ecause [the debtors] had completed their payment plan while the [t]rustee's motion to dismiss was pending . . . [the debtors] were entitled to a mandatory discharge pursuant to § 1328(a)." The trustee then appealed to the district court.

Section 1328(a), in relevant part, provides that "as soon as practicable after completion by the debtor of all payments under the plan . . . the court shall grant the debtor a discharge of all debts provided for by the plan." On the other hand, Section 1307(c), in relevant part, provides that a bankruptcy court "may dismiss a case under this chapter." The district court found that the word "shall," as used in § 1328(c), required the bankruptcy court to grant a discharge upon the completion of all plan payments. Although the district court found that the debtors seemingly "gamed the system to their advantage," the district court affirmed the bankruptcy court's determination that § 1328(a) "mandated discharge because [the debtors] had completed all payments under the plan." Id. at 778.

6. **A chapter 13 plan may bifurcate an undersecured home mortgage creditor's claim when the last mortgage payment is due before the end of the plan.** Hurlburt v. Black, No. 17-2449, 2019 WL 2237966 (4th Cir. May 24, 2019).

Section 1322(b)(2) prohibits the modification of a creditor's rights when the creditor's claim is secured only by a lien on the debtor's principal residence. However, § 1322(c)(2) excepts short-term home mortgages—mortgages where the last payment under the loan is due before the last payment under the chapter 13 plan—from the anti-modification provision of § 1322(b)(2).[3] In In re Witt, 113 F.3d 508 (4th Cir. 1997), a panel of the Fourth Circuit held that § 1322(c)(2) allows debtors to modify the timing of payments of an undersecured, short-term home mortgage, but not the amount of such claim. Under Witt, debtors could stretch out the payment of a short-term home mortgage over the length of the plan, but debtors could not "cram down" the amount of the secured claim to the value of the collateral securing the loan. In Hurlburt, the Fourth Circuit, sitting en banc, overruled Witt.

[3] Section § 1322(c)(2) provides:

> (c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law--
>
> > (2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.

(emphasis added).

In Hurlburt, the debtor purchased a home in 2004 for $136,000. The seller financed $131,000 of the purchase price, and the debtor executed a promissory note and a deed of trust in favor of the seller. The promissory note required the debtor to make monthly payments along with a final balloon payment due when the loan matured in May 2014. The debtor sought to refinance the balloon payment, but he was unsuccessful. The seller commenced foreclosure proceedings in 2015. The debtor then filed a chapter 13 petition in April 2016. In his petition, the debtor valued his home at $40,000, but a subsequent appraisal valued the home at $47,000. After accounting for a tax lien of $5,867.81, the debtor's amended proposed plan provided the seller with a secured claim in the amount of $41,132.19. The seller objected to the debtor's amended proposed plan, asserting that the debtor could not bifurcate her claim into secured and unsecured claims under Witt. The seller conceded that Witt allows the debtor to modify the payment of her secured claim, but not the amount of her secured claim.

Although the bankruptcy court noted that Witt has been widely criticized by other courts, the court found that it was bound by Witt and held that the debtor could not "cram down" or bifurcate the seller's claim. On appeal, the district court also acknowledged the widespread criticism of Witt, but the court held that it was bound by Witt and affirmed the bankruptcy court. In an unpublished per curiam opinion, a panel of the Fourth Circuit affirmed the district court. The debtor then filed a petition for rehearing en banc, which the Fourth Circuit granted in January 2019.

The Fourth Circuit, sitting en banc, held that short-term home mortgages are exempted from § 1322(b)(2)'s anti-modification provision. Therefore, the debtor in this case could modify the amount of the seller's secured claim, not just the payment of such claim. First, the court of appeals determined that its interpretation of § 1322(c)(2) conformed with the most natural reading of the phrase "payment of the claim as modified." Second, the court of appeals reasoned that Congress's use of the phrase "[n]otwithstanding subsection (b)(2)" in § 1322(c)(2) evidenced an intent to exempt short-term home mortgages from § 1322(b)(2)'s anti-modification provision. Finally, the Fourth Circuit was persuaded that § 1322(c)(2)'s reference to § 1325(a)(5) supported its view that § 1322(c)(2) permits the bifurcation of certain claims into secured and unsecured claims based upon the value of the collateral securing the claim. Judge Wilkinson filed a dissenting opinion.

7. Additional Cases of Interest

A. **Homestead exemption in marital home allowed for debtor who moved out the home after separating from her spouse.** In re Colton, 591 B.R. 829 (Bankr. C.D. Ill. 2018). The debtor purchased a home in Illinois with her husband in 2005. In August 2017, the debtor moved into a nearby duplex after she and her husband agreed to separate. As part of the informal separation agreement, the debtor and her husband agreed that their two children would live with the debtor. The debtor filed a chapter 7 petition in April 2018, roughly nine months after moving out of the marital home. The debtor claimed the Illinois homestead exemption—which permits individuals to exempt up to $15,000 of value in property owned and occupied as a residence—in the marital home. The chapter 7 trustee objected to the debtor's homestead exemption, alleging that the debtor could not claim the exemption because she no longer resided at the property. After hearing testimony from the debtor, the court found that the debtor did not intend to permanently abandon the marital home as her residence when she moved into the duplex. First, the court noted that it was likely that the debtor would receive custody of the children in the divorce proceedings and, as a result, it was also likely that the debtor would also receive the marital home in any subsequent property distribution. Second, the court found that the debtor left numerous items of personal property in the marital home, including clothing and furniture, which evidenced her "constructive occupancy" of the marital home. Finally, the court found that the debtor had not established a new homestead in which she could claim an exemption because she was living in a leased duplex. Therefore, the court held that the debtor could claim a homestead exemption in the marital home.

B. **Chapter 7 trustee, acting as a hypothetical judicial lien creditor, could avoid a recorded but deficiently executed mortgage.** In re Oakes, 917 F.3d 523 (6th Cir. 2019). In 2013, the debtors filed a chapter 7 petition in the Southern District of Ohio. At the time of filing, the debtors owned a parcel of real property valued at $160,000. A bank held a first mortgage on the real property. Although the bank recorded its mortgage, the mortgage was not properly executed under Ohio law. As such, the chapter 7 trustee sought to avoid the bank's mortgage. In 2013, the Ohio legislature enacted a statute which effectively eliminated a trustee's ability to act as a bona fide purchaser and avoid a deficiently executed mortgage. Under this statute, a recorded but deficiently executed mortgage provides the trustee with constructive notice of the mortgage. Because Ohio law requires a bona fide purchaser to be without notice of a prior mortgage, a trustee with constructive notice of a prior mortgage cannot qualify as a bona fide purchaser. The bank argued that the trustee, acting as a hypothetical judicial lien creditor under § 544, could not avoid its mortgage because the trustee had constructive notice of the mortgage. The bankruptcy court held that the trustee's constructive notice of the bank's mortgage had no impact on the trustee's ability to avoid the bank's mortgage as a judicial lien creditor. The BAP affirmed the bankruptcy court. On appeal, the Sixth Circuit affirmed the BAP. Although the bank recorded its mortgage, the bank did not perfect its security interest because the mortgage was not properly executed. The trustee, on the other hand, obtained a perfected judicial lien when the debtors filed their bankruptcy petition. Therefore, the court of appeals determined that the trustee's perfected lien has priority over the bank's unperfected mortgage.

C. **Debtor was entitled to refund of plan payments upon dismissal.** Dep't of Soc. Servs., Div. of Child Support Enf't v. Webb, 908 F.3d 941 (4th Cir. 2018). The debtor filed a chapter 13 petition in July 2016. At the time of filing, the debtor owed approximately $75,000 to the Virginia Department of Social Services (the "Department") for unpaid child support. Following four unsuccessful attempts to confirm a plan, the court dismissed the debtor's case in February 2017. Between July 2016 and February 2017, the debtor paid the trustee $3,000 for post-petition, pre-confirmation plan payments. After the case was dismissed, the Department served the trustee with a notice of levy—as authorized by Va. Code Ann. § 63.2-

1929—directing the trustee to turn over the funds received from the debtor to the Department. The trustee then requested guidance from the bankruptcy court on how to proceed with the refund. Section 1326(a)(2), in relevant part, provides that "[i]f a plan is not confirmed, the trustee shall return any such payments . . . to the debtor, after deducting any unpaid claim allowed under section 503(b)." Because the Department did not assert a § 503(b) claim, the bankruptcy court held that § 1326(a)(2) unambiguously requires the trustee to return the funds to the debtor. The district court affirmed the bankruptcy court and the Department appealed to the Fourth Circuit. The Fourth Circuit likewise found that the plain language of § 1326(a)(2) required the trustee to return the funds to the debtor. The Fourth Circuit further found that any state statute subjecting the trustee to levy was preempted by § 1326(a)(2).

D. **Claimant did not have standing to file a proof of claim.** In re Benyamin, 596 B.R. 789 (Bankr. S.D.N.Y. 2019). The debtors filed a voluntary chapter 11 petition in September 2017. In 2003, the debtors purchased an investment property in New York. In connection with this purchase, the debtors executed a promissory note in favor of IndyMac, F.S.B. The promissory note was secured by the investment property. After IndyMac commenced foreclosure proceedings against the debtors, the debtors filed their bankruptcy petition. The debtors' schedules listed IndyMac as a secured creditor and their list of creditors included Ditech for "notice purposes only." In December 2017, Ditech filed a proof of claim that was purportedly secured by the investment property. Although Ditech's proof of claim provided that Ditech had not acquired its claim from someone else, Ditech attached a copy of the promissory note between the debtors and IndyMac, which was endorsed in blank. Ditech's proof of claim also provided that Ditech was the current creditor and servicer of the promissory note. The debtors objected to the proof of claim filed by Ditech. The debtors argued that Ditech did not have standing to file the proof of claim. Although Ditech failed to file a timely response to the debtors' objection, Ditech eventually provided the court with a number of purported assignments of the note, which, according to Ditech, showed that the note had been assigned to Ditech. The court sustained the debtors' objection and expunged Ditech's proof of claim.

Shortly thereafter, Ditech filed a motion to reconsider. Ditech reversed its early positions and claimed that Freddie Mac was the "investor" in the promissory note and Ditech was the servicer and holder of the promissory note. Ditech's counsel also acknowledged that Bank of New York Mellon ("BONY") physically held the promissory note as a custodian. Ditech advanced two bases for standing. Both bases relied upon Ditech's assertion that "Freddie Mac obtained the Note at some unidentified time before the Petition Date." 596 B.R. at 795. First, Ditech alleged that Freddie Mac and Ditech entered into a pre-petition agreement whereby Ditech would act as the servicer of the promissory note. Second, Ditech claimed that Freddie Mac, Ditech, and BONY entered into a second pre-petition agreement which provided that BONY would act as the custodian of the promissory note for Ditech and Freddie Mac. Thus, Ditech claimed that it had constructive possession of the promissory note on the petition date.

The court began its analysis by setting forth the standing requirements under the Code and the Federal Rules of Bankruptcy Procedure. Under Rule 3001(b), "[a] proof of claim shall be executed by the creditor or the creditor's authorized agent except as provided in Rules 3004 and 3005." The Code defines a "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(10)(A). Likewise, the Code defines a "claim" as either a "right to payment" or a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. § 101(5). The court then articulated the requirements for standing as either a servicer or an assignee. First, "[t]o establish standing as a servicer, the claimant must show that it is an authorized agent of an entity that has the right to enforce the note." 596 B.R. at 794. Second, to establish standing as an assignee, "the assignee must provide proof of assignment of the note to the assignee or must demonstrate that the note has been endorsed in blank and that the assignee has physical possession of the note." Id.

The court found that the evidence presented at trial did not establish either of Ditech's asserted bases for standing. First, the court found that Ditech did not establish standing as an assignee. The court found that Ditech could not show that it had actual or constructive possession of the promissory note on the petition date because the custodial agreement was inadmissible. The court also noted that even if the custodial agreement had been admissible, Ditech still would not have been able to prove constructive possession because the custodial agreement was undated. Second, the court found that Ditech did not establish standing as a servicer. Although "Ditech introduced evidence showing that it is Freddie Mac's agent," the court found that Ditech "failed to show that Freddie Mac had the right to enforce the Note." Id. at 796. Specifically, Ditech could not prove that Freddie Mac had actual or constructive possession of the promissory note on the petition date because the custodial agreement was inadmissible. Therefore, the court expunged Ditech's claim.

E. **Servicer had standing to file claim.** In re Paylor, Case No. 17-80884 (Bankr. M.D.N.C. Mar. 22, 2019). The debtor filed a chapter 13 petition in October 2017. In December 2017, U.S. Bank filed a proof of claim, which the court designated as Claim No. 2. U.S. Bank's claim was secured by a deed of trust on the debtor's principal residence. U.S. Bank's proof of claim provided that notices in the case should be sent to U.S. Bank care of Ditech. U.S. Bank also attached a power of attorney to its proof of claim, which appointed Ditech as servicer of the home loan. In July 2018, Ditech filed a Notice of Post-Petition Mortgage Fees, Expenses, and Charges (the "Fee Notice"), which alleged that the debtor owed Ditech $1,007 for lender placed insurance. The Fee Notice listed Ditech as the creditor, but the Fee Notice was filed as a supplement to Claim No. 2 and provided that it was filed in relation to Claim No. 2. The debtor objected to the Fee Notice, in part, because the Fee Notice was not filed by the holder of the claim, U.S. Bank. The debtor argued that the Fee Notice should be disallowed under Rule 3002.1. Unlike in In re Benyamin, 596 B.R. 789 (Bankr. S.D.N.Y. 2019), the debtor did not dispute that U.S. Bank was the holder of the claim nor did the debtor object to U.S. Bank's claim. Further, the debtor did not dispute

Ditech's role as servicer of the loan or challenge the validity of the power of attorney attached to U.S. Bank's claim. Under Rule 3001(b), "[a] proof of claim shall be executed by the creditor or the creditor's authorized agent except as provided in Rules 3004 and 3005." The court first found that Ditech was authorized to file the Fee Notice as a creditor itself. See In re Conde-Dedonato, 391 B.R. 247, 250 (Bankr. E.D.N.Y. 2008) ("A servicer of a mortgage is clearly a creditor and has standing to file a proof of claim against a debtor pursuant to its duties as a servicer."). Next, the court noted that the debtor did not dispute Ditech's role as servicer of the loan nor did the debtor challenge the validity of the power of attorney attached to Claim No. 2. Thus, the court found that Ditech was also permitted to file the Fee Notice as an authorized agent of U.S. Bank. Therefore, the court overruled the debtor's objection.

F. **Unindorsed mortgage note attached to proof of claim did not establish assignee as the holder of the note.** In re Pinnock, 594 B.R. 609 (Bankr. S.D.N.Y. 2018). The debtors filed a chapter 13 petition in November 2016. In February 2018, the debtors objected to a proof of claim filed on behalf of U.S. Bank. U.S. Bank asserted that its claim was based upon a mortgage note ("Note"), which was secured by the debtors' property in the Bronx. The debtors noted that the court, in the male debtor's prior bankruptcy case, had denied U.S. Bank's motion for relief from the stay with respect to the property because U.S. Bank failed to demonstrate that it was the holder of the note at issue and because U.S. Bank failed to demonstrate that the note had been properly recorded. In the prior case, U.S. Bank attached a note between the debtors and First Meridian Mortgage, but the note did not contain any subsequent indorsements and U.S. Bank failed to produce evidence that it had standing to enforce the note. In this case, U.S. Bank attached the same note to its proof of claim. U.S. Bank also attached an undated "Allonge to the Promissory Note," which was purportedly indorsed in blank by First Meridian Mortgage. Also attached to the proof of claim in this case was "a Corporate Assignment of Mortgage, dated July 9, 2013, pursuant to which Mortgage Electronic Registration Systems, Inc. ("MERS"), purportedly 'as nominee for First Meridian Mortgage Its Successors And Assigns,' assigned the mortgage at issue, 'together with all moneys now owing or that may hereafter become due in respect thereof,' to U.S. Bank." 594 B.R at 610.

The debtors argued that the Allonge was not a proper allonge because it was not "firmly affixed" to the note as required by New York law. The debtors argued that the Allonge was not "firmly affixed" to the note since it was not attached to U.S. Bank's motion for relief from the stay in the prior case. The debtors also noted that "the Allonge and the purported assignment of the mortgage were prepared by . . . a company whose website states that it 'prepares allonge[s]' among other documents for lenders and has a hyperlink to its services for 'preparation of missing/intervening assignments.'" Id. at 611. The debtors further argued that MERS lacked the authority to assign the debt to U.S. Bank. The debtors asked the bankruptcy court to (1) disallow and expunge U.S. Bank's claim, and (2) declare "the lien securing the Note void pursuant to 11 U.S.C. § 506(d), including as recorded on behalf of the original lender by MERS." Id.

(footnotes omitted). At a hearing on the objection, U.S. Bank's counsel "asserted that U.S. Bank had physical possession of the Note." Id. U.S. Bank's counsel also "handed the [c]ourt a separate page that appeared to be the original signed Allonge but which was not firmly attached to the Note." Id. However, U.S. Bank's counsel did not produce any evidence "as to how, when or from whom U.S. Bank obtained the Note. Nor did U.S. Bank demonstrate MERS's authority to act on First Meridian's behalf with respect to any rights under the Note, as opposed to the mortgage." Id.

Although U.S. Bank's claim was presumed to be valid under Rule 3001(f), the allegations in the debtors' objection rebutted the presumption and shifted the burden of proof to U.S. Bank. The bankruptcy court found that U.S. Bank would have standing to enforce the Note and mortgage if it could show that it was "the proper holder or transferee entitled to enforce the Note." Id. at 612. Under New York law, a note may be transferred by either written assignment or proof of delivery of possession. In this case, U.S. Bank asserted that it possessed the Note. Under New York law, "mere possession does not give a party the right to enforce a note and mortgage." Id. at 613. U.S. Bank could enforce the note as the holder of the note "if the [n]ote were specifically indorsed by the prior owner, First Meridian to U.S. Bank and U.S. Bank possessed the Note . . . or if [U.S. Bank] possessed the Note indorsed in blank by First Meridian (as U.S. Bank argue[d] . . . based on the Allonge). Id. The court held that U.S. Bank could not enforce the Note as a holder because the Allonge was not firmly affixed to the Note. To enforce the Note as a transferee, U.S. Bank had to show that it received the Note from someone entitled to enforce the Note. The court found that U.S. Bank could not enforce the Note as a transferee because U.S. Bank failed to produce any "evidence of how or from whom it received and . . . held the Note." Id. at 617. Because U.S. Bank failed to carry its burden of showing that it was entitled to enforce the note as either a holder or a transferee, the court disallowed and expunged U.S. Bank's claim. Although the debtors asked the court to declare the mortgage lien void pursuant to § 506(d), the court concluded that this request was overbroad. Therefore, the court declared the lien void "only as to U.S. Bank and its successors and assigns' asserted interests in the [p]roperty." Id. at 618.

G. **Bankruptcy Court's finding that a plan was not proposed in good faith was clearly erroneous.** Matter of Booker, 753 F. App'x 316 (5th Cir. 2019). The debtors' second proposed plan provided that the debtors would retain a model year 1998 fishing boat, a boat motor, a boat trailer, three TVs, and a riding lawnmower, all of which secured a loan that would be repaid through the debtors' plan. The second proposed plan provided a 4% dividend to unsecured creditors. Although no party in interest objected to the second proposed plan, the bankruptcy court found that the plan was not proposed in good faith and denied confirmation of the plan. The bankruptcy court was particularly troubled that the second proposed plan allowed the debtors to retain the boat, motor, and trailer, while only paying a small dividend to unsecured creditors. The debtors were able to confirm a subsequent plan, but the debtors appealed the bankruptcy court's finding regarding good faith because their confirmed plan required them to surrender the boat, motor, trailer, TVs, and lawnmower. The district court affirmed the bankruptcy court and the debtors appealed to the Fifth Circuit. The court of appeals began its analysis by noting that "the concept of 'good faith' in Chapter 13 embodies a number of factors and has a long legal pedigree." 753 F. App'x at 317. The court of appeals then conducted an examination of the record to determine whether the bankruptcy court's finding regarding good faith was clearly erroneous. The court of appeals found that there were no objections to the second proposed plan, no problems with the debtors' schedules, no credibility issues, and, importantly, "[t]he debtors voluntarily committed their Social Security receipts to paying off the plan in the absence of legal compulsion." Id. at 318. In light of these circumstances, the court of appeals found that the bankruptcy court's finding regarding good faith was clearly erroneous. Therefore, the court of appeals vacated the order approving the debtors' subsequent plan, reversed the bankruptcy court's finding regarding good faith, and remanded the case to the bankruptcy court.

H. **A manufactured home was personal property, not real property.** In re Bennett, 917 F.3d 676 (8th Cir. 2019). The debtors purchased a manufactured home from a developer. The developer financed the purchase and the debtors granted the developer a security interest in their home. The debtors also signed a 990-year lease with the developer for the lot under their home. Thereafter, the debtors filed a chapter 13 petition. The developer filed a claim in the case. The debtors' proposed plan bifurcated the developer's claim into a secured and an unsecured claim. The developer objected to its proposed treatment, arguing that § 1322(b)(2) prohibited the modification of its claim. After an evidentiary hearing on the developer's objection, the bankruptcy court found that the debtor's home was personal property, not real property, and overruled the developer's objection. The BAP affirmed the bankruptcy court and the developer appealed to the Eighth Circuit. In a 2-1 decision, the court of appeals affirmed the BAP.

The court of appeals began its analysis by noting that the developer had the burden of demonstrating that the anti-modification provisions of § 1322(b)(2) applied to its claim. Then the court of appeals recited the three-part test under Iowa law for determining whether personal property is a fixture, and thus, constitutes real property: "(1) it is actually annexed to the realty, or to something appurtenant thereto; (2) it is put to the same use as the realty with which it is connected; and (3) the party making the annexation intends to make a permanent accession to the freehold." 917 F.3d at 679 (citing Ford v. Venard, 340 N.W.2d 270, 271 (Iowa 1983)). The court of appeals stated that a party's intention—a factual question—is the most important consideration in deciding whether personal property constitutes a fixture. Further, the court of appeals found that the first two factors are "mainly important in determining the intention of the party making the annexation." Id. at 679.

The court of appeals first reviewed the bankruptcy court's finding that "the method of attachment [did] not indicate an intent to make the home a permanent accession to the property." Id. at 680. At the evidentiary hearing, one of the debtors testified that "the home is placed on pier pads and concrete blocks, not a concrete foundation; and, he has raised a pier pad several times to level the home due to ground sinkage." Id. On the other hand, the developer's property manager testified that (1) the home sits on a "full concrete foundation;" (2) "the wheels and axles used to install the home were removed but the underlying structure to which they were attached was probably still there;" and (3) "moving the home from its concrete foundation would damage both the home and the lot." Id. The court of appeals held that, in light of the competing testimony, the bankruptcy court's factual findings were not clearly erroneous.

Next, the court of appeals reviewed the bankruptcy court's finding that the 990-year lease did not "clearly establish the intent to make the home a permanent accession to the real estate." Id. The developer argued that the lease demonstrates the developer's intent to make their home a permanent accession to the property. The developer pointed to provisions in the lease which state that "the home is 'permanently affixed,' has 'permanent footings,' and will 'be installed as a permanent improvement and fixture.'" Id. at 681. The court of appeals noted that "the lease also permits the home's removal from the property." Id. As such, the court of appeals found the bankruptcy court's finding regarding the lease was "permissible, and not clearly erroneous." Id. at 682.

Finally, the court of appeals distinguished this case from In re Green, 436 B.R. 91 (Bankr. S.D. Ill. 2010), which applied a similar test and concluded that a mobile home was a fixture. In Green, the "bankruptcy court found significant that the debtor 'testified that, at the time he signed the mortgage [for the mobile home and underlying land], he intended to permanently affix the mobile home to the real estate.'" Bennett, 917 F.3d at 682 (citing Green, 436 B.R. at 98). The court of appeals noted that in this case "the bankruptcy court, based on credibility determinations, found nothing in the record showed [the developer's] intent to make the manufactured home a fixture." 917 F.3d at 682.

Judge Beam filed a dissented from the court of appeals' opinion. The dissent agrees with the test used by the majority opinion, but disagrees with the majority's conclusion. Specifically, the dissent takes issue with the deference showed to the bankruptcy court's findings of fact. The dissent then applied the fixture test used by the majority and concluded that the debtors' home was a fixture.

The dissent argued that the first factor—"whether the structure is actually annexed to the realty or to something appurtenant thereto"— weighs in favor of the debtors' home being considered a fixture. Id. at 684 (Beam, J., dissenting). According to the dissent, "[i]t seems rather clear that the structure in this case is annexed to the realty, as the wheels and axles were removed once it was placed on the foundation." Id. The dissent also argued that the second factor—"whether the home is put to the same use as realty"—weighs in favor of the home being considered a fixture. Id. The dissent found that "the length of the lease effectively gives the residents of the structure ownership of the underlying land. And, the [debtors] certainly use the structure as a 'home.'" Id. Finally, the dissent argued that the third factor—"whether the party who annexed the property intended to make it a part of the real property"—also weighs in favor of the debtors' home being considered a fixture. Id. Under Iowa law, "a building which cannot be removed without destruction of a substantial part of its value becomes almost unavoidably an integral part of the real estate." Ford, 340 N.W.2d at 272. The dissent found that "[t]he cement or concrete foundation (or blocks and piers or whatever we want to call them) here is embedded in the soil, and the building could not be removed from the land without difficulty or destruction." Id. at 685. Therefore, the dissent argued that the debtors' home should be considered a fixture and the anti-modification provisions of § 1322(b)(2) should apply to the developer's claim.

I. **Pawned property was property of the bankruptcy estate.** In re Sorensen, 586 B.R. 327 (B.A.P. 9th Cir. 2018). The debtor filed a chapter 13 petition in August 2016. Five months before she filed her bankruptcy petition, the debtor obtained five loans from a pawnbroker. The debtor pledged five pieces of jewelry as collateral for the pawn loans. In July 2016, the debtor "obtained replacement loans that had a termination date of November 18, 2016." 586 B.R. at 329. Thus, the pawn loans had not terminated before the debtor filed her bankruptcy petition. The debtor's schedules listed the pawnbroker as a secured creditor and the first proposed plan provided for the payment of the pawn loans through the plan. The pawnbroker issued a notice of loan termination on November 18, 2016. The notice provided the debtor with a ten-day redemption period as required by California Financial Code § 21201, but the debtor did not timely redeem her jewelry. After communications between counsel, "[the pawnbroker] offered [the debtor] two more extensions of her redemption rights; the final deadline was March 3, 2017." Id. at 329. The debtor subsequently proposed an amended plan, which also provided for the payment of the pawn loans through the plan. The pawnbroker did not object to confirmation of the amended proposed plan nor did it move for relief from the stay.

Two days before the final redemption deadline, the debtor filed an adversary proceeding against the pawnbroker seeking injunctive and declaratory relief. The debtor argued that the jewelry was part of her bankruptcy estate and sought an injunction prohibiting the pawnbroker from disposing of the jewelry. "[The debtor] also filed an application for a temporary restraining order . . . to prevent [the pawnbroker] from disposing of the jewelry." Id. The pawnbroker opposed the debtor's motion for a TRO, arguing that the debtor "was unlikely to succeed on the merits because the jewelry was excluded from the bankruptcy estate pursuant to § 541(b)(8)." Id. The pawnbroker argued that "because [the debtor] did not redeem her property within the statutory period, the jewelry was excluded from the bankruptcy estate under § 541(b)(8), and the automatic stay never applied to the jewelry. Id. at 330. The bankruptcy court confirmed the debtor's amended plan and requested additional briefing on the TRO motion. The pawnbroker then moved to dismiss the adversary proceeding, "arguing that the bankruptcy court lacked subject matter jurisdiction over the pawned jewelry because it was excluded from the bankruptcy estate." Id. The bankruptcy court found that the redemption period had not expired under California law and, as such, the jewelry was part of the debtor's bankruptcy estate. Accordingly, the bankruptcy court granted the debtor's TRO motion (though the bankruptcy court later clarified its order to provide that it granted a preliminary injunction) and denied the pawnbroker's motion to dismiss. The pawnbroker then appealed the decision to the BAP.

Under § 541(b)(8), pawned property is excluded from a debtor's bankruptcy estate if three conditions are satisfied. In this case, the parties acknowledged that first two conditions were satisfied. The third condition necessary for pawned property to be excluded from the bankruptcy estate is that "neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b)." § 541(b)(8)(C). The BAP noted that "California law provides the longer period for redemption of pawned property." Id. at 333. Specifically, "California Financial Code section 21201 provides that, if a pawned item is not redeemed before the end of the loan period, the pawnbroker must give notice of the loan termination and provide a ten-day redemption period." Id. Further, "California law specifies that the pawnbroker only becomes vested with full ownership of the property after the ten-day period expires." Id. Thus, the debtor's right to redeem her jewelry did not expire until ten days after the pawnbroker gave the debtor proper notice of the loan termination. Although the pawnbroker issued a notice of loan termination in November 2016, the BAP agreed with the bankruptcy court's determination that the issuance of the notice violated the automatic stay. As such, the notice of loan termination was void ab initio. "Because the ten-day notice was void ab initio," the BAP found that "[the pawnbroker] did not satisfy the notice requirement in California Financial Code section 21201(d)." Id. at 334. The BAP determined that § 541(b)(8)(C) was not satisfied in this case because the debtor's right to redeem the jewelry under California law had not terminated since the ten-day redemption period never began to run.

The BAP distinguished this case from In re Northington, 876 F.3d 1302 (11th Cir. 2017). In Northington, the Eleventh Circuit found that a debtor's right to redeem a pawned vehicle was originally part of the bankruptcy estate but under Georgia law, the vehicle automatically "dropped out" of the estate when the redemption period expired. The BAP noted that "[i]n Georgia, following a statutory redemption period, the interest in the pawned property is automatically vested in the pawnbroker; the pawnbroker does not need to take any action." 586 B.R. at 335. Although the BAP agreed with the Eleventh Circuit's reasoning in Northington, the result in this case was different because under California law, the debtor's jewelry did not automatically "drop out" of the bankruptcy estate. Instead, "California Financial Code section 21201(d) required [the pawnbroker] to send notice to [the debtor] before it obtained legal title to the jewelry." Id.

J. **Debt Purchaser Outsourcing Collection Activity May Still Qualify as a "Debt Collector."** Barbato v. Greyston Alliance, LLC, 916 F.3d 260 (3d Cir. 2018). Consumer brought action under the FDCPA in state court. The action was removed to federal court by the defendant, a successor to a third-party servicer hired to collect debts. The consumer filed an amended complaint to add as defendants the third-party servicer and the original debt purchaser. The consumer dismissed the original defendant and the third-party successor. The purchaser moved for summary judgment contending that the complaint should be dismissed because the purchaser did not qualify as a "debt collector," an required element of the action under the FDCPA. The purchaser argued that it could not qualify as a "debt collector," because, among other reasons, its "principal purpose" was not the collection of the debt but the acquisition of debt that it then outsourced for collection from the consumer. The district court denied the purchaser's motion for summary judgment concluding that the purchaser was a debt collector subject to the FDCPA. The district court certified and the purchaser filed an interlocutory appeal.

The Court of Appeals for the Third Circuit affirmed the summary judgment ruling, holding that that the purchaser did qualify as a debt collector under the FDCPA because the "principal purpose" of the business was collection of the purchased debts. The Court of Appeals declined to make a distinction for the purchaser's status based on the fact that the purchaser hired third-party servicers to collect debts and the fact that the purchaser did not directly contact consumers about the defaulted debts.

K. **"Equal Monthly Payments" Means "Equal Monthly Payments."** In re Benedicto, 587 B.R. 573 (Bankr. S.D. Fla. 2018). In two separate cases, chapter 13 debtors proposed chapter 13 plans which included balloon payments at the end of the plan term to pay creditors secured by the debtors' real estate. The creditors filed objections to confirmation. The bankruptcy court looked toward section 1325(a)(5)(B)(iii)(I), which provides that if the payment to secured creditors "is in the form of periodic payments, such payments shall be in equal monthly amounts." The court found that balloon payments are the last in the series of periodic payments but in an amount not equal to the other payments; thus the balloon payments are periodic payments prohibited by 1325 because they are not in an equal amount. Based on this finding, the bankruptcy court sustained the creditors' objections and denied confirmation of the proposed plans. The court limited the scope of its ruling and noted that the equal monthly payments only need be equal following confirmation of the plan (explaining that modification of an already confirmed plan to provide for a different equal monthly payment is permissible).

L. **Sometimes Debtors Successfully Satisfy *Brunner* Test.** Hill v. Educ. Credit Mgmt. Corp. (In re Hill), Adv. P. No. 17-05131-SMS, 2019 WL 1472957 (Bankr. N.D. Ga. Apr. 1, 2019). A chapter 7 debtor filed an adversary complaint seeking to determine that her student loans of over $120,000 should be discharged as an undue hardship. The court evaluated the complaint under the three prongs of the *Brunner* test. The three prongs are first whether the debtor can maintain a standard of living if forced to repay the debt, second whether the debtor's circumstances are likely to persist during the entirety of the loan repayment period, and finally whether the debtor has made a good faith effort to repay the loan.

The debtor had been diagnosed with post-traumatic stress disorder and bipolar disorder with psychotic features. Her only income was disability benefits of $1,341 monthly. Based on this, the court found that the first prong was satisfied that she could not maintain a minimal standard of living if forced to repay the debt. This finding was despite the fact that the debtor could enter into a $0 monthly repayment plan for the student loans. Turning to the second prong, the court found that the bipolar disorder would persist and the debtor faced a certainty of hopelessness with her financial condition. Finally, as to the third prong, although the debtor had never made a payment on her student loans, the court was satisfied that she acted in good faith in her efforts to repay the loans. The court found good faith because her payments were never in default by her proactive efforts to obtain forbearances and deferments. She thus satisfied the third element. Because the debtor met the three elements of the *Brunner* test, the court granted judgment in her favor.

M. Income Based Repayment Plans Need Not Factor into *Brunner* Test Analysis. Educ. Credit Mgmt. Corp. v. Metz, Case No. 18-1281-JWB, 2019 WL 1953119 (D. Kan. May 2, 2019). A chapter 13 debtor sought discharge of her entire student loan debt. The bankruptcy court held that the repayment of accrued interest on a debtor's student loan debt would constitute an undue hardship and was thus dischargeable under section 523(a)(8), but did not find the principal balance dischargeable. Educational Credit Management Corporation filed an appeal, and the debtor cross appealed asserting that the entire debt should be discharged, not just the interest. The district court affirmed. The district court found that the bankruptcy court did not clearly err on the application of the *Brunner* test to the facts of the case. First, the debtor could not afford minimal living standards if required to pay the current principal and accumulated interest, but that the debtor could do so if the accumulated interest was discharged. The bankruptcy court's decision not to consider potential repayment plans was favorably affirmed by the district court. Second, the debtor's looming retirement and lack of prospect of better financial situation certainly would persist during the entire repayment period. Third, the debtor made a good faith effort to repay the loans and was not required to look into income-based repayment plans as part of the good faith attempt. Finally, the district court rejected the "all-or-nothing" approach to dischargeability supported by the debtor and affirmed the determination that a bankruptcy court could discharge only a portion of the debt.

N. Discharge revoked after the debtor failed to surrender tax refunds to the trustee. In re Thiel, 587 B.R. 92 (B.A.P. 8th Cir. 2018). The debtor filed a chapter 7 petition in February 2015. Four days after the debtor filed his petition, the debtor filed his federal and state income tax returns for 2014. The debtor completed and signed an amended schedule of personal property on April 10, 2015. That same day, the debtor also completed and signed an amended schedule of exempt property. Although the debtor signed his amended schedules on April 10, 2015, the debtor did not immediately file them with the court. One week after the debtor completed his amended schedules, the debtor attended his § 341 meeting of creditors. At the meeting of creditors, the trustee asked the debtor if his schedules contained any mistakes or errors. The debtor informed the trustee that he would file amended schedules to correct the amount of a previously disclosed disability claim, disclose a wage claim, and amend his claim for property exemptions. However, the debtor did not mention his tax refunds at the meeting of creditors. Four days after the meeting of creditors, the debtor filed amended schedules, which disclosed his tax refunds. The debtor subsequently received his discharge. After the debtor failed to surrender his tax refunds to the trustee, the trustee filed an adversary proceeding against the debtor, requesting the court to revoke the debtor's discharge under § 727(d)(2). The bankruptcy court held a trial and found that the debtor knowingly and fraudulently failed to surrender his tax refunds to the trustee. Therefore, the bankruptcy court revoked the debtor's discharge. The debtor then appealed the decision.

The BAP began by reviewing the predicate facts relied upon by the trustee in requesting the bankruptcy court to revoke the debtor's discharge. The debtor acknowledged that he received the 2014 tax refunds, that the tax refunds were property of the estate, and that he did not surrender the tax refunds to the trustee. Thus, the issue before the BAP was whether the bankruptcy court's determination that the debtor knowingly and fraudulently failed to turn over the tax refunds was clearly erroneous. The debtor did not dispute any of the predicate facts and he acknowledged that he made mistakes. Nevertheless, the debtor maintained that he never sought to hide anything from anyone. The BAP found that the bankruptcy court's interpretation of the evidence was permissible and not clearly erroneous. The BAP also rejected the debtor's argument that the trustee never informed him that he could not spend his tax refunds because the tax refunds were property of the estate. The BAP noted that the debtor did not cite any authority suggesting that the trustee was required to do so.

O. **A creditor's post-petition subrogation lien, which arose by operation of law, did not violate the automatic stay.** In re Garcia, 740 F. App'x 163 (10th Cir. 2018), cert. denied sub nom. Davis v. Tyson Prepared Foods, Inc., No. 18-941, 2019 WL 266858 (May 20, 2019). The bankruptcy court, relying upon In re Cowen, 849 F.3d 943 (10th Cir. 2017), held that a creditor's post-petition subrogation lien in settlement proceeds, which arose by operation of law, did not violate the automatic stay. The chapter 13 trustee appealed directly to the Tenth Circuit. In Cowen, the Tenth Circuit held that the term "act," as used in § 362(a)(3), only encompasses affirmative conduct. In this case, the trustee argued that Cowen was wrongly decided and asserted that the term "act," as used in § 362(a)(4), also encompasses passive conduct. The court of appeals began by noting that Cowen has not been overruled by either the court of appeals sitting en banc or the Supreme Court. As such, the court of appeals determined that it was required to faithfully apply existing circuit precedent. Therefore, the court of appeals affirmed the bankruptcy court's holding that a creditor's post-petition subrogation lien, which arose in the absence of affirmative conduct, did not violate the automatic stay. The trustee subsequently filed a petition for a writ of certiorari, which the Supreme Court denied on May 20, 2019.

Fill in this information to identify your case:			
Debtor 1	First Name	Middle Name	Last Name
Debtor 2 (Spouse, if filing)	First Name	Middle Name	Last Name
United States Bankruptcy Court for the: ____________ District of ____________ (State)			
Case number (If known) ____________			

❑ Check if this is an amended plan, and list below the sections of the plan that have been changed.

____

____

Official Form 113

Chapter 13 Plan

12/17

Part 1: Notices

To Debtors: **This form sets out options that may be appropriate in some cases, but the presence of an option on the form does not indicate that the option is appropriate in your circumstances or that it is permissible in your judicial district. Plans that do not comply with local rules and judicial rulings may not be confirmable.**

In the following notice to creditors, you must check each box that applies.

To Creditors: **Your rights may be affected by this plan. Your claim may be reduced, modified, or eliminated.**

You should read this plan carefully and discuss it with your attorney if you have one in this bankruptcy case. If you do not have an attorney, you may wish to consult one.

If you oppose the plan's treatment of your claim or any provision of this plan, you or your attorney must file an objection to confirmation at least 7 days before the date set for the hearing on confirmation, unless otherwise ordered by the Bankruptcy Court. The Bankruptcy Court may confirm this plan without further notice if no objection to confirmation is filed. See Bankruptcy Rule 3015. In addition, you may need to file a timely proof of claim in order to be paid under any plan.

The following matters may be of particular importance. ***Debtors must check one box on each line to state whether or not the plan includes each of the following items. If an item is checked as "Not Included" or if both boxes are checked, the provision will be ineffective if set out later in the plan.***

1.1	**A limit on the amount of a secured claim, set out in Section 3.2, which may result in a partial payment or no payment at all to the secured creditor**	❑ **Included**	❑ **Not included**
1.2	**Avoidance of a judicial lien or nonpossessory, nonpurchase-money security interest, set out in Section 3.4**	❑ **Included**	❑ **Not included**
1.3	**Nonstandard provisions, set out in Part 8**	❑ **Included**	❑ **Not included**

Part 2: Plan Payments and Length of Plan

2.1 Debtor(s) will make regular payments to the trustee as follows:

$ ___________ per_______ for _____ months

[and $ ___________ per_______ for _____ months.] *Insert additional lines if needed.*

If fewer than 60 months of payments are specified, additional monthly payments will be made to the extent necessary to make the payments to creditors specified in this plan.

Debtor ______________________________ Case number ______________

2.2 Regular payments to the trustee will be made from future income in the following manner:

Check all that apply.

- ☐ Debtor(s) will make payments pursuant to a payroll deduction order.
- ☐ Debtor(s) will make payments directly to the trustee.
- ☐ Other (specify method of payment):____________________________.

2.3 Income tax refunds.

Check one.

- ☐ Debtor(s) will retain any income tax refunds received during the plan term.
- ☐ Debtor(s) will supply the trustee with a copy of each income tax return filed during the plan term within 14 days of filing the return and will turn over to the trustee all income tax refunds received during the plan term.
- ☐ Debtor(s) will treat income tax refunds as follows:

____

____

2.4 Additional payments.

Check one.

- ☐ **None.** *If "None" is checked, the rest of § 2.4 need not be completed or reproduced.*
- ☐ Debtor(s) will make additional payment(s) to the trustee from other sources, as specified below. Describe the source, estimated amount, and date of each anticipated payment.

____

____

2.5 The total amount of estimated payments to the trustee provided for in §§ 2.1 and 2.4 is $ __________________.

Part 3: Treatment of Secured Claims

3.1 Maintenance of payments and cure of default, if any.

Check one.

- ☐ **None.** *If "None" is checked, the rest of § 3.1 need not be completed or reproduced.*
- ☐ The debtor(s) will maintain the current contractual installment payments on the secured claims listed below, with any changes required by the applicable contract and noticed in conformity with any applicable rules. These payments will be disbursed either by the trustee or directly by the debtor(s), as specified below. Any existing arrearage on a listed claim will be paid in full through disbursements by the trustee, with interest, if any, at the rate stated. Unless otherwise ordered by the court, the amounts listed on a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) control over any contrary amounts listed below as to the current installment payment and arrearage. In the absence of a contrary timely filed proof of claim, the amounts stated below are controlling. If relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, then, unless otherwise ordered by the court, all payments under this paragraph as to that collateral will cease, and all secured claims based on that collateral will no longer be treated by the plan. The final column includes only payments disbursed by the trustee rather than by the debtor(s).

Name of creditor	**Collateral**	**Current installment payment** (including escrow)	**Amount of arrearage** (if any)	**Interest rate on arrearage** (if applicable)	**Monthly plan payment on arrearage**	**Estimated total payments by trustee**
_________________	____________	$__________ Disbursed by: ☐ Trustee ☐ Debtor(s)	$__________	_______%	$__________	$___________
_________________	____________	$__________ Disbursed by: ☐ Trustee ☐ Debtor(s)	$__________	_______%	$__________	$___________

Insert additional claims as needed.

Debtor ____ Case number _____________________

3.2 Request for valuation of security, payment of fully secured claims, and modification of undersecured claims. *Check one.*

❑ **None.** *If "None" is checked, the rest of § 3.2 need not be completed or reproduced.*

The remainder of this paragraph will be effective only if the applicable box in Part 1 of this plan is checked.

❑ The debtor(s) request that the court determine the value of the secured claims listed below. For each non-governmental secured claim listed below, the debtor(s) state that the value of the secured claim should be as set out in the column headed *Amount of secured claim*. For secured claims of governmental units, unless otherwise ordered by the court, the value of a secured claim listed in a proof of claim filed in accordance with the Bankruptcy Rules controls over any contrary amount listed below. For each listed claim, the value of the secured claim will be paid in full with interest at the rate stated below.

The portion of any allowed claim that exceeds the amount of the secured claim will be treated as an unsecured claim under Part 5 of this plan. If the amount of a creditor's secured claim is listed below as having no value, the creditor's allowed claim will be treated in its entirety as an unsecured claim under Part 5 of this plan. Unless otherwise ordered by the court, the amount of the creditor's total claim listed on the proof of claim controls over any contrary amounts listed in this paragraph.

The holder of any claim listed below as having value in the column headed *Amount of secured claim* will retain the lien on the property interest of the debtor(s) or the estate(s) until the earlier of:

(a) payment of the underlying debt determined under nonbankruptcy law, or

(b) discharge of the underlying debt under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor.

Name of creditor	Estimated amount of creditor's total claim	Collateral	Value of collateral	Amount of claims senior to creditor's claim	Amount of secured claim	Interest rate	Monthly payment to creditor	Estimated total of monthly payments
____________	$_______	__________	$______	$_______	$______	___%	$_______	$_______
____________	$_______	__________	$______	$_______	$______	___%	$_______	$_______

Insert additional claims as needed.

3.3 Secured claims excluded from 11 U.S.C. § 506.

Check one.

❑ **None.** *If "None" is checked, the rest of § 3.3 need not be completed or reproduced.*

❑ The claims listed below were either:

(1) incurred within 910 days before the petition date and secured by a purchase money security interest in a motor vehicle acquired for the personal use of the debtor(s), or

(2) incurred within 1 year of the petition date and secured by a purchase money security interest in any other thing of value.

These claims will be paid in full under the plan with interest at the rate stated below. These payments will be disbursed either by the trustee or directly by the debtor(s), as specified below. Unless otherwise ordered by the court, the claim amount stated on a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) controls over any contrary amount listed below. In the absence of a contrary timely filed proof of claim, the amounts stated below are controlling. The final column includes only payments disbursed by the trustee rather than by the debtor(s).

Name of creditor	Collateral	Amount of claim	Interest rate	Monthly plan payment	Estimated total payments by trustee
_________________________	___________________	$__________	_____%	$_______ Disbursed by: ❑ Trustee ❑ Debtor(s)	$_______________
_________________________	___________________	$__________	_____%	$_______ Disbursed by: ❑ Trustee ❑ Debtor(s)	$_______________

Insert additional claims as needed.

Debtor ____ Case number ________________________

3.4 Lien avoidance.

Check one.

❑ **None.** *If "None" is checked, the rest of § 3.4 need not be completed or reproduced.*

The remainder of this paragraph will be effective only if the applicable box in Part 1 of this plan is checked.

❑ The judicial liens or nonpossessory, nonpurchase money security interests securing the claims listed below impair exemptions to which the debtor(s) would have been entitled under 11 U.S.C. § 522(b). Unless otherwise ordered by the court, a judicial lien or security interest securing a claim listed below will be avoided to the extent that it impairs such exemptions upon entry of the order confirming the plan. The amount of the judicial lien or security interest that is avoided will be treated as an unsecured claim in Part 5 to the extent allowed. The amount, if any, of the judicial lien or security interest that is not avoided will be paid in full as a secured claim under the plan. See 11 U.S.C. § 522(f) and Bankruptcy Rule 4003(d). *If more than one lien is to be avoided, provide the information separately for each lien.*

Information regarding judicial lien or security interest	Calculation of lien avoidance		Treatment of remaining secured claim
Name of creditor ____________________	a. Amount of lien	$____________	**Amount of secured claim after avoidance** (line a minus line f) $____________________
	b. Amount of all other liens	$____________	
Collateral ____________________	c. Value of claimed exemptions	+ $____________	**Interest rate** (if applicable)
	d. Total of adding lines a, b, and c	$____________	______ %
Lien identification (such as judgment date, date of lien recording, book and page number) ____________________ ____________________	e. Value of debtor(s)' interest in property	− $____________	**Monthly payment on secured claim** $____________________
	f. Subtract line e from line d.	$____________	**Estimated total payments on secured claim** $____________________
	Extent of exemption impairment (*Check applicable box*): ❑ **Line f is equal to or greater than line a**. The entire lien is avoided. *(Do not complete the next column.)* ❑ **Line f is less than line a.** A portion of the lien is avoided. (*Complete the next column.)*		

Insert additional claims as needed.

3.5 Surrender of collateral.

Check one.

❑ **None.** *If "None" is checked, the rest of § 3.5 need not be completed or reproduced.*

❑ The debtor(s) elect to surrender to each creditor listed below the collateral that secures the creditor's claim. The debtor(s) request that upon confirmation of this plan the stay under 11 U.S.C. § 362(a) be terminated as to the collateral only and that the stay under § 1301 be terminated in all respects. Any allowed unsecured claim resulting from the disposition of the collateral will be treated in Part 5 below.

Name of creditor	Collateral
__________________________________	__________________________________
__________________________________	__________________________________

Insert additional claims as needed.

Debtor ______________________________ Case number ______________________

Part 4: Treatment of Fees and Priority Claims

4.1 General

Trustee's fees and all allowed priority claims, including domestic support obligations other than those treated in § 4.5, will be paid in full without postpetition interest.

4.2 Trustee's fees

Trustee's fees are governed by statute and may change during the course of the case but are estimated to be ________% of plan payments; and during the plan term, they are estimated to total $___________.

4.3 Attorney's fees

The balance of the fees owed to the attorney for the debtor(s) is estimated to be $___________.

4.4 Priority claims other than attorney's fees and those treated in § 4.5.

Check one.

❑ **None.** *If "None" is checked, the rest of § 4.4 need not be completed or reproduced.*

❑ The debtor(s) estimate the total amount of other priority claims to be _____________.

4.5 Domestic support obligations assigned or owed to a governmental unit and paid less than full amount.

Check one.

❑ **None**. *If "None" is checked, the rest of § 4.5 need not be completed or reproduced.*

❑ The allowed priority claims listed below are based on a domestic support obligation that has been assigned to or is owed to a governmental unit and will be paid less than the full amount of the claim under 11 U.S.C. § 1322(a)(4). *This plan provision requires that payments in § 2.1 be for a term of 60 months; see* 11 U.S.C. § 1322(a)(4).

Name of creditor	Amount of claim to be paid
______________________________	$________________________
______________________________	$________________________

Insert additional claims as needed.

Part 5: Treatment of Nonpriority Unsecured Claims

5.1 Nonpriority unsecured claims not separately classified.

Allowed nonpriority unsecured claims that are not separately classified will be paid, pro rata. If more than one option is checked, the option providing the largest payment will be effective. *Check all that apply.*

❑ The sum of $___________.

❑ _______% of the total amount of these claims, an estimated payment of $_________.

❑ The funds remaining after disbursements have been made to all other creditors provided for in this plan.

If the estate of the debtor(s) were liquidated under chapter 7, nonpriority unsecured claims would be paid approximately $__________. Regardless of the options checked above, payments on allowed nonpriority unsecured claims will be made in at least this amount.

Debtor ______________________________ Case number ______________

5.2 Maintenance of payments and cure of any default on nonpriority unsecured claims. *Check one.*

❑ **None.** *If "None" is checked, the rest of § 5.2 need not be completed or reproduced.*

❑ The debtor(s) will maintain the contractual installment payments and cure any default in payments on the unsecured claims listed below on which the last payment is due after the final plan payment. These payments will be disbursed either by the trustee or directly by the debtor(s), as specified below. The claim for the arrearage amount will be paid in full as specified below and disbursed by the trustee. The final column includes only payments disbursed by the trustee rather than by the debtor(s).

Name of creditor	Current installment payment	Amount of arrearage to be paid	Estimated total payments by trustee
______________	$________ Disbursed by: ❑ Trustee ❑ Debtor(s)	$________	$________
______________	$________ Disbursed by: ❑ Trustee ❑ Debtor(s)	$________	$________

Insert additional claims as needed.

5.3 Other separately classified nonpriority unsecured claims. *Check one.*

❑ **None.** *If "None" is checked, the rest of § 5.3 need not be completed or reproduced.*

❑ The nonpriority unsecured allowed claims listed below are separately classified and will be treated as follows

Name of creditor	Basis for separate classification and treatment	Amount to be paid on the claim	Interest rate (if applicable)	Estimated total amount of payments
______________	______________	$________	______%	$________
______________	______________	$________	______%	$________

Insert additional claims as needed.

Part 6: Executory Contracts and Unexpired Leases

6.1 The executory contracts and unexpired leases listed below are assumed and will be treated as specified. All other executory contracts and unexpired leases are rejected. *Check one.*

❑ **None.** *If "None" is checked, the rest of § 6.1 need not be completed or reproduced.*

❑ **Assumed items.** Current installment payments will be disbursed either by the trustee or directly by the debtor(s), as specified below, subject to any contrary court order or rule. Arrearage payments will be disbursed by the trustee. The final column includes only payments disbursed by the trustee rather than by the debtor(s).

Debtor _______________ Case number _______________

Name of creditor	Description of leased property or executory contract	Current installment payment	Amount of arrearage to be paid	Treatment of arrearage (Refer to other plan section if applicable)	Estimated total payments by trustee
________	________	$________ Disbursed by: ❑ Trustee ❑ Debtor(s)	$________	________ ________	$________
________	________	$________ Disbursed by: ❑ Trustee ❑ Debtor(s)	$________	________ ________	$________

Insert additional contracts or leases as needed.

Part 7: Vesting of Property of the Estate

7.1 Property of the estate will vest in the debtor(s) upon

Check the applicable box:

❑ plan confirmation.

❑ entry of discharge.

❑ other: ________________________.

Part 8: Nonstandard Plan Provisions

8.1 Check "None" or List Nonstandard Plan Provisions

❑ **None.** *If "None" is checked, the rest of Part 8 need not be completed or reproduced.*

Under Bankruptcy Rule 3015(c), nonstandard provisions must be set forth below. A nonstandard provision is a provision not otherwise included in the Official Form or deviating from it. Nonstandard provisions set out elsewhere in this plan are ineffective.

The following plan provisions will be effective only if there is a check in the box "Included" in § 1.3.

____

____

____

____

____

Debtor ______________________________ Case number ______________

Part 9: **Signature(s):**

9.1 Signatures of Debtor(s) and Debtor(s)' Attorney

If the Debtor(s) do not have an attorney, the Debtor(s) must sign below; otherwise the Debtor(s) signatures are optional. The attorney for the Debtor(s), if any, must sign below.

✘ ______________________________
Signature of Debtor 1

Executed on ______________
MM / DD / YYYY

✘ ______________________________
Signature of Debtor 2

Executed on ______________
MM / DD / YYYY

✘ ______________________________
Signature of Attorney for Debtor(s)

Date ______________
MM / DD / YYYY

By filing this document, the Debtor(s), if not represented by an attorney, or the Attorney for Debtor(s) also certify(ies) that the wording and order of the provisions in this Chapter 13 plan are identical to those contained in Official Form 113, other than any nonstandard provisions included in Part 8.

Exhibit: Total Amount of Estimated Trustee Payments

The following are the estimated payments that the plan requires the trustee to disburse. If there is any difference between the amounts set out below and the actual plan terms, the plan terms control.

a.	**Maintenance and cure payments on secured claims** (*Part 3, Section 3.1 total*)		$_____________
b.	**Modified secured claims** (*Part 3, Section 3.2 total*)		$_____________
c.	**Secured claims excluded from 11 U.S.C. § 506** (*Part 3, Section 3.3 total*)		$_____________
d.	**Judicial liens or security interests partially avoided** (*Part 3, Section 3.4 total*)		$_____________
e.	**Fees and priority claims** (*Part 4 total*)		$_____________
f.	**Nonpriority unsecured claims** (*Part 5, Section 5.1, highest stated amount*)		$_____________
g.	**Maintenance and cure payments on unsecured claims** (*Part 5, Section 5.2 total*)		$_____________
h.	**Separately classified unsecured claims** (*Part 5, Section 5.3 total*)		$_____________
i.	**Trustee payments on executory contracts and unexpired leases** *(Part 6, Section 6.1 total)*		$_____________
j.	**Nonstandard payments** *(Part 8, total)*	+	$_____________
	Total of lines a through j		$_____________

B2300B (Form 2300B) (12/15)

United States Bankruptcy Court

_______________ District Of _______________

In re ___________________________________ Case No. _________
Debtor*

Address: ________________________________ Chapter 13

Last four digits of Social-Security or Individual Taxpayer-Identification (ITIN) No(s).,(if any):
Employer Tax-Identification (EIN) No(s).(if any):

ORDER CONFIRMING CHAPTER 13 PLAN

The debtor's plan was filed on _________________ (date), and was modified on _____________ (date). The plan or a summary of the plan was transmitted to creditors pursuant to Bankruptcy Rule 3015. The court finds that the plan meets the requirements of 11 U.S.C. § 1325.

IT IS ORDERED THAT:

The debtor's chapter 13 plan is confirmed, with the following provisions:

1. Payments:
Amount of each payment: $__________________

Due date of each payment: the ☐ ________day of each month, or
☐ ______________

Period of payments: ☐ _____________ months,
☐ until a _________% dividend is paid to creditors holding allowed unsecured claims, or
☐ _________________

Payable to:
_____________________________________Standing Trustee
____
____

2. Attorney's Fees:
The debtor's attorney is awarded a fee in the amount of $______________, of which $______________ is due and payable from the estate.

3. [Other provisions as needed] ______________________________

________________________________ ________________________________
Date *Bankruptcy Judge*

** Set forth all names, including trade names, used by the debtor(s) within the last 8 years. For joint debtors, set forth the last four digits of both social-security numbers or individual taxpayer-identification numbers.*

NCMB-1301 (05/18)

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA

Fill in this information to identify your case:

Debtor 1: ______________________________
First Name Middle Name Last Name

Debtor 2: ______________________________
(Spouse, if filing) First Name Middle Name Last Name

Case number: ______________________________
(If known)

SS# Debtor 1: XXX – XX – ____________

SS# Debtor 2: XXX – XX – ____________

☐ Check if this is an amended plan, and list below the sections of the plan that have changed.

____

____

CHAPTER 13 PLAN

Section 1: Notices.

To Debtors: This form sets out options that may be appropriate in some cases, but the presence of an option on this form does not indicate that the option is appropriate in your circumstances. Plans that do not comply with Local Rules and judicial rulings may not be confirmable. ***You must check each box that applies in § 1.1 and 1.3 below. If an item is checked as "Not Included" or if both boxes are checked, the provision will be ineffective if set out later in the plan.***

1.1	A limit on the amount of a secured claim, set out in Section 4, which may result in a partial payment or no payment at all to the secured creditor.	☐ Included	☐ Not included
1.2	Avoidance of a judicial lien or nonpossessory, nonpurchase money security interest will be done by separate motion or adversary proceeding.		■ Not included
1.3	Nonstandard provisions set out in Section 9.	☐ Included	☐ Not included

To Creditors: Your rights may be affected by this plan. Your claim may be reduced, modified, or eliminated.

You will need to file a proof of claim in order to be paid under any plan. Official notice will be sent to Creditors, which will provide the name and address of the Trustee, the date and time of the meeting of creditors, and information regarding the filing of proofs of claim.

You should read this plan carefully and discuss it with your attorney if you have one in this bankruptcy case. If you do not have an attorney, you may wish to consult one. If you oppose the plan's treatment of your claim or any provision of this plan, you or your attorney must file an objection to confirmation at least seven days before the date set for the hearing on confirmation. You will receive notification from the Bankruptcy Court of the date set for the hearing on confirmation. The Bankruptcy Court may confirm this plan without further notice if no objection to confirmation is filed. See Bankruptcy Rule 3015.

The applicable commitment period is:

☐ 36 months

☐ 60 months

The amount that allowed priority and non-priority unsecured claims would receive if assets were liquidated in a Chapter 7 case, after allowable exemptions, is estimated to be $_____________.

Debtor ______________________________ Case Number ____________________

Section 2: Payments.

2.1 The Debtor will make payments to the Trustee as follows:

$ ________________ per month for __________ month(s)

$ ________________ per month for __________ month(s)

Additional payments ________________________________

2.2 The Debtor shall commence payments to the Trustee within thirty (30) days from the date the petition was filed. If fewer than 60 months of payments are specified, additional monthly payments will be made to the extent necessary to pay creditors as specified in this plan.

Section 3: Fees and Priority Claims.

3.1 **Attorney fees.**

☐ The Attorney for the Debtor will be paid the presumptive base fee of $ ____________. The Attorney has received $ ____________ from the Debtor pre-petition and the remainder of the fee will be paid monthly by the Trustee as funds are available.

☐ The Attorney for the Debtor will be paid a reduced fee of $_________ . The Attorney has received $ ________ from the Debtor pre-petition and the remainder of the fee will be paid monthly by the Trustee as funds are available.

☐ The Attorney for the Debtor will file an application for approval of a fee in lieu of the presumptive base fee.

3.2 **Trustee costs.** The Trustee will receive from all disbursements such amount as approved by the Court for payment of fees and expenses.

3.3 **Priority Domestic Support Obligations ("DSO").**

a. ☐ None. If none is checked, the rest of Section 3.3 need not be completed or reproduced.

b. ☐ The name and address of the holder of any DSO as defined in 11 U.S.C. § 101(14A) is as follows:

Name of DSO Claimant	Address, City & State

c. All post-petition DSO amounts will be paid directly by the Debtor to the holder of the claim and not by the Trustee.

d. Arrearages owed to DSO claimants under 11 U.S.C. § 507(a)(1)(A) not presently paid through wage garnishment will be paid by the Trustee as follows:

Name of DSO Claimant	Estimated Arrearage Claim	Monthly payment
	$	$

3.4 **Other Priority Claims to be Paid by Trustee.**

a. ☐ None. If none is checked, the rest of Section 3.4 need not be completed or reproduced.

b. ☐ To Be Paid by Trustee

Creditor	Estimated Priority Claim
	$
	$

Debtor _______________________________________ Case Number ____________________

Section 4: Secured Claims.

4.1 **Real Property – Claims Secured Solely by Debtor's Principal Residence.**

a. ☐ None. If none is checked, the rest of Section 4.1 need not be completed or reproduced.

b. ☐ Maintenance of Payments and Cure of Default.

Installment payments on the claims listed below will be maintained and any arrearage will be paid in full. Proofs of claim should reflect arrearage amounts through the petition date. For accounts that are in default, the Trustee will commence disbursements of installment payments the month after confirmation. Any filed arrearage claim will be adjusted to include post-petition installment payments through the month of confirmation.

Amounts stated on a filed proof of claim, and as adjusted to include post-petition payments through the month of confirmation, will control over any contrary amounts listed below for the installment payment and the arrearage. Additionally, the Trustee will adjust the installment payment in accordance with any Notice of Mortgage Payment Change filed under Bankruptcy Rule 3002.1.

The Trustee is authorized to pay any post-petition fee, expense, or charge for which notice is filed under Bankruptcy Rule 3002.1 if no objection is filed to such fee, expense, or charge.

Creditor	Address of Residence	Current Y/N	Installment Payment	Estimated Arrearage Amount on Petition Date	If Current, Indicate by Debtor or Trustee
			$	$	

c. ☐ Claims to be Paid in Full by Trustee.

Creditor	Address of Residence	Estimated Claim	Monthly Payment	Monthly Escrow Payment	Contractual Interest Rate
		$	$	$	%

d. ☐ Request for Valuation to Treat Claims as Totally Unsecured. *This will be effective only if the applicable box in Section 1.1 of this plan is checked.*

Creditor	Address of Residence	Estimated Claim	Value of Residence	Amount of Claims Senior to Creditor's Claim	Amount of Secured Claim
		$	$	$	$ -0-

4.2 **Real Property – Claims Secured by Real Property Other Than by Debtor's Principal Residence AND Claims Secured by Debtor's Principal Residence and Additional Collateral.**

a. ☐ None. If none is checked, the rest of Section 4.2 need not be completed or reproduced.

Debtor ______________________ Case Number ______________

b. ☐ Maintenance of Payments and Cure of Default.

Proofs of claim should reflect arrearage through the petition date. For accounts that are in default the Trustee will commence disbursements of installment payments the month after confirmation and any filed arrearage claims will be adjusted accordingly. Amounts stated on a proof of claim as adjusted to include post-petition payments through the month of confirmation, will control over any contrary amounts listed below for the installment payment and the arrearage.

Creditor	Collateral	Current Y/N	Installment Payment	Estimated Arrearage Amount on Petition Date	If Current, Indicate by Debtor or Trustee
			$	$	

c. ☐ Claims to be Paid in Full by Trustee.

Creditor	Collateral	Estimated Claim	Monthly Payment	Monthly Escrow Payment	Interest Rate
		$	$	$	%

d. ☐ Request for Valuation to Treat Claims as Secured to the Value of the Property and any Amount in Excess as Unsecured. *This will be effective only if the applicable box in Section 1.1 of this plan is checked.*

Creditor	Collateral	Value of Property	Amount of Claims Senior to Creditor's Claim	Amount of Secured Claim	Monthly Payment to Creditor	Interest Rate
		$	$	$	$	%

4.3 **Personal Property Secured Claims.**

a. ☐ None. If none is checked, the rest of Section 4.3 need not be completed and reproduced.

b. ☐ Claims Secured by Personal Property to be Paid in Full.

Creditor	Collateral	Estimated Claim	Monthly Payment	Interest Rate	Adequate Protection Payment	Number of Adequate Protection Payments
		$	$	%	$	

c. ☐ Claims Secured by Personal Property excluded from 11 U.S.C. § 506 being either (i) incurred within 910 days before the petition date and secured by a purchase money security interest in a motor vehicle acquired for personal use of the Debtor, or (ii) incurred within one (1) year of the petition date and secured by a purchase money security interest in any other thing of value. The filed claim must include documentation to show exclusion from 11 U.S.C. § 506 in order to be paid in full.

Creditor	Collateral	Estimated Claim	Monthly Payment	Interest Rate	Adequate Protection Payment	Number of Adequate Protection Payments
		$	$	%	$	

Debtor ______________________________ Case Number ____________________

d. ☐ Request for Valuation to Treat Claims as Secured to the Value of the Collateral and Any Amount in Excess as Unsecured. *This will be effective only if the applicable box in Section 1.1 of this plan is checked.*

Creditor	Estimated Amount of Total Claim	Collateral	Value of Collateral	Amount of Claims Senior to Creditor's Claim	Amount of Secured Claim	Monthly Payment	Interest Rate	Adequate Protection Payment	Number of Adequate Protection Payments
	$		$	$	$	$	%	$	

e. ☐ Maintenance of Payments and Cure of Default.

Proofs of claim should reflect arrearage through the petition date. For accounts that are in default the Trustee will commence disbursements of installment payments the month after confirmation and any filed arrearage claims will be adjusted accordingly. Amounts stated on a proof of claim as adjusted to include post-petition payments through the month of confirmation, will control over any contrary amounts listed below for the installment payment and the arrearage.

Creditor	Collateral	Installment Payment	Estimated Arrearage Amount on Petition Date
		$	$

The Debtor requests that the Court determine the value of the secured claims listed as set forth in Sections 4.1.d, 4.2.d, and 4.3.d as applicable. For each non-governmental secured claim listed above, the Debtor states that the value of the secured claim should be set out in the column headed *Amount of Secured Claim.* For secured claims of governmental units only, unless otherwise ordered by the Court, the value of a secured claim listed in a proof of claim filed in accordance with the Bankruptcy Rules controls over any contrary amount listed above. For each listed claim, the value of the secured claim will be paid in full with interest at the rate stated above.

The portion of any allowed claim that exceeds the amount of the secured claim will be treated as an unsecured claim under Section 6 of this plan. If the amount of a creditor's secured claim is listed above as having no value, the creditor's allowed claim will be treated in its entirety as an unsecured claim under Section 6 of this plan. Unless otherwise ordered by the Court, the amount of the creditor's total claim listed on the proof of claim controls over any contrary amounts listed in Section 4.

The holder of any claim listed in Section 4 as having value in the column headed *Amount of Secured Claim* will retain the lien on the property interest of the Debtor or the estate until the earlier of:

(a) payment of the underlying debt determined under non-bankruptcy law, or

(b) discharge of the underlying debt under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor.

Section 5: **Collateral to be Surrendered.**

a. ☐ None. If none is checked, the rest of Section 5 need not be completed or reproduced.

b. ☐ The Debtor Proposes to Surrender to Each Creditor Listed Below the Collateral that Secures the Creditor's Claim.

Upon timely filing of a claim evidencing a non-avoidable lien, the Debtor will surrender the collateral in satisfaction of the secured claim, and the stay under 11 U.S.C. § 362(a) will be terminated as to the collateral only and the stay under § 1301 will be terminated in all respects effective upon confirmation of this plan. Effective upon confirmation the creditor will be allowed a period of 120 days for personal property and a period of 180 days for real property to file a documented deficiency claim. Any allowed unsecured claim resulting from disposition of the collateral will be treated as an unsecured claim under Section 6.

Creditor	Collateral to be Surrendered

Debtor ______________________________ Case Number ______________

Section 6: Nonpriority Unsecured Claims.

6.1 **Nonpriority Unsecured Claims Not Separately Classified.**

Allowed nonpriority unsecured claims will be paid pro rata with payments to commence after priority unsecured claims are paid in full.

a. ☐ The estimated dividend to unsecured nonpriority allowed claims is _______%.

b. ☐ The minimum sum of $___________ will be paid pro rata to nonpriority unsecured claims due to the following:

☐ Liquidation Value

☐ Disposable Income

☐ Other

6.2 **Separately Classified Nonpriority Unsecured Claims.**

a. ☐ None. If none is checked, the rest of Section 6.2 need not be completed or reproduced.

b. ☐ Allowed Nonpriority Unsecured Claims Listed Below are Separately Classified.

Creditor	Basis for Separate Classification (Include Name and Address of Co-Debtor, if Applicable)	Estimated Claim	Monthly Payment	Interest Rate (If applicable)
		$	$	%

Section 7: Executory Contracts and Unexpired Leases.

a. ☐ None. If none is checked, the rest of Section 7 need not be completed or reproduced.

b. ☐ Executory Contracts and Leases to be Rejected.

Creditor	Nature of Lease or Contract

c. ☐ Executory Contracts and Leases to be Assumed.

Creditor	Nature of Lease or Contract	Monthly Payment	Payment by Debtor or Trustee	Arrearage Amount	Arrearage Paid by Debtor or Trustee	Monthly Payment on Arrearage
		$		$		$

Debtor ____ Case Number ______________________

Section 8: **Local Standard Provisions.**

8.1 a. The Trustee shall collect and disburse payments in accordance with the plan.

b. Proofs of claim must be filed to receive disbursements pursuant to the plan. Any claim to be paid as secured must contain evidence of a properly perfected lien on property of the estate. If a claim is listed as secured and the creditor files an unsecured claim, the claim will be treated as unsecured.

c. Any creditor holding an allowed secured claim and to whom the Debtor is surrendering property under the order confirming plan is granted relief from the automatic stay as to the property and relief from any co-debtor stay so the creditor may obtain possession and liquidate the property. Any net proceeds, after payment of liens and costs of liquidation, are to be forwarded to the Trustee.

d. All payments being made by the Trustee on any claim secured by real or personal property shall terminate upon the lifting of the automatic stay with respect to the affected property.

e. Notwithstanding the allowance of a claim as secured, all rights under Title 11 to avoid liens are reserved and confirmation of the plan is without res judicata effect as to any action to avoid a lien.

f. Notwithstanding 11 U.S.C. § 1327(b), all property of the estate as specified by 11 U.S.C. §§ 541 and 1306 shall continue to be property of the estate following confirmation until the earlier of discharge, dismissal, or conversion of the case.

g. Confirmation of the plan shall not prejudice the right of the Debtor or Trustee to object to any claim.

h. The Debtor must promptly report to the Trustee and must amend the petition schedules to reflect any significant increases in income and any substantial acquisitions of property such as inheritance, gift of real or personal property, or lottery winnings.

8.2 **THE FOLLOWING ADDITIONAL PROVISIONS ARE APPLICABLE TO THE HOLDER OR SERVICER ("HOLDER") OF A CLAIM SECURED BY A DEED OF TRUST, A MORTGAGE OR SECURITY INTEREST IN REAL PROPERTY, OR A MOBILE HOME THAT IS THE DEBTOR'S PRINCIPAL RESIDENCE:**

a. The Holder, upon confirmation, is precluded from imposing late charges or other default related fees based solely on pre-confirmation default.

b. If the Trustee is disbursing ongoing monthly installment payments, the Holder must apply each ongoing payment to the month in which the payment is designated.

c. For any loan with an escrow account, the Holder must prepare and must send an escrow analysis annually to the Debtor, the Trustee and the Debtor's attorney. The first escrow analysis must be filed with the proof of claim in accordance with Bankruptcy Rule 3002.1. The escrow analysis should not include any amounts that were included or should have been included in the arrearage claim.

d. The Holder shall continue to send monthly statements to the Debtor in the same manner as existed pre-petition and such statements will not be deemed a violation of the automatic stay.

e. The Holder is required, upon request, to provide account information to the Trustee within 21 days of the request and failure to provide a timely response may result in an order requiring the Holder to appear and show cause as to why Holder should not be sanctioned for failure to comply.

f. Nothing herein shall modify Holder's responsibilities under Bankruptcy Rule 3002.1.

g. Unless the Court orders otherwise, an order granting a discharge in the case shall be a determination that all pre-petition and post-petition defaults have been cured and the account is current and reinstated on the original payment schedule under the note and security agreement as if no default had ever occurred.

h. PENALTY FOR FAILURE OF HOLDER TO COMPLY WITH THE REQUIREMENTS OUTLINED IN BANKRUPTCY RULE 3002.1. Without limitation to the Court's authority to afford other relief, any willful failure of the Holder to credit payments in the manner required by Bankruptcy Rule 3002.1 or any act by the creditor following the entry of discharge to charge or collect any amount incurred or assessed prior to the filing of the Chapter 13 Petition or during the pendency of the Chapter 13 case that was not authorized by the order confirming plan or approved by the Court after proper notice, may be found by the Court to constitute contempt of Court and to be a violation of 11 U.S.C. § 524(i) and the injunction under 11 U.S.C. § 524(a)(2).

Debtor ______________________ Case Number ______________

Section 9: Nonstandard Plan Provisions.

a. ☐ None. If none is checked, the rest of Section 9 need not be completed or reproduced.

b. ☐ The following plan provisions will be effective only if there is a check in the box "Included" in Section 1.3. Any nonstandard provision as defined by Bankruptcy Rule 3015(c) set out elsewhere in this plan is void.

By filing this document, the Debtor(s), if not represented by an attorney, or the Attorney for Debtor(s) certify(ies) that the wording and order of the provisions in this Chapter 13 Plan are identical to those contained in MDNC Local Form 113, other than any nonstandard provisions included in Section 9.

Signature(s):

If the Debtor(s) do not have an attorney, the Debtor(s) must sign below; otherwise the Debtor(s) signatures are optional. The attorney for the Debtor(s), if any, must sign below.

______________________ ______________________
Signature of Debtor 1 Signature of Debtor 2

Executed on ______________ Executed on ______________
mm/dd/yyyy mm/dd/yyyy

______________________ Date: ______________
Signature of Attorney for Debtor(s)

Address: ______________
____
____

Telephone: ______________

State Bar No: ______________

NCMB-1301 (05/18)

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA

In re: ______________________________)	Case No. ____________________
______________________________)	
______________________________)	
SS# xxx-xx- ______________________)	CHAPTER 13 PLAN
SS# xxx-xx- ______________________)	
)	
Debtor(s))	

<u>CERTIFICATE OF SERVICE</u>

The undersigned certifies that a copy of the plan was served by first class mail, postage prepaid, to the following parties at their respective addresses:

Date: ____________________ ______________________________

SO ORDERED.

Dated: November 28, 2016

Madeleine C. Wanslee

Madeleine C. Wanslee, Bankruptcy Judge

James R. McDonald, Jr., bar # 013604
McDonald Law Offices, PLLC
1907 E. Broadway, Suite 1
Tempe, Arizona 85282
Phone: (480)968-3100
Fax: (480)968-7910
mcdonaldlaw@azbar.org

IN THE UNITED STATES BANKRUPTCY COURT

OF THE DISTRICT OF ARIZONA

In re: *Robert Rivera* *&* *Margarita Rivera,* Debtors.	Chapter 13 Case No. 2:13-bk-20842-MCW **STIPULATED ORDER CONFIRMING AMENDED FIRST MODIFIED CHAPTER 13 PLAN**

The Amended First Modified Chapter 13 Plan having been properly noticed out to creditors and any objection to confirmation having been resolved,

IT IS ORDERED confirming the Amended First Modified Plan of the Debtors as follows:

(A) **INCOME SUBMITTED TO THE PLAN.** Debtors shall submit the following amounts of future income to the Trustee for distribution under the Plan.

(1) Future Earnings or Income. Debtors shall make the following monthly Plan payments:

Months	Amount	
1 - 7	**$370.00**	**(January 2014 through July 2014)**
8 - 10	**$655.00**	**(August 2014 through October 2014)**
11 - 27	**$806.00**	**(November 2014 through March 2016)**
28	**$43.09**	**(April 2016)**
29 - 31	**$0.00**	**(May 2016 through July 2016)**
RB **32 - ~~46~~ 41**	**$600.00**	**(August 2016 through ~~October~~ May 2017)** RB

The payments are due on or before the 3rd day of each month commencing January 3, 2014. Debtors are advised that when payments are remitted late, additional interest may accrue on secured debts which may result in a funding shortfall at the end of the Plan term. Any funding shortfall must be cured before the plan is deemed complete.

The Debtors shall provide, directly to the Trustee copies of their **federal** and **state** income tax returns for post-petition years 2013, 2014 & 2015 within 15 days of filing them. The purpose is to assist the Trustee in determining any change in debtor's annual disposable income.

(2) Other Property. ***Debtors received $3900.00 in state & federal tax refunds for the year ending 2013 which they were required to turnover. The Debtors failed to turn over the tax refunds as requested.*** ~~***The amount being paid to the unsecured creditors has been increased by the amount of the tax refunds. The unsecured creditors must receive a total of $4,801.45 before a discharge will be entered in this case.***~~ In the event that other property is submitted, it shall be treated as supplemental payments. In order to reimburse unsecured creditors for the Debtors' 2013 net tax refunds, Plan funding allows for the 100% payment of all allowed unsecured claims. RB

(B) **DURATION.** This Plan shall continue for 41 ~~**46**~~ **months** from the first regular monthly payment described in Paragraph (A)(1) above. If at any time before the end of the Plan period all claims are paid, then the Plan shall terminate. In no event will the term of the Plan be reduced to less than 36 months, exclusive of any property recovered by the Trustee, unless all allowed claims are paid in full.

(C) **CLASSIFICATION AND TREATMENT OF CLAIMS.** Claims shall be classified as listed below. The Plan and this Order shall not constitute an informal proof of claim for any creditor. This Order does not allow claims. Claims allowance is determined by § 502 and the Federal Rules of Bankruptcy Procedure. The Trustee shall receive the percentage fee on the Plan payments pursuant to 28 U.S.C. § 586(e), then the Trustee will pay secured creditors or allowed claims in the following order:

(1) Administrative expenses:

(a) Attorney Fees. ***McDonald Law Offices***, shall be allowed total compensation of $3,391.92 for fees and costs. Counsel received $53.00 prior to filing this case and will be paid $3,338.92 by the Chapter 13 Trustee upon entry of an Order for Payment of Administrative Expense in this case.

(b) Other Administrative Expenses. ***McDonald Law Offices PLLC*** shall be paid $750.00 as an administrative claim for this First Modified Chapter 13 Plan in addition to payments previously scheduled.

(2) Claims Secured by Real Property:

(a) Roundpoint Mortgage, secured by a first deed of trust in the Debtors' residence, shall be paid the prepetition arrearage of $15,571.89 with 0% interest. Regular post-petition payments will be made directly by the Debtors to the secured creditor.

(3) Claims Secured by Personal Property:

None.

(4) Unsecured Priority Claims:

None.

(5) Surrendered Property. Upon confirmation of this plan or except as otherwise ordered by the Court, bankruptcy stays are lifted as to collateral to be surrendered. Such creditor shall receive no distribution until the creditor timely files a claim or an amended proof of claim that reflects any deficiency balance remaining on the claim. Assuming the creditor has an allowed proof of claim, should the creditor fail to file an amended claim consistent with this provision, the Trustee need not make any distributions to that creditor. Debtors surrender the following property:

None.

(6) Other Provisions: None.

(7) Unsecured Non-priority Claims. Claims allowance is determined by § 502 and the Federal Rules of Bankruptcy Procedure. Allowed unsecured claims shall be paid pro rata the balance of the payments under the Plan and any unsecured debt balance remaining unpaid upon completion of the Plan may be discharged as provided in 11 U.S.C. § 1328.

(D) **EFFECTIVE DATE AND VESTING.** The effective date of the Plan shall be the date of this Order. Property of the estate vests in Debtors upon confirmation, subject to the rights of the Trustee to assert a claim to any additional property of the estate pursuant to 11 U.S.C §1306.

ORDER SIGNED ABOVE

Approved as to Form and Content By:

RBrown

Russell Brown
2016.11.22 15:10:55
-07'00'

Russel

James R McDonald

James R. McDonald, Jr.

Attorney for Debtors

The debtors certify: All required State and Federal income tax returns have been filed. No domestic support obligation is owed or, if owed, such payments are current since the filing of the petition.

Robert Rivera

Margarita Rivera

Margarita Rivera

AMERICAN BANKRUPTCY INSTITUTE

Final Report of the ABI Commission on Consumer Bankruptcy

THE ABI COMMISSION ON CONSUMER BANKRUPTCY

HON. WILLIAM H. BROWN (RET.)	HON. ELIZABETH L. PERRIS (RET.)
MICHAEL T. BATES	HON. DAVID W. HOUSTON, III (RET.)
G. WILLIAM BEARD	PROF. DALIÉ JIMÉNEZ
ALANE A. BECKET	RICHARDO I. KILPATRICK
EDWARD C. BOLTZ	PROF. BRUCE A. MARKELL
RUDY J. CERONE	RONALD R. PETERSON
HON. RANDALL L. DUNN (RET.)	JOHN RAO
EDWARD T. GAVIN	WENDELL J. SHERK
SAMUEL J. GERDANO	TARA TWOMEY
HENRY E. HILDEBRAND, III	HON. EUGENE R. WEDOFF (RET.)
ARIANE HOLTSCHLAG	CLIFFORD J. WHITE, III

REPORTER: PROF. ROBERT M. LAWLESS

AMERICAN BANKRUPTCY INSTITUTE

2017~2019

FINAL REPORT AND RECOMMENDATIONS

III. FACILITATING EFFECTIVE ACCESS TO BANKRUPTCY

A. Paying for Bankruptcy

§ 3.01 Chapter 7 Attorney's Fees

(a) The dischargeability of prepetition attorney's fees in chapter 7 hinders access to the bankruptcy system and access to justice. Congress and all stakeholders to the bankruptcy system should take steps to lower barriers to access, including:

(1) consistent with the Commission recommendation at § 5.06 Bankruptcy Forms, creating easy-to-understand online data input forms that would generate asset and liability compilations that could be reviewed by a bankruptcy professional to make preparation of schedules less time-consuming;

(2) increasing provision of pro bono bankruptcy representation for low-income debtors;

(3) reducing filing fees for low-income debtors, even if represented by paid counsel;

(4) allowing video attendance at § 341 meetings and scheduling these meetings outside of regular working hours, with safeguards ensuring that the named debtor is the one appearing; and

(5) providing low-income debtors legal representation through a governmental office, akin to public defenders' offices.

(b) Congress should amend the Bankruptcy Code to allow postpetition payment for attorney services rendered prepetition. Different mechanisms have different costs and benefits. The Commission believes two mechanisms merit consideration:

(1) Excepting fee agreements from the automatic stay and delaying the discharge of fees for a period of time, such as six months, with other coordinating amendments to the Bankruptcy Code to ensure no change to other creditors' access to their collateral during the delay.

(2) Making prepetition attorney's fees nondischargeable in a chapter 7 with judicial review of the fee agreement.

Background. How consumers pay for legal representation in bankruptcy is one of the most important issues facing the bankruptcy system. Consumers who cannot pay either cannot access the bankruptcy system or must file pro se, and studies show pro se filers get inferior outcomes.[1] Another study suggests consumers are increasingly using "no money down" chapter 13 cases that allow payments of their attorney's fees through the chapter 13 plan, although such filers end up paying more and are less likely to receive a bankruptcy discharge.[2] A bankruptcy system that works only for those who can pay for legal representation does not further the American ideal of equal justice under law.

The current situation is the result of legal rules that begin with the U.S. Supreme Court's decision in *Lamie v. United States Trustee*,[3] which held that attorney's fees for work done on behalf of chapter 7 debtors during the bankruptcy case cannot be treated as an administrative expense and therefore cannot be paid from estate assets. Next, almost every published decision has held that any agreement to pay attorney's fees is a prepetition fee agreement subject to the automatic stay and the bankruptcy discharge.[4] Putting this case law together, an attorney who is owed money for work done before filing the bankruptcy petition is no different than any other unsecured creditor. Additionally, the Eleventh Circuit has held that an attorney cannot advise a client to incur debt from another person to pay the attorney fee for bankruptcy representation.[5]

Under this state of the law, an attorney offering representation to potential chapter 7 debtors has four fee options, each of which produces undesirable results:

> *Option 1:* The attorney can delay filing a chapter 7 case until the debtor has paid up front all of the anticipated fees in the case. There are three problems with this common approach. First, it deprives the debtor of immediate relief, which might especially frustrate the debtor's goal in filing bankruptcy if there is ongoing or imminent collection activity, such as wage garnishment or seizure of collateral. Second, if the debtor is unable to complete the prepetition payments, no case will be filed, and the debtor will likely lose at least some portion of the funds deposited with the lawyer as payment for whatever services — legal or administrative — were provided. Third, if the debtor does complete the required prepetition payment, and the case requires unanticipated services after filing, the attorney will have the same difficulties in collecting additional fees as in cases filed without prepayment.

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1 One study found chapter 7 debtors who were represented by an attorney were over nine times as likely to get a discharge as chapter 7 debtors who filed pro se. Angela K. Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 Wm. & Mary L. Rev. 1933, 1974 tbl.3b (2011).

2 *See* Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne, *"No Money Down" Bankruptcy*, 90 S. Cal. L. Rev. 1055, 1075 tbl.1, 1093 tbl.5 (2017).

3 540 U.S. 526 (2004).

4 *See* Bethea v. Robert J. Adams & Associates, 352 F.3d 1125 (7th Cir. 2003); *see also In re* Beschloss, 2018 WL 2138276, at *2 (Bankr. S.D.N.Y. 2018) ("[W]hether [a prepetition] obligation to pay the law firm's fees was based on an initial retainer agreement . . . on quantum meruit for the work that they performed, or . . . on a promise to pay even if the debtor got a discharge . . . [t]hey are all subject to discharge.").

5 *See* Cadwell v. Kaufman, 886 F.3d 1153 (11th Cir. 2018) (applying § 526(a)(4) of the Bankruptcy Code).

Option 2: The attorney can file a chapter 7 case without receiving full payment of the anticipated fees, hoping that the debtor will voluntarily pay the fees from non-estate assets postpetition. This option presents a low likelihood that the attorney will be paid. The debtor has no financial incentive to pay the fees because the bankruptcy is accomplishing the debtor's goals without payment, and the attorney has no ability to take any collection action — even suggesting voluntary repayment — because the claim for fees is subject to the automatic stay and the discharge injunction.

Option 3: The attorney can bifurcate the legal services to be provided, first entering into an agreement with a nominal fee covering only prepetition services and then entering into a postpetition agreement for the bulk of the fees to cover postpetition services. Because it occurs postfiling and creates postfiling obligations, the automatic stay and the bankruptcy discharge do not apply to the postpetition agreement. Thus, the attorney theoretically can demand payment and engage in collection activity after discharge. This option, however, has at least five drawbacks. First, local rules or practice may not allow the unbundling of postpetition services.[6] Second, even if unbundling is allowed, the court may find that the fees allocated to prepetition services are unreasonably low and the fees for postpetition services are unreasonably high. Third, the client may decline to enter into the second fee agreement, requiring the attorney to withdraw from the representation, leaving the debtor unrepresented and leaving the attorney with no ability to obtain additional payment for the services already rendered. Fourth, where the client enters into a postpetition contract, there is no incentive for the client to pay for the postpetition services other than a threat of collection action, which the attorney may be reluctant to engage in, both because of its expense and because it may generate unfavorable reviews of the attorney, online and otherwise. Fifth, the attorney may assign the right to be paid under the postpetition agreement to a third-party collector, incurring significant charges and increasing the fee charged to the client to offset these charges. As illustrated by later discussion of options that merit congressional consideration, the Commission expressly disapproves of attorney fee factoring agreements between debtors' attorneys and third-party collectors.[7]

Option 4: The debtor can file the case under chapter 13 instead of chapter 7. If the debtor makes any payments required by the chapter 13 plan, at least a portion of the attorney fees will be paid. Also, the debtor has an incentive to make payments because, absent the uncommon occurrence of a "hardship" discharge, the court will grant a discharge only if the debtor makes all plan payments. But this option also has drawbacks. First, chapter 13

6 The Commission has made a recommendation on unbundling at § 3.02 Unbundling of Legal Services.

7 Alleging multiple disclosure and ethics issues, the U.S. Trustee has filed several suits against attorneys who were bifurcating and factoring client accounts for filing chapter 7 using the services of a national company. *See, e.g., In re* Wright, 591 B.R. 68 (Bankr. N.D. Okla. 2018); *see also* Complaint, U.S. Trustee for the Central Dist. of Cal. v. Ashcraft, Adversary Proceeding 6:17-ap-01721 (Bankr. C.D. Cal. Dec. 12, 2017); Daniel Gill, "Firm Sued by U.S. Trustee Over Billing Practices in Chapter 7" (Dec. 19, 2017), available at https://www.bna.com/firm-sued-us-n73014473436/ (last visited Dec. 27, 2018) (summarizing the complaint and including responses from the company).

> imposes additional costs on the debtor, both in higher fees and in the requirement that the debtor devote all disposable income to paying claims under the plan. Second, if the court does dismiss the case, the debtor will not only fail to receive a discharge but also will lose any fees paid to the attorney and chapter 13 trustee, as well as other costs the debtor has incurred in filing. Third, it may be unethical for an attorney to file a chapter 13 case for a client when chapter 7 provides the relief that the client needs, simply because the attorney prefers the more secure fee payment in chapter 13.

Table 1 summarizes the effects of these four options on debtors and their attorneys, setting out for each option (a) how much the option increases the likelihood of debtor payments, (b) how much it increases the attorney's costs, and (c) how much it diminishes the debtor's relief.

Comparisons of Existing Options to Pay Chapter 7 Attorney Fees

Table 1

	Effectiveness in encouraging fee payment	*Cost to the attorney*	*Negative effect on the debtor*
Option 1: Delay filing until anticipated fees are paid	*High* Debtor has high incentive to pay the fees, because otherwise there will be no filing.	*Low* Any administrative cost in holding funds before filing can be covered by a higher fee.	*High* The delay in filing may cause harm to the client, and the attorney may deduct expenses from any refund if the case is not filed.
Option 2: Chapter 7 filing without prepayment	*Low* The debtor is under no legal obligation to pay the fees; the automatic stay and discharge prevent the attorney from asking for fee payment.	*High* Failure of the debtor to make completely voluntary payments results in no possibility of payment for the services provided.	*Low* There is no negative effect. Unless the debtor chooses to pay the fee, without prompting, the debtor obtains the legal services without charge.
Option 3: Bifurcated representation	*Moderate* Although excepted from discharge, fees under the post-filing contract may be difficult to collect.	*Moderate* The attorney incurs costs of collection if the debtor fails to complete payments and may have to defend the bifurcation if it is challenged as unethical.	*Moderate* The debtor is subject to collection of unpaid fees and may incur liability for costs of collection. The unpaid fees may be assigned for collection, increasing costs to the debtor.
Option 4: File chapter 13	*High* The debtor is encouraged to complete plan payments to obtain a discharge and avoid the need for refiling after dismissal.	*Moderate* The court may dismiss the case for failure to make plan payments before payment of attorney fees. Collecting unpaid fees would impose costs and reputation risk.	*High* The attorney fees are higher than a chapter 7; failure to complete plan payments results in a loss of fee and expense payments and no discharge is obtained.

The Ninth Circuit summarized the inadequacy of these alternatives for payment of the debtor's attorney fees in chapter 7:

> [B]ecause no existing solution is totally satisfactory, it is only the rarity of litigated disputes in this area (as a practical matter) that avoids a real chilling of competent counsel's willingness to represent Chapter 7 debtors. Needless to say, the optimum solution to the problem would call for action by Congress to provide express statutory authority and an express procedure for the compensation of Chapter 7 debtors' attorneys who render postpetition services.[8]

Attorneys serve as the gateway for the bankruptcy system. Whether persons get the bankruptcy relief they seek very much depends on whether the system incentivizes competent counsel to serve with fair compensation.

*Recommendation — System Changes to Make Bankruptcy Less Expensive. I*n the Commission's deliberations, several commissioners expressed the view that the root problem stems from a system that is poorly designed for the needs of the average consumer whose financial affairs are simple and whose bankruptcy cases are straightforward. Over 90% of chapter 7s are no-asset cases that provide no distribution to unsecured creditors,[9] but these cases are all administered under a heavily judicialized procedure using the same statute, rules, and forms as are used by all individuals regardless of wealth. Moreover, the many amendments to the Bankruptcy Code have made it a complex law to navigate, making it more imperative than ever for consumers to have expert and expensive legal assistance.

Part of the solution to make it easier for consumers to pay for their bankruptcies is to lower the cost of filing bankruptcy. The Commission's charge — to recommend "improvements to the consumer bankruptcy system that can be implemented within its existing structure" — limited what it could recommend. Were it not for this limitation, some commissioners might have had an interest in exploring measures such as a new consumer-only bankruptcy law or administering the consumer bankruptcy system through a government agency. Other commissioners believe such measures are not necessary, but the Commission as a whole agreed that solutions that would require a complete overhaul of the bankruptcy system were beyond the Commission's charge. The recommendations in this section reflect the task that was set before the Commission and should not be interpreted either as a rejection or an endorsement of more radical solutions.

The Commission agreed on several measures that would lower costs and can be implemented within the existing structure of the bankruptcy system:

> (1) As the Commission has recommended elsewhere, the AO, the Federal Judicial Center (FJC), and the Advisory Committee on Rules of Bankruptcy Procedure should work with both nonprofit and for-profit private actors to develop software that allows for easier data entry on bankruptcy forms.[10] Such software would lower the costs to attorneys, which in

8 Gordon v. Hines, 147 F.3d 1185, 1190 (9th Cir. 1998).

9 Dalié Jiménez, *The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases*, 83 Am. Bankr. L.J. 795, 819 (2009).

10 *See* § 5.06 Bankruptcy Forms.

the competitive market for consumer bankruptcy lawyers presumably would be passed through to debtors in the form of lower fees.

(2) Legal aid organizations and private attorneys should increase the availability of pro bono representation for bankruptcy debtors.

(3) Although the law currently allows a court to waive the filing fee for debtors within 150% of the poverty line,[11] that law should be expanded to reach more individuals and allow the payment of partial filing fees in appropriate cases.

(4) Consistent with its recommendation on stand-in counsel,[12] the Commission recommends the bankruptcy system should allow trustees, using video technology, to conduct section 341 meetings remotely and should encourage trustees to offer section 341 meetings outside of regular working hours. Attendance at the section 341 meeting, required in every bankruptcy case, can be a burden for poorer debtors who cannot easily take time off work. In this situation, the bankruptcy process can contribute to the debtor's financial distress instead of alleviating it. Also, in rural areas, the section 341 meeting can require hours of travel that the debtor does not have available or cannot financially afford. Expanded use of video attendance at section 341 meetings requires the balancing of interests of debtors, debtors' attorneys, trustees, and creditors, as well as the overall integrity of the bankruptcy system.

(5) Congress should provide for legal representation of low-income debtors in the bankruptcy process in a manner that the federal public defender currently provides in the criminal justice system.

Recommendations — Statutory Amendments. The Commission debated over several meetings the question of whether and how to amend the Bankruptcy Code to address the payment of attorney's fees in chapter 7 bankruptcies. Culling ideas from the committee report it had received, as well as proposals from individual commissioners, the Commission eventually narrowed its discussion to four options:

Option 1: The first option would be to make chapter 7 attorney's fees nondischargeable without any additional procedures. Under this option, Congress would add a new paragraph to section 523(a) to except from discharge amounts due under any agreement for payment of chapter 7 fees. Nondischargeability would be automatic, and the attorney could enforce the agreement in any court with jurisdiction over the matter, much as domestic support obligations may be enforced under current law. An exception to the automatic stay would be added to allow for postpetition payment of chapter 7 attorney fees along with coordinating amendments to other sections to deal with other issues.

11 *See* 28 U.S.C. § 1930(f). Individual debtors also may pay the filing fee in installments. *Id.* § 1930(a).

12 *See* § 3.05 Stand-in Counsel.

By allowing an attorney to discuss fee payment with the debtor during and after the bankruptcy case and to take collection action if necessary, attorneys would have more incentive to file a chapter 7 case before the full fee was paid. This proposal would simply render unpaid legal fees in chapter 7 cases nondischargeable, and the attorney would be in the same position as with a nonbankruptcy client's promise to pay fees. Section 329, the rules of professional ethics, and contract law would provide safeguards against unreasonable fees.

Option 2: The second option would add procedural protections to the first option. These protections would provide for judicial review of fee agreements at the outset of a case to ensure reasonable charges. The attorney would need to move for nondischargeability during the bankruptcy case, and a debtor could recover fees and costs in response to an unjustified request for nondischargeability. This option would be implemented principally through amendments to sections 329 and 523(a), along with coordinating amendments elsewhere in the Bankruptcy Code.

Option 3: The third option would be to make the bankruptcy discharge contingent on a chapter 7 debtor's completion of payments under a prepetition fee agreement. Debtors would have an incentive to pay the attorney's fee because otherwise they would not receive a discharge. There would be a procedure to allow discharge if the debtor showed an inability to pay. A new exception to the automatic stay would allow postpetition payment of attorney's fees, as well as allow discussion of repayment between attorney and debtor. This option would be implemented principally through an amendment to section 727, along with coordinating changes elsewhere in the Bankruptcy Code.

Option 4: The fourth option would authorize attorneys for chapter 7 debtors to enter into prepetition fee agreements under which the debtor could make voluntary payments postpetition. Entry of discharge would be delayed for a brief period of time, such as six months from case commencement, to permit discussion and potential payment of a reasonable fee. This option could be implemented principally through an amendment to section 727 and an amendment to Federal Rule of Bankruptcy Procedure 4004 on the issuance of a discharge order. Section 362 would need to be amended to allow postpetition collection of attorney's fees paid voluntarily. Protection against unreasonable fees would be under section 329, which would require judicial approval of any fee agreement. Coordinating amendments would be necessary elsewhere, especially to ensure that no prejudice occurs to whatever rights a secured creditor has to access its collateral during the delay in discharge. Although this option would not assure attorneys of payment of their fees, it would provide a mechanism allowing payment of the fees to be requested and received postpetition.

At the center of each of these options is the necessity of some sort of mechanism to allow postpetition collection of chapter 7 attorney's fees. Each option has costs and benefits as summarized in Table 2.

Comparisons of Proposed Amendments to Allow Postpetition Collection of Chapter 7 Attorney's Fees

Table 2

	Effectiveness in encouraging fee payment	*Cost to the attorney*	*Negative effect on the debtor*
Option 1: Attorney's fee excepted from discharge, no procedural protections	*Moderate* Although excepted from discharge, fees may be difficult to collect.	*Moderate* The attorney would incur costs of collection for unpaid fees.	*Moderate* The debtor is subject to fee-collection action but obtains discharge of other debts. The debtor's principal protection against unreasonable fees is only section 329.
Option 2: Attorney's fee excepted from discharge, with procedural protections	*Moderate* Although excepted from discharge, fees may be difficult to collect.	*High* Attorney would have to initiate a procedure in the bankruptcy case.	*Moderate* The debtor is subject to fee collection but obtains discharge of other debts. Judicial review in every case offers additional protection against unreasonable fees.
Option 3: Delay discharge until attorney's fees are paid	*High* Debtor will likely complete fee payments to obtain the general discharge.	*Low* The attorney need only file a notice of nonpayment in the bankruptcy case. Collection action is likely not needed.	*High* The penalty for not paying fees is loss of discharge.
Option 4: Delay discharge for six months	*Low to moderate* The debtor is under no legal obligation to pay the fees	*High* Judicial proceedings are required before collection efforts can begin.	*Low* The attorney may repeatedly suggest voluntary fee payment

The Commission decided that options two and four merit congressional consideration. The Commission's numerical listings of the two possibilities in the table or in its formal recommendation above is not meant to imply a preferred ranking.

What the Commission has listed as option two is the creation of a discharge exception for a prepetition fee agreement for a chapter 7. This option would require several changes, specifically:

- A new subsection would be added to section 329 providing (a) that on motion of an attorney for an individual debtor in a chapter 7 case, stating that the attorney has fully advised the client about the effect of the agreement, the court could approve a prepetition agreement for the debtor to pay the attorney's fees as specified in the contract; and (b) that such a contract would not be treated as an executory contract under section 365. In approving a fee agreement, the bankruptcy court could include in its order provisions

(1) prohibiting an increase in fees based on delay in payment under the contract,

(2) prohibiting or limiting interest on the installment payments,

(3) requiring enforcement of the agreement only through the bankruptcy court, specifically prohibiting arbitration,

(4) prohibiting assignment, factoring, or other collection by a third party, and

(5) imposing other conditions to avoid abusive or unnecessary collection practices.

- Section 362(b) would be amended to add a new exception from the automatic stay allowing an attorney to discuss with the debtor the payment of fees under a fee agreement approved under section 329.

- Section 523(a) would be amended to add an exception from discharge for amounts due under a postpetition fee agreement approved under section 329.

- Section 523(c)(1) would be amended to provide that the new exception from discharge for attorney fees will only be effective upon an order entered by the court presiding over the bankruptcy case on request of the attorney or firm to whom the fees are owed, based on a determination by the court that the outstanding fees were incurred reasonably and in compliance with any conditions imposed by the bankruptcy court.

- Section 523(d) would be amended to include the new exception from discharge as one for which the debtor may obtain payment of costs and reasonable attorney fees if the position of the attorney is not substantially justified.

- Section 1328(a)(2) would be amended to include the new exception from discharge in chapter 13.

- Section 526(a)(4) would be amended to exclude agreements for payment of chapter 7 legal fees, allowing an attorney to recommend entry into such an agreement.

- Federal Rule of Bankruptcy Procedure 2016(b) would be amended to require the filing of any motion to approve a prepetition agreement for the debtor's payment of fees for the attorney's services under section 329 at the same time as the statement required by the rule.

- Federal Rule of Bankruptcy Procedure 4007(a) and (c) would be amended to provide that the new discharge exception for chapter 7 attorney fees may be implemented by motion rather than through an adversary complaint, and that the motion must be filed within five years of the entry of discharge in the case.

- Federal Rule of Bankruptcy Procedure 7001(6) would be amended to allow determinations of the nondischargeability of obligations under court-approved fee agreements to be made by motion rather than adversary proceeding.

The Commission also believes that what it has listed as option four merits congressional consideration. This option would delay the discharge for six months and would require the following changes:

- Section 526(a)(4) would be amended to exclude agreements for payment of chapter 7 legal fees, allowing an attorney to recommend entry into such an agreement for voluntary payment.

- Section 362(b) would be amended to add a new exception from the automatic stay for payment of chapter 7 debtors' attorney fees and for discussion between the attorney and client for voluntary payment.

- Section 329 of the Bankruptcy Code would be amended to add a new subsection providing (a) that on motion of an attorney for an individual debtor in a chapter 7 case, stating that the attorney has fully advised the client about the effect of the agreement, the court may approve a prepetition agreement for the debtor's payment of fees for the attorney's services as specified in the contract; and (b) that such a contract will not be treated as an executory contract under section 365. In approving a fee agreement, the bankruptcy court could require provisions

    (1) prohibiting an increase in fees based on delay in payment under the contract,

    (2) prohibiting or limiting interest on the installment payments,

    (3) requiring enforcement of the agreement only through the bankruptcy court, specifically prohibiting arbitration,

    (4) prohibiting assignment, factoring or other collection by a third party, and

    (5) imposing other conditions to avoid abusive or unnecessary collection practices.

- Either section 727 or Federal Rule of Bankruptcy Procedure 4004 would be amended to provide that if the court approves a prepetition fee agreement under section 329, the discharge would be delayed. The Commission believes a delay of six months would be appropriate.

- Federal Rule of Bankruptcy Procedure 2016(b) would be amended to require the filing of any motion to approve a prepetition agreement for the debtor's payment of fees for the attorney's services under section 329 of the Code at the same time as the statement required by the rule.

- Section 365 would be amended to prohibit the trustee from assuming or rejecting a contract for payment of chapter 7 debtors' attorney fees.

- Section 503(b) would be amended to provide that the reasonable unpaid postpetition fees for the debtor's attorney, as approved by the court under section 329, would be an administrative expense in an asset case.

- Coordinating amendments would need to be made to ensure that the delay in discharge does not prejudice the rights of secured creditors given that section 362(c) provides that the automatic stay terminates at discharge. Such an amendment might state that if discharge was delayed under this procedure and absent a court order to the contrary, a secured creditor could proceed at a given point in time — so many days after the meeting of creditors — or at the time discharge would have been entered had the delay not occurred.

Under this proposal, any fees unpaid after the expiration of the delay would be subject to discharge. As with other prepetition debts, the debtor could voluntarily continue to pay the unpaid amount after entry of discharge. It is not part of the Commission's recommendation that any unpaid fees would be subject to reaffirmation.

§ 3.02 Unbundling of Legal Services

Bankruptcy courts should adopt local rules that address unbundling, specifying what services a lawyer may and may not exclude from the legal representation being provided. The courts should ensure that these local rules are consistent with applicable rules of professional responsibility.

Background. "Unbundling," more formally known as "limited-scope representation" or "limited-services representation," occurs when a lawyer specifies to a client limits on what the lawyer will do for the client. Unbundling is common in consumer bankruptcy cases where a lawyer often accepts a flat fee and wants to make clear to the client that the fee does not cover services for unanticipated and possibly expensive contingencies, such as a trial over the debtor's eligibility for a discharge. Unbundling also can be a tool to address the rising costs of a consumer bankruptcy filing.[13]

Theoretically, unbundling is a matter of contract between the lawyer and the client. In reality, unbundling raises serious ethical concerns about whether the client meaningfully consented to a limited representation given the lawyer's immense informational advantage about what services the client will need and the client's expectation the lawyer will act in the client's best interest. Model Rule of Professional Conduct 1.2(c) allows a lawyer to limit the scope of a representation if the limitation is reasonable and the client gives informed consent.

13 *See* Pamela Foohey, et al., *supra* note 2, at 1066 (2017) (finding median chapter 7 fees using 2013-16 data of $1229 and median chapter 13 fees of $3217). The mean figures from the ABI Consumer Bankruptcy Fee Study using 2007-08 data and adjusted for inflation are $1195 for chapter 7 asset cases and $2858 for chapter 13. *See* Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17, 30 (2012) (reporting figures of $1,072 for chapter 7 asset cases and $2,564 for chapter 13 cases).

In consumer bankruptcy, unbundling can allow some potential consumer filers access to legal assistance they otherwise would not be able to afford. But, unbundling can be a two-edged sword. Unbundling can leave debtors with no help when needed. Such debtors then often seek legal advice from those who cannot provide it, such as the court clerk's office, their trustee, or even the judge. The question is whether justice is better served by allowing access to only some basic legal services, such as preparation of the bankruptcy petition and schedules, or leaving the debtor without any legal help. Always lurking in the background is whether the typical consumer debtor can give informed consent to a limited representation in a complex bankruptcy matter.

As costs have risen and competitive pressures on attorneys have climbed, issues about unbundling seem to be increasing in the bankruptcy system. Numerous articles try to parse the boundary lines for practitioners about when unbundling is appropriate.[14] In remarks to bankruptcy trustees, the director of the U.S. Trustee Program (USTP) twice recently has expressed concern over the deleterious effects that excessive unbundling can have on consumer bankruptcy filers.[15]

Unbundling also plays a role in attempts to bifurcate bankruptcy attorney fees into smaller amounts the consumer must pay in full before filing bankruptcy and larger amounts that the consumer can pay in installments after filing. For bifurcation to be effective, the prepetition agreement must necessarily limit the scope of the attorney's postpetition representation. The Commission has a separate proposal on payment of attorney's fees that should minimize, if not eliminate, the motivations to bifurcate attorney's fees,[16] but bifurcation of fees is another example of how issues about unbundling are playing an increasing role in how consumers access the bankruptcy system.

In considering unbundling in consumer bankruptcy, the Commission was aware that it was not writing on a blank slate. The Final Report of the American Bankruptcy Institute's National Ethics Task Force has a twenty-five-page section describing best practices for limited-scope representations in consumer bankruptcy cases. The Task Force described its goal as addressing the following concerns:

> In considering the issue of Limited Services Representation, the Task Force recognizes the necessity of reconciling the need to protect debtors from receiving inadequate and ineffective representation, even for a limited fee, and the interest of providing

14 Alexander Laughlin, *Unbundling as a Means of Financing Bankruptcy Fees and Working Without a "Wet" Signature*, Am. Bankr. Inst. J., Oct. 2017, at 30; Zach Mosner, *Unbundling and Ghostwriting: Who Ya Gonna Call?*, Am. Bankr. Inst. J., Sept. 2016, at 14; Gary E. Sullivan & Jessica M. Zorn, *Bankruptcy and Unbundling: Oil and Water*, 77 Ala. Law. 344 (2016); Carrie E. Zuniga, *The Ethics of Unbundling Legal Services in Consumer Cases*, Am. Bankr. Inst. J., Oct. 2013, at 14.

15 U.S. Dep't of Justice, "Remarks of Director Cliff White Before the 2018 Annual Conference of the National Association of Bankruptcy Trustees" (Aug. 16, 2018), https://www.justice.gov/ust/speeches-testimony/nabt_annual_conference_08162018; U.S. Dep't of Justice, "Remarks of Director Cliff White Before the 53rd Annual Seminar of the National Association of Chapter 13 Trustees" (June 28, 2018), https://www.justice.gov/ust/speeches-testimony/director-addresses-53rd-annual-seminar-national-association-chapter-13-trustees.

16 *See* § 3.01 Chapter 7 Attorney's Fees.

> debtors with the option of limited legal representation in lieu of self-help resources or non-legal assistance.[17]

The Commission agrees with these goals. In preparing this report, the Commission drew on the Task Force's report. The Commission commends to practitioners, assuming it is consistent with any applicable local rule, the Task Force's model agreement for use with clients, which tries to plainly lay out the services the attorney will provide and includes a checkbox format the client can readily understand.[18]

Recommendation. As noted above, the rules of professional conduct allow an attorney to limit the scope of representation so long as any limitations are reasonable. The Commission first considered drafting a model local rule that jurisdictions could use to draw lines between the services an attorney could and could not unbundle. At the extremes, the issues are easy. For example, it seems clearly unreasonable for an attorney to disclaim responsibility to take basic steps to ensure the debtor receives a discharge, because a discharge is typically the whole point of filing a bankruptcy petition. On the other hand, it clearly seems reasonable for the attorney to specify that the flat fee for filing the bankruptcy case does not include defending the debtor at a trial on dischargeability.

Once the Commission moved away from the extremes, the issues became increasingly difficult. For example, what if the debtor said the principal purpose of the bankruptcy was to discharge a debt that a competent attorney would know raises discharge issues?[19] Also, commissioners from different states expressed views about what their state bars required as well as the appropriateness of unbundling specific services given local conditions. What might make sense in a rural environment where attorneys are far apart might not be a reasonable place to draw a line in a dense urban area where consumers have access to more alternatives for legal representation. The local costs of filing and other local barriers to justice also need to be considered.

Unlike the National Ethics Task Force, which promulgated a model rule,[20] the Commission decided that the better course was to encourage the promulgation of local rules addressing unbundling. The Task Force's report noted that "dozens" of judicial districts already have local rules.[21] These local rules, together with the Task Force's model rule, provide excellent starting points for jurisdictions to implement a local rule on unbundling or update an existing rule.

17 Final Report of the ABI National Ethics Task Force 51 (2013) (available at https://abi-org.s3.amazonaws.com/Endowment/Research_Grants/Final_Report_ABI_Ethics_Task_Force.pdf) (last visited Dec. 27, 2018).

18 *Id.* at 60-63.

19 *Cf. In re Seare*, 515 B.R. 599 (B.A.P. 9th Cir. 2014) (upholding sanctions and rejecting the attorney's attempt to limit the representation because a cursory investigation would have led the attorney to know defending an adversary proceeding for fraud would be necessary to accomplish the client's objective).

20 *See* Final Report, *supra* note 17, at 57-59. Recognizing the differing requirements in differing states, the Task Force's model rule begins with the qualifier "If permitted by the governing Rules of Professional Conduct . . . ."

21 *Id.* at 52.

The Commission's recommendation should not be misinterpreted as indifference to the importance of addressing unbundling issues. The Commission recommends that every jurisdiction have a local rule that provides certainty to attorneys about what services can be unbundled and the procedures for unbundling. The local rulemaking process allows the professional community to come together, consider local conditions and state rules of professional responsibility, then implement appropriate client protections without unduly blocking access to the bankruptcy system and harming the persons they are meant to protect.

§ 3.03 Presumptively Reasonable Attorney's Fees in Chapter 13s

(a) In chapter 13 cases, courts should adopt presumptively reasonable flat fees that cover typical attorney work until confirmation.

(b) Courts should adopt an "a la carte" fee structure for work performed after confirmation.

(c) Courts should consider consumer bankruptcy specialist certification as a factor in setting presumptively reasonable fees.

(d) Courts should review presumptively reasonable fees on a regular basis to determine whether they are promoting the goals of efficiency, a qualified bar, the diligent practice of law, and fairness to debtors.

Background. Attorneys must disclose the amounts they receive as compensation for a bankruptcy case, and attorney compensation is subject to court oversight. Section 329 and Federal Rule of Bankruptcy Procedure 2016(b) require attorneys to disclose all compensation received in the year prior to filing a bankruptcy case and the total compensation the debtor has promised to pay. The court can disallow prepetition compensation to the extent it exceeds the reasonable value of the services. Under section 330(a)(4)(B), the court can allow reasonable postpetition compensation to the debtor's lawyer in chapter 13 cases.[22] Rule 2016(a) directs the attorney seeking such compensation "to file an application setting forth a detailed statement of (1) the services rendered, time expended, expenses incurred, and (2) the amounts requested."

With chapter 13 cases being filed at rates of 300,000 to more than 400,000 annually,[23] a detailed scrutiny of the "services rendered, time expended, and expenses incurred" in each and every case is not realistic. Consequently, local rules or norms have largely replaced individual review of fee applications by using presumptively reasonable fees, often called "no look" fees. If the attorney requests payment at or below the presumptive amount, the bankruptcy court generally approves the request without a hearing.

22 The Supreme Court has ruled that in chapter 7, the Bankruptcy Code does not permit postpetition compensation from estate assets for the debtor's lawyer. *See* Lamie v. U.S. Trustee, 540 U.S. 526 (2004). The consequences of the *Lamie* decision and the Commission's recommendations regarding payment of the attorney's fees in a chapter 7 are discussed at § 3.01 Chapter 7 Attorney's Fees.

23 *See* Administrative Office of the U.S. Courts, Just the Facts: Consumer Bankruptcy Filings, 2006-2017 (Mar. 8, 2018), www.uscourts.gov/news/2018/03/07/just-facts-consumer-bankruptcy-filings-2006-2017 (last visited Jan. 21, 2019).

There are many advantages to this system. Presumptively reasonable fees carry benefits for the court, chapter 13 trustees, and debtors and their counsel. Most obviously, presumptively reasonable fees greatly reduce the time and cost that bankruptcy courts and chapter 13 trustees need to expend in reviewing fee applications. Attorneys can provide debtors an accurate estimate of the amount necessary for their legal representation, and debtors' counsel can represent their clients without the necessity of keeping track of their time. Bankruptcy practice often involves multiple short communications along with amendments to schedules and hearings that are brief compared to a nonbankruptcy trial practice. More efficient operations allow debtors' counsel to take time that would otherwise go to tedious and pointless recordkeeping and devote it to client representation. When provided by competent and zealous counsel, presumptively reasonable fees also allow the pooling of risks for both debtor and debtors' attorneys. For example, appeals that would never be in any individual debtor's pecuniary interest can and are brought by attorneys for whom the benefits of a successful appeal will inure throughout a large segment of their clients.

There are, however, disadvantages to the presumptively reasonable fee system. While most debtors' attorneys are diligent and represent their clients well, the flat-fee system provides an incentive to do the minimum amount of work and service for their clients and so maximize the return on this work. Also, because everyone pays the same presumptively reasonable fee, clients who have largely uncomplicated cases — for example, debtors with complete financial records and few claims who timely make all of their plan payments — subsidize those whose financial situations are more complex and who fail to make timely payments. Finally, a debtor in a jurisdiction with a total flat-fee system — one in which there is one flat fee for representation of the debtor from filing to discharge — may find it difficult to substitute attorneys. The "no look" fee is paid to the initial attorney, and only the remainder of the fee may be available for a subsequent attorney. As a result, many substitute attorneys in chapter 13 have an incentive to allow that case to be dismissed so that they are able to claim a full attorney's fee in the new case.

A private study done in 2018 for the National Association of Consumer Bankruptcy Attorneys and provided to the Commission found substantial variation in presumptively reasonable fees in chapter 13 cases.[24] Seventy-three percent of judicial districts were found to have some sort of presumptively reasonably fee structure, meaning a quarter of judicial districts did not. Of the districts with a fee structure, 41% of the districts provided a presumptively reasonable fee only for the work done through confirmation, with procedures for the attorneys to apply for compensation for postconfirmation work. Two judicial districts offer attorneys the option of charging a presumptively reasonable fee for work through confirmation or for the entire case. The remaining districts — 56% of the districts with a fee structure — specify a presumptively reasonable fee for all work done in the case. The study also found variation in how often the local court reviewed the presumptively reasonable fee, with one district having conducted no review of its presumptively reasonable fee in nine years.

24 The study's finding of variation in local practices on presumptively reasonable fees is largely consistent with the findings in two earlier, publicly available studies. *See* U.S. Gov't Accountability Office, Bankruptcy Reform: Dollar Costs Associated with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 24-27, 46 tbl.6 (2008); Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17, 110-19 (2012).

Recommendation — Presumptively Reasonable Fees. The Commission believes that the benefits of presumptively reasonable fees outweigh the costs. Therefore, the Commission recommends that all judicial districts adopt a presumptively reasonable fee. Judicial districts should do so through a transparent process, such as local rulemaking.

The Commission recommends that the presumptively reasonable fee should be for work done through confirmation only. After confirmation, the courts should have a standard "a la carte" fee structure for work commonly done after confirmation, with presumptively reasonable fees for categories of postconfirmation work. Having a flat, presumptively reasonable fee for preconfirmation work and then presumptively reasonable "a la carte" fees for postconfirmation work best balances the interests of the system in administrative feasibility and the interests of debtors.

A presumptively reasonable fee through confirmation recognizes that all debtors require certain preconfirmation work in a chapter 13 case, but postconfirmation work is highly variable. Prior to confirmation, all debtors must provide the same basic information, file the required documents, attend a 341 meeting, and perform other necessary actions. Postconfirmation, some clients can finish their cases with little additional involvement of counsel. Others require substantial additional assistance to defend against motions to dismiss and for relief from the automatic stay, and to propose plan modifications.

Allowing presumptively approved fees for specific categories of work performed after confirmation reduces costs for debtors in uncomplicated cases and appropriately puts the costs on debtors who need extra help. Further, if the debtor hires new counsel, this model compensates the attorneys who actually perform the postconfirmation work.

The bankruptcy court should have a procedure for approval of applications for presumptively reasonable postconfirmation fees. The requesting attorney should send notice of an application for postconfirmation fees and expenses to at least each debtor and the trustee. Each notice should verify completion of the services for which the attorney seeks compensation, set a reasonable deadline to object to the application, and include a certificate of service. After notice and the expiration of the objection deadline, the applications for presumptively reasonable postconfirmation fees should be deemed approved by the court. Of course, the court may set a hearing on any fee request, even without objection, to determine whether the fees should be allowed.

Ethical considerations and fairness require that every attorney for a chapter 13 debtor disclose to the debtor the amount of the attorney's fees, including the potential fees for postconfirmation services, and the court's role in approving the fees. Model Rule of Professional Conduct 1.2(c) requires that the attorney ensure that fees for the attorney's representation, including separate fees for the postconfirmation services, are reasonable and that the client has given informed consent.

These requirements are discussed as part of the Commission's separate recommendation on limited-scope representation or "unbundling."[25]

Attorneys should not be required to use presumptively reasonable fees. In complex chapter 13 cases for which the attorney believes that the presumptively reasonable fee is not adequate compensation, the attorney should be allowed to apply for compensation on a "time and expense" basis through the regular processes in sections 329 and 330 and Federal Rule of Bankruptcy Procedure 2016. These processes permit the court to determine whether the attorney's compensation should be allowed based on time and expense or whether the presumptively reasonable fee is more appropriate.

In determining reasonable compensation, section 330(a)(3)(E) allows a bankruptcy court to consider whether the attorney "is board certified or otherwise has demonstrated skill and experience in the bankruptcy field." The Commission recommends that in setting a presumptively reasonable fee, judicial districts should consider board certification as a factor and increase the presumptively reasonable fee accordingly, as several jurisdictions already do. A slightly higher fee would incentivize bankruptcy attorneys to earn certification and provide clients with more highly qualified attorneys.

Finally, the Commission recommends regular review of presumptively reasonable fees. Presumptively reasonable fees that do not track rising costs or inflation become outdated, leading attorneys to use them less and defeating the purpose of having a presumptively reasonable fee.

Priority of Attorney Fees in a Chapter 13 Plan. Section 1326(b)(1) requires the payment of administrative expenses, including chapter 13 attorney's fees, either before or with each distribution to creditors. At the same time and absent the secured creditor's consent, section 1325(a)(5)(B)(iii)(I) requires that payments to secured creditors be in equal amounts. For attorney's fees paid through the plan, it has been difficult to reconcile these two provisions. Some courts have ruled that section 1326(b)(1) allows a chapter 13 plan to pay attorney's fees first, temporarily decreasing secured creditor payments until the attorney's fees are paid in full, then making increased payments to secured creditors in equal amounts.[26] Such plans are sometimes referred to as "step plans." Other courts have ruled that section 1325(a)(5)(B)(iii)(I)'s requirement of equal payments is paramount and prohibit step plans.[27]

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25 *See* § 3.02 Unbundling of Legal Services.

26 *See, e.g.*, *In re* Carr, 584 B.R. 268 (Bankr. N.D. Ill. 2018); *In re* Marks, 394 B.R. 198 (Bankr. N.D. Ill. 2008); *In re* Erwin, 376 B.R. 897 (Bankr. C.D. Ill. 2007). *Collier* also adopts this position:

> Some courts have promulgated rules or procedures that delay the payment of attorney's fees in chapter 13 cases by spreading them out over some or all of the duration of the plan. However, such delay contravenes section 1326(b)(1). The requirement that these fees be paid first may mean that equal monthly payments to secured creditors required under section 1325(a)(5)(B)(iii)(I) must be deferred, with the secured creditor provided adequate protection during the period administrative expenses are paid.

8 Collier on Bankruptcy ¶ 1326.03[1] (16th ed. Richard Levin & Henry Sommer eds.).

27 *See, e.g.*, *In re* Shelton, 592 B.R. 193 (Bankr. N.D. Ill. 2018); *In re* Micelli, 587 B.R. 493 (Bankr. N.D. Ill. 2018); *In re* Williams, 583 B.R. 453 (Bankr. N.D. Ill. 2018); *In re* Romero, 539 B.R. 557 (Bankr. E.D. Wis. 2015); *In re* Sanchez, 384 B.R. 574 (Bankr. D. Or. 2008).

The Commission discussed this split in the case law, noting that it is tied into a larger debate about the extent to which section 1325(a)(5)(B)(iii)(I) allows uneven or balloon payments to secured creditors. The Commission decided not to take a position on the split in the case law. The Commission believes that a uniform resolution of this issue should develop through the normal appellate process.

B. Attorney Roles & Responsibilities

§ 3.04 Attorney Competency & Remedying Lawyer Misconduct

(a) Individuals and organizations with enforcement and disciplinary responsibility for attorneys in bankruptcy — including individual attorneys, case trustees, bankruptcy judges, the Office of the United States Trustee, state bar disciplinary committees, and United States Attorneys — should diligently and vigorously employ the many tools available to address attorney misbehavior.

(b) Increased enforcement of existing rules carries with it at least two burdens: an increased workload on those enforcing the rules, and the conflict inherent in bankruptcy judges simultaneously undertaking the roles of investigator, prosecutor, hearing officer, and final arbiter. These burdens can be at least partially addressed by the formation of committees or other bodies at the local level charged with investigating and resolving complaints against offending attorneys. These bodies could be staffed by judges, local attorneys, or a combination of the two.

(c) Any such local bodies, and the procedures governing them, should be approved by the relevant bankruptcy and district courts and should be adopted as local rules. Some districts have already implemented such systems. In smaller districts, the extension of existing cooperation regarding caseloads among adjacent districts should be extended to include assistance in addressing improper behavior.

(d) In addition to the sting of sanctions, courts and other entities should also employ incentives to practice ethically. In this regard, one incentive should be consistently awarding enhanced fees to professionals who are "board certified or [who have] otherwise . . . demonstrated skill and experience in the bankruptcy field," as authorized by 11 U.S.C. § 330(a)(3)(E). This enhancement should be implemented by local court rules, which should provide details encouraging compliance, such as permitting defined enhancements when the representation is by a firm in which some, but not all, of the attorneys have been board certified.

(e) As a disincentive to practice incompetently, bankruptcy courts should docket all disciplinary orders in such a way that all such orders can be searched and found by interested parties, including the public, the press, and governmental agencies such as state bar disciplinary authorities. In particular, the Administrative Office of the United States Courts (AO) should monitor disciplinary filings and include in its annual report a summary of all disciplinary orders. This summary should not only indicate the types of discipline or sanctions ordered but should also note and tabulate whether the entity disciplined was a debtor, creditor, trustee, governmental agency, or an attorney (with the affiliation of the attorney also noted).

Background. Bankruptcy law promises fair and equal treatment to creditors and a fresh start to debtors. Whether bankruptcy delivers on these promises depends largely on whether parties have effective legal representation. Attorneys who do not provide competent services disserve not just their clients but the system as a whole.

The American Bankruptcy Institute's National Ethics Task Force addressed attorney competency in its Final Report and listed core competencies required to represent consumer debtors:

> (1) A lawyer should understand and be able to communicate to his or her client the advantages and disadvantages of bankruptcy as a debt-relief remedy.
>
> (2) A lawyer should be familiar with the information necessary to prepare a bankruptcy case. In addition, the lawyer must have developed efficient and effective systems and procedures to obtain from the client the information and documentation required by the Bankruptcy Code.
>
> (3) A lawyer should be aware of the Bankruptcy Code provisions mandating certain disclosures by the lawyer. A lawyer should also know what types of information he or she is required to communicate to consumer debtor clients.
>
> (4) A lawyer should know how to efficiently and effectively prepare and file a bankruptcy petition and the related schedules, statements and other necessary documents.
>
> (5) A lawyer should understand the consumer bankruptcy case process and system and have the skills to represent the debtor's interests diligently in connection with the case proceedings, keep his or her client informed, provide ongoing advice and responses to the debtor's inquiries, and be responsive to inquiries and requests made by the court and by other professionals in the case.[28]

The Ethics Task Force noted that "many, if not all, of these same competencies and skills are required to represent the other parties in interest in bankruptcy cases."[29]

Although many attorneys practice skillfully, bankruptcy courts often face conduct by lawyers that does not meet reasonable expectations or that is not competent to achieve the aims of the lawyer's clients. The standard method of compensation in a consumer-based practice — a flat fee charged all debtors or cascading fixed fees paid to layers of creditors' attorneys — carries with it incentives to reduce the time spent on matters that cut corners or fail to provide the services that clients and the courts expect.

28 Final Report of the ABI National Ethics Task Force 68-73 (2013) (available at https://abi-org.s3.amazonaws.com/Endowment/Research_Grants/Final_Report_ABI_Ethics_Task_Force.pdf) (last visited Dec. 27, 2018).

29 *Id.* at 66.

Myriad cases illustrate the gravity of such misbehavior. Attorneys have been found so lacking in ethics that a bankruptcy court has sent them back to law school (not to continuing education) to take an ethics course.[30] A national law firm was found to have, "among other things, systematically engaged in the unauthorized practice of law, provided inadequate representation to consumer debtor clients, and promoted and participated in a scheme to convert auto lenders' collateral and then misrepresented the nature of that scheme."[31] Attorneys have factored their clients' receivables and then charged those clients more for the same representation given to a client who paid all cash, after first improperly segregating and categorizing postpetition work as unconnected with the prepetition retention.[32] Beginning in 2015, the Commission understands that the USTP deployed a national strategy to address the problems caused by underperforming or malfeasant attorneys, resulting in a 30% increase in formal actions against consumer attorneys in the 2016 fiscal year.[33]

Attorneys representing creditors also falter. One creditor's attorney filed a proof of claim for which he should have known that the debtor was not liable, was sanctioned $700 for it, and then compounded the error by filing a 102-page motion to reconsider.[34] In another case, a creditor's attorney refused to communicate with the trustee and another creditor about a motion for relief from the automatic stay, causing parties to fly to Puerto Rico only to find that the creditor had withdrawn the motion hours before it was heard.[35] Finally, creditors' attorneys have been sanctioned for filing meritless nondischargeability proceedings simply to gain an advantage over the debtor by imposing additional costs.[36]

Although bankruptcy courts have many diverse tools to address such misconduct, the responses of the courts and the professional community are often inconsistent and ineffective. The success of remedial efforts requires those with discretion to report and address misconduct to be more vigorous in the exercise of their discretion. In particular, the Commission believes that individual attorneys, case trustees, bankruptcy judges, the Office of the United States Trustee, bankruptcy administrators, state bar disciplinary committees, and even United States Attorneys should be more vigorous in the exercise of their discretion to redress ethical lapses. The Commission also encourages the implementation of complementary measures that would provide positive inducements to ethical practice, such as approving increased fees for attorneys who can demonstrate, by professional certification or otherwise, that they practice in an ethical and professional manner.

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30 *In re* Varan, 2014 WL 2881162 (Bankr. N.D. Ill. 2014).

31 U.S. Dep't of Justice, "National Consumer Bankruptcy Law Firm Sanctioned for Harming Financially Distressed Consumers and Auto Lenders" (Feb. 13, 2018), https://www.justice.gov/opa/pr/national-consumer-bankruptcy-law-firm-sanctioned-harming-financially-distressed-consumers-and (characterizing the court's decision in Robbins v. Delafield (*In re* Williams), 2018 WL 832894 (Bankr. W.D. Va. 2018)).

32 *In re* Wright, 591 B.R. 68 (Bankr. W.D. Okla. 2018).

33 U.S. Dep't of Justice Exec. Office of U.S. Trustees, United States Trustee Program Annual Report of Significant Accomplishments Fiscal Year 2016, at 6, available at https://www.justice.gov/ust/file/ar_2016.pdf/download (last visited Jan. 21, 2019) (reporting a 30% increase in FY 2016 for enforcement actions under section 329, which governs debtors' transactions with attorneys, and under section 526, which limits the conduct of debt-relief agencies).

34 *See In re* Falbo, 560 B.R. 203 (Bankr. W.D.N.Y. 2016).

35 *In re* MJS Las Croabas Prop., Inc., 545 B.R. 401 (B.A.P. 1st Cir. 2016).

36 *See, e.g.,* Weinstein, Pinson & Riley, P.S. v. Nelson (*In re* Nelson), 650 F. App'x 528 (9th Cir. 2016).

Recommendation — More Vigorous Use of Existing Disciplinary Tools. The Commission's first recommendation is more vigorous use of the many existing tools available to address attorney misbehavior. Bankruptcy courts already have many means at their disposal to deal with attorney misconduct, including the court's inherent and statutory powers to regulate proceedings and practice before them (including admission and expulsion from the practice before the bankruptcy court); the civil contempt power; the vexatious litigant statute at 28 U.S.C. § 1927 and Federal Rule of Bankruptcy Procedure 9011; discovery provisions such as rule 7037; provisions regarding prosecuting claims filed in bankruptcy including rule 3002.1; the ability to regulate debtors' attorneys' fees under section 329; the regulation of debtor attorneys provided by section 707(b)(4); and finally the referral of attorney misconduct to other bodies, such as making criminal referrals under 18 U.S.C. § 3057 and the power to refer specific instances of misbehavior to state bar disciplinary proceedings. Each of these tools is discussed below.

First, it is generally recognized that bankruptcy courts have the inherent power to regulate the practice of law before them.[37] It is largely irrelevant whether this power is inherent — with no need for a statutory authorization — or is found in the various words and phrases of section 105.[38] Courts may thus regulate who appears before them, and may sanction attorneys or their clients[39] for abuse of process and other harms.[40] As discussed in the next paragraph, the ability to sanction may take the form of civil contempt, or it may take the form of sanctions not otherwise authorized in the Bankruptcy Code or Federal

37 *See, e.g.*, *In re* Volpert, 110 F.3d 494, 500 (7th Cir. 1997) ("We therefore hold that, under 11 U.S.C. § 105(a), bankruptcy courts may punish an attorney who unreasonably and vexatiously multiplies the proceedings before them."); Peugeot v. U.S. Trustee (*In re* Crayton), 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996) ("A bankruptcy court also has the inherent power to suspend or disbar attorneys."); *In re* MPM Enters., Inc., 231 B.R. 500, 503 (E.D.N.Y. 1999) (bankruptcy court has power to permanently disbar attorney from appearing before it); *In re* T.H., 529 B.R. 112, 133 (Bankr. E.D. Va. 2015) (bankruptcy court has the inherent power to regulate attorneys who appear before it); Walton v. Jones (*In re* Shirley), 184 B.R. 613, 617 (Bankr. N.D. Ga. 1995) ("Ample authority exists for a bankruptcy court to hear a challenge to the unauthorized practice of law in connection with a bankruptcy case.").

38 *See* Ngan Gung Restaurant, Inc. v. Official Comm. of Unsecured Creditors (*In re* Ngan Gung Restaurant, Inc.), 195 B.R. 593, 598—99 (S.D.N.Y. 1996) ("It is generally agreed that bankruptcy courts possess the same inherent sanction powers that district courts enjoy. Some courts have held that these inherent powers are specifically derived from 11 U.S.C. § 105(a). . . . Other courts have held that the inherent powers of a bankruptcy court to sanction arise independently of any statutory authority." (citations omitted)); *In re* Hessinger & Assocs., 192 B.R. 211 (N.D. Cal. 1996) (upholding $100,000 fine imposed by bankruptcy court and suspension of firms from practicing before court until fine paid and noting state bar had sanctioned lawyer for actions in case).

39 *In re* Rimsat, Ltd., 212 F.3d 1039, 1048—49 (7th Cir. 2000) (bankruptcy court may use section 105(a) to impose sanctions on all culpable parties); Yukon Energy Corp. v. Brandon Investments, Inc. (*In re* Yukon Energy Corp.), 138 F.3d 1254 (8th Cir. 1998) (court may, under section 105, eject party from courtroom after party, appearing pro se, asked questions regarding witness's belief in the Easter Bunny and Santa Claus, and after being warned about acting uncivilly); Jones v. Bank of Santa Fe (*In re* Courtesy Inns, Ltd.), 40 F.3d 1084, 1089—90 (10th Cir. 1994) (awarding sanctions against sole shareholder of debtor corporation for bad faith filing).

40 United States v. Mourad, 289 F.3d 174 (1st Cir. 2002) (court has power under section 105 to bar vexatious and obstreperous litigant from entering floor of courthouse where case was being heard; litigant could still file papers and check status by telephone); Karsch v. LaBarge (*In re* Clark), 223 F.3d 859 (8th Cir. 2000) (court has power under section 105(a) to sanction attorney, in the amount of the opposition's attorney's fees, for engaging in course of conduct that resulted in non-attorney handling representation of chapter 13 debtors, with attorney only meeting clients at the meeting of creditors); Caldwell v. Unified Capital Corp. (*In re* Rainbow Mag.), 77 F.3d 278, 284 (9th Cir. 1996) (bankruptcy court has power to sanction beyond that authorized in Federal Rule of Bankruptcy Procedure 9011); Havelock v. Taxel (*In re* Pace), 67 F.3d 187 (9th Cir. 1995) (bankruptcy court has power under section 105 to award damages to trustee for violation of section 362 automatic stay notwithstanding limitation in section 362(h) to "individuals"); Deep v. Danaher, 393 B.R. 51 (N.D.N.Y. 2008) (court enjoined individual debtor from filing documents unless court gave prior approval).

Rules of Bankruptcy Procedure,[41] including general damages.[42] In addition, at least one court has held that section 105 authorizes sanctions in the form of fee disgorgement for practices that the court has expressly prohibited.[43]

Second, the majority of cases conclude that all courts, whether created pursuant to Article I or Article III of the Constitution, have inherent civil contempt power to enforce compliance with their lawful judicial orders, and no specific statute is required to invest a court with civil contempt power.[44] Some have argued that this inherent power extends to all contempt sanctions, civil or criminal,[45] while most courts have held that bankruptcy courts have, at most, civil contempt power and power over only a limited set of criminal contempts (such as contempt committed in the presence of the court).[46] In 1986, Congress amended section 105 to add a second sentence to subsection (a) so that it now reads as follows:

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41 Casse v. Key Nat'l Bank Ass'n (*In re* Casse), 198 F.3d 327 (2d Cir. 1999) (using section 105(a) to affirm order prohibiting individual from continuing in the serial filing of petitions); Caldwell v. Unified Capital Corp. (*In re* Rainbow Mag.), 77 F.3d 278, 284 (9th Cir. 1996) (bankruptcy court has power to sanction beyond that authorized in Fed. R. Bankr. P. 9011); Franklin Credit Mgmt. Corp. v. Cook, 551 B.R. 613, 624, 625 (M.D. Tenn. 2016) ("'[Section] 105(a) grants bankruptcy courts the authority to award mild noncompensatory punitive damages . . . where the violation was 'willful' and reflects a 'clear disregard for the bankruptcy laws.'") (citations omitted); *see also* Knupfer v. Lindblade (*In re* Dyer), 322 F.3d 1178, 1191 (9th Cir. 2003); Ocwen Loan Servicing, LLC v. Marino (*In re* Marino), 577 B.R. 772, 788 (B.A.P. 9th Cir. 2017) ("While the Ninth Circuit has stated that the bankruptcy courts are prohibited from assessing any 'serious' punitive damages, it has left open the possibility of 'relatively mild noncompensatory fines.'").

42 Havelock v. Taxel (*In re* Pace), 67 F.3d 187 (9th Cir. 1995) (bankruptcy court has power under section 105 to award damages to trustee for violation of section 362 automatic stay notwithstanding limitation in section 362(h) to "individuals"); *see also* 56 Assocs. v. Diorio, 381 B.R. 431, 440—41 (D.R.I. 2008) (as part of contempt sanction, court ordered contemnor to pay other side's attorney's fees).

43 Cuevas-Segarra v. Contreras, 134 F.3d 458, 459 (1st Cir. 1998) (court ordered disgorgement of fees related to matter settled by lawyers after court expressly refused to approve settlement; court finds "only a hopelessly strained interpretation of the Code would tie the court's hands while attorneys ignore a direct court ruling, hoping that the statute of limitations will run before the creditors, trustees or judge catch on").

44 Alderwoods Grp., Inc. v. Garcia, 682 F.3d 958, 967 n.18 (11th Cir. 2012) ("Civil contempt power is inherent in bankruptcy courts since all courts have authority to enforce compliance with their lawful orders.") (citation omitted); Price v. Lehtinen (*In re* Lehtinen), 564 F.3d 1052, 1058 (9th Cir. 2009); Joubert v. ABN Mtg. Group, Inc. (*In re* Joubert), 411 F.3d 452, 455 (3d Cir. 2005) (stating that section 105 provides bankruptcy courts with a contempt remedy); Jones v. Bank of Santa Fe (*In re* Courtesy Inns, Ltd., Inc.), 40 F.3d 1084, 1089 (10th Cir. 1994) ("We believe, and hold, that [section] 105 intended to imbue the bankruptcy courts with the inherent power recognized by the Supreme Court in [Chambers v. NASCO, Inc., 501 U.S. 32 (1991)]."); Mapother & Mapother, P.S.C. v. Cooper (*In re* Downs), 103 F.3d 472, 477 (6th Cir. 1996) ("Bankruptcy courts, like Article III courts, enjoy inherent power to sanction parties for improper conduct."). *But see* Ortiz v. Aurora Health Care, Inc. (*In re* Ortiz), 665 F.3d 906, 913 (7th Cir. 2011) (drawing distinction between Article III courts and legislative courts, and questioning whether legislative courts have any powers beyond those granted by statute); Solow v. Kalikow (*In re* Kalikow), 602 F.3d 82 (2d Cir. 2010) (rejecting section 105 as an independent basis for imposing sanction when no other provision of the Bankruptcy Code is violated); In re 1990's Caterers Ltd., 531 B.R. 309, 319—20 (Bankr. E.D.N.Y. 2015) ("It is well settled that bankruptcy courts are vested with the inherent authority to enforce compliance with their orders through the issuance of civil contempt orders.").

The Supreme Court has not committed to either view. It has declined to state affirmatively that a bankruptcy court has such inherent powers. In Law v. Siegel, 571 U.S. 415 (2014), the Court twice referred to inherent powers of bankruptcy courts, but each time conditioned the statement with language indicating that the issue has not yet been decided. *See id.* at 421 (stating that bankruptcy court "*may* also possess 'inherent power . . . to sanction "'abusive litigation practices.'"" (emphasis supplied)); *id.* at 427 ("The court *may* also possess further sanctioning authority under either § 105(a) or its inherent powers." (emphasis supplied)).

45 On the difference between civil and criminal contempt, *see* Stockschlaeder & McDonald, Esqs. v. Kittay (*In re* Stockbridge Funding Corp.), 158 B.R. 914 (S.D.N.Y. 1993). A cogent argument that criminal contempt powers reside in bankruptcy courts is laid out in John A. E. Pottow & Jason S. Levin, *Rethinking Criminal Contempt in The Bankruptcy Courts*, 91 Am. Bankr. L.J. 311 (2017).

46 Cox v. Zale Delaware, Inc., 239 F.3d 910 (7th Cir. 2001); Pertuso v. Ford Motor Credit Co., 233 F.3d 417, 423 n.1 (6th Cir. 2000); Bessette v. Avco Fin. Servs., Inc., 230 F.3d 439 (1st Cir. 2000); Placid Refining Co. v. Terrebonne Fuel & Lube, Inc. (*In re* Terrebonne Fuel & Lube, Inc.), 108 F.3d 609, 613 (5th Cir. 1997); Eck v. Dodge Chem. Co. (*In re* Power Recovery Sys., Inc.), 950 F.2d 798, 802 (1st Cir. 1991); Mountain America Credit Union v. Skinner (*In re* Skinner), 917 F.2d 444, 447 (10th Cir. 1990); Burd v. Walters (*In re* Walters), 868 F.2d 665, 669 (4th Cir. 1989); *see also In re* Hipp, Inc., 895 F.2d 1503, 1515-16 (5th Cir. 1990) (no criminal contempt power in section 105); *In re* Lawrence, 164 B.R. 73 (W.D. Mich. 1993) (following *Hipp*). *But cf.* Brown v. Ramsay (*In re* Ragar), 3 F.3d 1174, 1179 (8th Cir. 1993) ("With all respect, we think [*Hipp*] is simply wrong.").

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent any abuse of process.[47]

Several courts have held that the addition of the second sentence to section 105 indicates that Congress meant section 105 to serve as the statutory basis for the civil contempt power of bankruptcy judges.[48]

Third, the federal vexatious litigant statute is aimed at "penalizing conduct that unreasonably and vexatiously multiplies the proceedings."[49] It provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.[50]

One problem with the application of this statute is that not all circuits recognize bankruptcy courts as "courts of the United States," which is a requirement for the application of the statute. As noted in a recent law review note, "[a] slim majority of circuit courts counts the bankruptcy courts as 'courts of the United States,' while the minority does not grant this status."[51]

Fourth, Federal Rule of Bankruptcy Procedure 9011 governs pleadings filed and positions taken in court. It could come into play if an attorney (or an unrepresented litigant) files foolish or frivolous pleadings. Rule 9011's language is quite broad. If the court finds an attorney or party to have violated the rule's terms, it permits the court to unilaterally impose "directives of a nonmonetary nature, [or] an order to pay a penalty into court." In response to a party's motion, the rule additionally allows an order for payment of the party's reasonable fees and expenses. The text, however, does require that "[a] sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Also, rule 9011's "safe harbor" provisions often

47 Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 203, 100 Stat. 3088, 3097. In 1984, Congress had previously amended section 105(a) to change "bankruptcy court" to "court." *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 118, 98 Stat. 333, 344.

48 *See In re* Matthews, 184 B.R. 594 (Bankr. S.D. Ala. 1995); *In re* Duggan, 133 B.R. 671 (Bankr. D. Mass. 1991); *In re* Stephen W. Grosse, P.C., 84 B.R. 377, 386 (Bankr. E.D. Pa. 1988); *In re* Miller, 81 B.R. 669, 676-78 (Bankr. M.D. Fla. 1988).

49 Fink v. Gomez, 239 F.3d 989, 991 (9th Cir. 2001).

50 28 U.S.C. § 1927.

51 Angelo G. Labate, Note, *Bankruptcy's Gray Area: Are Bankruptcy Courts "Courts Of The United States"?*, 92 Notre Dame L. Rev. 1815, 1818 (2017). The article cites the following cases as holding that bankruptcy courts are courts of the United States: *In re* Schaefer Salt Recovery, Inc., 542 F.3d 90, 102—05 (3d Cir. 2008); Adair v. Sherman, 230 F.3d 890, 895 n.8 (7th Cir. 2000); Baker v. Latham Sparrowbush Assocs. (*In re* Cohoes Indus. Terminal, Inc.), 931 F.2d 222, 230—31 (2d Cir. 1991). It then notes that these cases hold that bankruptcy courts are not "courts of the United States": Jones v. Bank of Santa Fe (*In re* Courtesy Inns, Ltd.), 40 F.3d 1084, 1086 (10th Cir. 1994); IRS v. Brickell Inv. Corp. (*In re* Brickell Inv. Corp.), 922 F.2d 696, 699 (11th Cir. 1991). One can add the Ninth Circuit to this list as well. Miller v. Cardinale (*In re* DeVille), 361 F.3d 539, 546 (9th Cir. 2004) ("The Ninth Circuit does not regard a bankruptcy court as a 'court of the United States.'").

make it difficult to obtain effective relief, because chronic violators may fix the problem in individual cases while repeating their behavior.

Fifth, Federal Rule of Bankruptcy Procedure 7037 expressly incorporates Federal Rule of Civil Procedure 37, which would include rule 37(a)(3)(A)'s sanctions provisions: "If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions." Rule 37(b) also contains provisions regarding sanctions for failure to comply with a court order. Sanctions are also authorized for failure to disclose or update a disclosure under rule 37(c), and for failure to attend a deposition or provide answers to written discovery under rule 37(d). All of these powers are available to a bankruptcy court.

Sixth, the bankruptcy claims process has provisions authorizing courts to police misconduct. As discussed in more detail elsewhere, Federal Rule of Bankruptcy Procedure 3002.1(g) requires mortgage creditors to file a response to a notice of final cure providing the creditor's accounting of the status of the debtor's mortgage just prior to plan completion.[52] This rule has its own sanctions provision, allowing courts to preclude creditors from presenting evidence of obligations that were not disclosed.[53] It has not been generally interpreted to permit awards of monetary damages in addition.[54] The Commission has recommended amendment of the rule to allow a trustee or debtor to file a motion to compel a statement by a creditor, to provide for payment of attorney's fees to a successful movant, and to treat failure to comply as a contempt of court.[55]

Seventh, section 329 permits a court to monitor the fees charged by debtors' attorneys during the year preceding the filing of a case. If the court believes the "compensation [provided in any retainer agreement] exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive. . . ."[56] As summarized by the Seventh Circuit:

> Section 329(b) authorizes the court to assess the reasonable value of the services counsel provided to the debtor and to compare that value with the amount the debtor paid or agreed to pay for the attorney's services. If the court determines that the fee charged by the attorney is excessive — i.e., that it exceeds the reasonable value of the services provided — then it may cancel any compensation agreement between the attorney and his client, or it may order the return of the excessive portion of the fee to the debtor's estate or to the entity making the payment.[57]

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52 *See* § 2.07 Improvements in Federal Rule of Bankruptcy Procedure 3002.1 — Payment Change Notices and Notices of Final Cure.

53 *See* Fed. R. Bankr. P. 3002.1(i).

54 *See* PHH Mtg. Corp. v. Sensenich, 2017 WL 699820, at *5 (E.D. La. 2017) ("The parties have not cited and the court has not found any case from any American jurisdiction in which a bankruptcy court has imposed sanctions on this basis and in this manner."); *In re* Tollstrup, 2018 WL 1384378, at *5 (Bankr. D. Or. 2018) ("I conclude that Rule 3002.1 does not permit me to impose punitive monetary sanctions.").

55 *See* § 2.07 Improvements in Federal Rule of Bankruptcy Procedure 3002.1 — Payment Change Notices and Notices of Final Cure.

56 11 U.S.C. § 329(b); *see also* Fed. R. Bankr. P. 2017 (providing similar authority).

57 *In re* Geraci, 138 F.3d 314, 318 (7th Cir. 1998).

Moreover, as stated by the Ninth Circuit's Bankruptcy Appellate Panel, "The reasonable value of services rendered by a debtor's attorney 'is a question of fact to be determined by the particular circumstances of each case. The requested compensation may be reduced if the court finds that the work done was excessive or of poor quality.'"[58]

Eighth, debtors' attorneys must prepare petitions, statements, and schedules with care. Indeed, section 707(b)(4) allows a court to order the attorney to pay the attorney's fees and other costs of a trustee who successfully prosecutes a motion for dismissal or conversion of a chapter 7 case on the ground the filing constituted an abuse of the Bankruptcy Code under section 707(b). The court must follow the procedures of Federal Rule of Bankruptcy Procedure 9011. The court also can impose a civil penalty on the attorney. The obligations imposed by section 707(b)(4) are not new. As summarized by one bankruptcy court:

> To comply with Section 707(b)(4)(C), the attorney must perform an objectively reasonable investigation into the circumstances giving rise to the petition, assessed at the time the petition was filed. 11 U.S.C. § 707(b)(4)(C) (2012). The attorney cannot take all of the client's assertions at face value nor rely solely upon the information provided by the client. The attorney may rely on her client's objectively reasonable assertions, but where the client-provided information is internally (or externally) inconsistent, materially incomplete, or raises "red flags," the attorney is obligated to probe further — by asking questions, obtaining additional documents, or by some other means. [T]he attorney is the expert and cannot rely upon a client's limited understanding of what constitutes the "complete" or "necessary" information that the attorney must have nor what information is or is not relevant to the client's particular situation.[59]

Ninth, many agencies and organizations outside of the bankruptcy system regulate attorneys. Indeed, the default regulator of attorneys is the local state bar organization. Often, bankruptcy judges can refer instances of misbehavior to these entities so that they can exercise their duties to police attorney behavior.[60] In addition, bankruptcy judges and trustees have a statutory duty to report to the applicable United States attorney when they have "reasonable grounds for believing" a bankruptcy crime has been committed.[61]

58 *In re* Nakhuda, 544 B.R. 886, 902 (B.A.P. 9th Cir. 2016), *aff'd*, 703 F. App'x 621 (9th Cir. 2017) (quoting *In re* Spickelmier, 469 B.R. 903, 914 (Bankr. D. Nev. 2012)).

59 *In re* Seare, 493 B.R. 158, 211 (Bankr. D. Nev. 2013), *as corrected* (Apr. 10, 2013), *aff'd*, 515 B.R. 599 (B.A.P. 9th Cir. 2014); *see also* Am. Bar. Ass'n Section of Bus. Law, Task Force on Attorney Discipline, *Attorney Liability Under Section 707(b)(4) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 61 Bus. Law. 697, 703-04 (2006).

60 *See, e.g.*, *In re* Irons, 379 B.R. 680, 684 (Bankr. S.D. Tex. 2007) ("The Court could refer counsel who violated State Bar obligations to the appropriate disciplinary authorities."); *see also In re* Brandt, 2017 WL 3382310, at *3 (Cal. Bar Ct. 2017) (noting referral from bankruptcy court had initiated proceeding).

61 The statute provides:

> Any judge, receiver, or trustee having reasonable grounds for believing that any violation under chapter 9 of this title or other laws of the United States relating to insolvent debtors, receiverships or reorganization plans has been committed, or that an investigation should be had in connection therewith, *shall report* to the appropriate United States attorney all the facts and circumstances of the case, the names of the witnesses and the offense or offenses believed to have been committed.

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In summary, there is not a need for new substantive provisions to address attorney misconduct. The Commission's recommendation is for more vigorous use of the provisions that already exist.

Recommendation — Creation of Local Disciplinary Tribunals and Procedures. Although there are many tools to combat sloppy, incompetent or unethical practices, these tools each have their own special requirements and often apply only to particular types of parties or in specialized situations. Furthermore, there is no incentive for a bankruptcy judge to actively police attorney conduct (other than the generalized hope that by adjusting the behavior of some attorneys, the average level of representation will rise for all clients). Indeed, given the propensity and incentive for the sanctioned lawyer to appeal, the sanctioning judge may have to work harder. This conundrum was captured by Professor Nancy Rapoport:

> When judges write sanctions opinions, they're writing them after very long days, and they're writing them very carefully. After all, if a lawyer is on the wrong side of a court-initiated sanctions opinion and decides to appeal, the lawyer gets to write a brief, designate the record, and argue the appeal. The judge who wrote the sua sponte sanctions opinion, however, only stands on the opinion — there is no advocate automatically arguing for the judge's view of what happened. . . . If the judge doesn't do a good job of explaining why the sanction was necessary (and assuming that the sanction was necessary), then the opinion will be reversed on appeal, and the misbehaving lawyer will learn nothing from the experience.[62]

The creation of local tribunals would remove the bankruptcy judge from the combined and conflicted roles of investigator, prosecutor, arbiter, jury, and punisher. Some districts have local rules that allow a judge to refer suspected misbehavior to a panel of attorneys or judges. These panels are then empowered to investigate and then, if appropriate, impose a large range of sanctions.

For example, the Northern District of California appoints a standing committee to act as special counsel in disciplinary matters,[63] and judges in the district may refer disciplinary matters to the committee or to the chief judge.[64] After an investigation, the committee can resolve the matter informally or by consent. If the committee recommends public reprimand, suspension, disbarment, monetary sanctions or other formal sanctions and the attorney does not consent, then the committee initiates a civil petition in the district court.[65] The disciplinary process has been made applicable to proceedings in the bankruptcy court.[66] The Bankruptcy Appellate Panel for the Ninth Circuit explained: "The rationale for this

18 U.S.C. § 3057(a) (emphasis supplied).

62 Nancy B. Rapoport, *Through Gritted Teeth and Clenched Jaw: Court-Initiated Sanctions Opinions in Bankruptcy Courts*, 41 St. Mary's L.J. 701, 706 (2010).

63 N.D. Cal. R. 11-6(c).

64 *Id.* R. 11-6(a).

65 *See id.* R. 11-6(d).

66 *See* Bankr. N.D. Cal. R. 1001-2(a) (incorporating local district court rule 11-6).

recommendation is that it 'relieves a court from serving in the dual roles of prosecutor and arbiter in the investigation, prosecution and discipline of attorneys.'"[67]

Another example comes from the Northern District of Illinois, which allows anyone, including one of the court's judges, to file a complaint alleging that an attorney violated a disciplinary rule of the court. After an opportunity for response from the attorney, the bankruptcy court by majority vote determines whether the complaint should be pursued, and if so, the court issues a statement of charges for the attorney to answer. The U.S. Trustee may accept an appointment from the court to investigate and prosecute the charges, and if the U.S. Trustee declines the appointment, the court may request a member of the bar to undertake the investigation and prosecution. The chief judge of the bankruptcy court appoints one of the bankruptcy court's judges to preside over any hearing and issue a written decision, appealable to the executive committee of the district court. This procedure substantially reduces the conflicting disciplinary roles of bankruptcy judges. It removes a complaining judge from the need to prosecute and adjudicate charges of misconduct arising from behavior in that judge's case, and it removes the court from presenting evidence that a judge of the court would have to evaluate.[68]

Creation of disciplinary boards by local rule has many advantages. As the Ninth Circuit's Bankruptcy Appellate Panel noted, such boards relieve the individual bankruptcy judge from being the prosecutor and judge in the same matter, and they can spread the work around available judges or allocate initial work to local attorneys. The participation of local attorneys also provides a visible commitment to the ethical practice of law from the professional community as a whole. The rules themselves serve as notice of how such misbehavior will be treated, and so provide a warning of the potential consequence of the misbehavior.

Recommendation — Recognition of Board Certification. Section 330(a)(3)(E) expressly authorizes a bankruptcy court to consider professional certification in determining whether an attorney's fee is reasonable. The Commission believes that board certification should be considered by courts in policing attorney's fees generally. Indeed, part of the Commission's recommendation on presumptively reasonable attorney's fees is that professional board certification serves as a factor in setting such professional fees.[69] Local rules should specify enhancements allowed for board certification, including provisions adjusting the enhancement when not all attorneys in a firm are board certified. Such provisions would encourage certification, which in turn would encourage attorneys to gain further professional education in bankruptcy law.

Recommendation — Uniform Docketing and Report. The Commission has recommended that the AO promote uniform docketing practices generally, including naming conventions for pleadings, events,

67 Price v. Lehtinen (*In re* Lehtinen), 332 B.R. 404, 413 (B.A.P. 9th Cir. 2005) (quoting *In re* Crayton, 192 B.R. 970, 980 (B.A.P. 9th Cir. 1996)), *aff'd*, 564 F.3d 1052 (9th Cir. 2009).

68 Bankr. N.D. Ill. R. 9029-4B.

69 *See* § 3.03 Presumptive Reasonable Attorney's Fees in Chapter 13s.

and party names.[70] The Commission believes uniform docketing practices are especially important to allow interested parties — including other courts and lawyers, potential clients, disciplinary bodies, and the press — to know about disciplinary orders. Disciplinary orders are entered only after due process in a court, and there is no reason such orders should be difficult to locate.

Uniform docketing also would facilitate the creation of an annual report by the AO documenting the incidence of disciplinary orders, including the type of party — debtor, creditor, government agency, trustee — that the disciplined attorney was representing. Such a report would provide an understanding of the scope of disciplinary problems in bankruptcy court and whether the incidence of disciplinary orders is changing over time. Courts and disciplinary bodies also would have an understanding of the range of sanctions being imposed for categories of misconduct. The spirit of the Commission's recommendation on docketing practices as they relate to disciplinary orders is Justice Brandeis's wisdom that sunlight is the best of disinfectants.[71]

§ 3.05 Stand-in Counsel

(a) Stand-in counsel, sometimes called "appearance counsel," is an attorney engaged by a party's attorney to appear in a matter on behalf of the party but who does not have authority to act on behalf of the party in any way other than ministerial.

(b) Bankruptcy courts, the USTP, and state licensing authorities should adopt rules with best practices related to stand-in counsel that ensure the competent, efficient, and ethical representation of clients in bankruptcy matters.

(c) Federal Rule of Bankruptcy Procedure 9010 should require a notice of appearance to disclose any limitation allowed by law on the attorney's representation of the party.

(d) Bankruptcy courts should adopt local rules permitting video and telephonic hearings to ensure the best use of court resources, reduction of expenses, and the timely and efficient resolution of disputes.

(e) When appropriate, bankruptcy courts should develop and permit practitioners to utilize negative notice procedures to reduce the necessity for counsel and litigants to appear at hearings on uncontested matters. Bankruptcy courts should develop consent dockets to minimize the amount of time an attorney needs to spend in the courtroom.

Background. By "stand-in counsel," the Commission means an attorney engaged by a represented party's attorney to appear in a matter but who does not have authority to act on behalf of the represented party. Stand-in counsel is also referred to as "appearance counsel." The concept of stand-in counsel applies throughout all areas of law, and attorneys use stand-in counsel for many different reasons. In

70 *See* § 5.07 Case Management (CM)/Electronic Case Filing (ECF) & Docketing Improvements.

71 Louis Dembitz Brandeis, Other People's Money: And How the Bankers Use It 92 (1914).

a consumer bankruptcy case, attorneys often engage stand-in counsel to ease scheduling conflicts.[72] Consumer bankruptcy attorneys — both those representing debtors and those representing creditors — often carry considerable caseloads, and the bankruptcy cases often involve proceedings that are routine.

The use of stand-in counsel raises ethical issues. Model Rule of Professional Conduct 1.1 requires that a lawyer provide competent representation. Comment 6 to this rule expands on the duties attorneys must fulfill before retaining a lawyer who is not a member of their firm:

> Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. . . . The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

Whatever benefits come from engaging stand-in counsel, they cannot override the professional obligation to provide competent representation. It is the Commission's sense that bankruptcy courts have become increasingly frustrated with the problems that unprepared stand-in counsel can create. In one case, debtor's counsel had hired stand-in counsel to attend two meetings of creditors in which the debtor truthfully testified about mistakes debtor's counsel had made in the bankruptcy schedules.[73] On both occasions, stand-in counsel had no knowledge about the case and was unable to provide any guidance to the debtor or the trustee. Judge Sean Lane expressed his concern:

> [T]his case starkly highlights the perils of the use of appearance counsel. Such counsel are attorneys who appear at proceedings at the request of, and on behalf of, the debtors' chosen attorney. As other courts have observed, these lawyers are generally not disclosed to the Court or to the Chapter 7 trustee before their appearance, and debtors are usually unaware that an appearance attorney will be representing them until right before the meeting or hearing. . . .
>
> All these significant concerns are only heightened by the apparently widespread (and increasing) use of appearance counsel in Chapter 7 cases. While the Court is not in a position to assess such trends directly — because the Court does not participate in 341

72 The engagement of true local counsel or specialized counsel is not the subject of the recommendations in this section. In chapter 11 cases, engagement of local counsel or specialized counsel is often done for very different reasons than in a consumer case. As discussed in the Foreword, the Commission expresses no opinion on the application of its recommendations outside of consumer bankruptcy.

73 *In re D'Arata,* 587 B.R. 819 (Bankr. S.D.N.Y. 2018).

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> meetings — members of the bar who serve as trustees in Chapter 7 cases have helpfully provided information about current trends. They paint a disturbing picture. Indeed, one Chapter 7 trustee in this jurisdiction stated that use of appearance counsel at 341 meetings "has substantially increased in frequency in recent years and has become, unfortunately, a common practice in the Southern District."[74]

Having failed to provide competent representation, the court ordered debtor's counsel to return the entire attorney's fee to the debtor.[75]

In a thorough opinion about attorney misconduct in a case before him, Judge Jeff Bohm expressed similar frustrations about an attorney who routinely used stand-in counsel at section 341 meetings.[76] In that case, the debtor met with stand-in counsel just before the section 341 meeting and discovered forgeries and errors in the documents, including a notice of conversion that the debtor's attorney had prepared. The stand-in counsel had no knowledge about the case and was not prepared to address the deficiencies in the documents. Judge Bohm lamented the "lack of accountability" that stand-in counsel often displayed and that the use of stand-in counsel often leads to "lazy and poor lawyering."[77] After considering all of the facts, Judge Bohm banned the use of stand-in counsel in all future cases before him, commenting, "Attorneys are not fungible."[78]

The problem is not limited to debtor's counsel. In another case, for example, a secured creditor had filed a pro forma objection to confirmation of a chapter 13 plan riddled with mistakes. The firm representing the secured creditor hired stand-in counsel who appeared at the confirmation hearing but was not prepared to prosecute the objection. When the debtor reasserted in open court its written response that the real property in question was not the debtor's principal residence, stand-in counsel said his instructions in that instance were to ask for a continuance.[79] Finding secured creditor's counsel in violation of local rules on stand-in counsel and considering other violations, the court later imposed a fine of $75,000.[80]

Commentators also have highlighted the problems that can come from stand-in counsel. Over two decades ago, Judge Geraldine Mund wrote, "While certain appearance attorneys are extremely capable and ably represent the client, others are mere drones who give inadequate representation."[81] Writing with his law clerk, Judge Alan Trust said he tolerates stand-in counsel for uncontested matters and

74 *Id.* at 825-26, 828.

75 *Id.* at 829.

76 *In re* Bradley, 495 B.R. 747 (Bankr. S.D. Tex. 2013).

77 *Id.* at 804.

78 *Id.* at 808.

79 *See In re* Allen, 2007 WL 115182 (Bankr. S.D. Tex. 2007).

80 *See In re* Allen, 2007 WL 1747018 (Bankr. S.D. Tex. 2007).

81 Geraldine Mund, *Paralegals: The Good, the Bad, and the Ugly*, 2 Am. Bankr. Inst. L. Rev. 337, 343 (1994).

"frowns" on the practice for contested matters, commenting that a colleague will ask stand-in counsel who disclaims knowledge about a case, "'Then why do I care about anything you are about to say?'"[82]

Recommendation. The Commission recommends the adoption of rules to govern stand-in counsel. These rules should have best practices specific to bankruptcy that ensure clients receive competent and ethical representation. Because appropriate use of stand-in counsel promotes the efficient practice of law, which redounds to the benefit of clients, the Commission's recommendation rejects an outright ban on the use of stand-in counsel.

The Commission's approach is consistent with the only formal ethics opinion of which the Commission is aware that addresses the use of stand-in counsel in bankruptcy specifically.[83] This opinion allows the use of stand-in counsel in bankruptcy but requires the attorney to follow ethical safeguards. It states that stand-in counsel must determine whether there are conflicts of interest and must prepare adequately. A recent article by Elizabeth Stephens came to a similar conclusion. After outlining the sanctions that courts can impose for inappropriate use of stand-in counsel, the article concluded that employing stand-in counsel was not unreasonable per se and recommended a number of measures, including advance disclosure of stand-in counsel to make it possible for the client to give informed consent.[84] Stephens also suggests other steps that promote the ethical use of stand-in counsel: (1) sufficiently informing the client of the benefits and disadvantages of stand-in counsel, (2) giving clear communication to the client of how stand-in counsel is compensated, (3) ensuring that the stand-in counsel reviews the petition and case notes at least forty-eight hours in advance, and (4) requiring that stand-in counsel report the results of their work back to the debtor's counsel.[85] The rules on stand-in counsel should consider specifying categories of routine matters, such as uncontested motions to terminate the stay, motions to terminate the section 1301 codebtor stay, and motions to redeem, for which retention of stand-in counsel is most likely to be appropriate.

In addition to rules on stand-in counsel, the Commission recommends that Federal Rule of Bankruptcy Procedure 9010 should be amended to provide that any attorney's entry of appearance must disclose any limitations on the attorney's representation. Rule 9015(b) requires an attorney to file a notice of appearance, "unless the attorney's appearance is otherwise noted in the record." If the attorney made the notice of appearance in open court, the attorney would disclose the limitation verbally as part of the notice of appearance. The failure to disclose a limitation would mean the attorney was deemed to represent the client for all purposes. Requiring disclosure of the limitation would give notice to all parties and the court, as well as focus the attorney's attention on the ethical

82 Alan S. Trust & Michael A. Pantzer, *Does Sending or Being an Appearance Attorney Have an 80 Percent Chance of Success?*, Am. Bankr. Inst. J., July 2017, at 14, 15.

83 N.C. State Bar, "Covering" a Bankruptcy Proceeding for Another Lawyer, 99 Formal Ethics Op. 12 (Jan. 21, 2000), https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/99-formal-ethics-opinion-12/ (last visited Dec. 31, 2018); *see also* W. Va. Legal Ethics Op. 2015-01, Use of Stand-In Counsel, W. Va. Law., Dec. 2015, at 48 (opining about the ethical rules applicable to the use of stand-in counsel generally), available at http://www.wvodc.org/pdf/LEO%202015%20-%2001.pdf (last visited Dec. 31, 2018).

84 *See* Elizabeth Stephens, *Using Appearance Counsel in Court: Risky Business?*, Am. Bankr. Inst. J., Nov. 2018, at 14, 62 (citing *In re* Bernhardt, 2012 WL 646150, at *5 (Bankr. D. Colo. 2012)).

85 *Id.* at 62.

considerations of serving as stand-in counsel. In individual cases, a court could modify the rule in the interest of justice.

The need for stand-in counsel arises, in part, due to the time and expense pressures of travel required for attendance at court hearings and section 341 meetings. Bankruptcy representation, particularly consumer debtor representation, often is conducted with limited resources, and in large federal districts, the cost of travel can be burdensome for matters involving little or no dispute. Travel expenses are also an issue for attorneys representing creditors, and many attorneys hired by large national and regional creditors face additional costs as they often must cover geographic areas encompassing multiple court districts. A more complete solution to the problems of stand-in counsel requires taking measures to reduce the need for stand-in counsel.

Therefore, the Commission recommends that bankruptcy courts adopt local rules to allow appropriate video and telephonic hearings to reduce costs for all litigants, including debtors, and save travel time for court staff, all litigants and attorneys. Technology allows for timely hearings, increases access to the courts, and maximizes the use of court resources. Of course, not all hearings may be appropriately held by video or telephonic means, and when technology is utilized, efforts must be made to ensure that the dignity of the court and its proceedings are maintained.

Another step that would reduce the need to use stand-in counsel is the use of "negative notice," sometimes called "passive motions" or "passive notice." With the most common negative notice procedures, the moving party sets the matter for hearing and gives interested parties notice of the hearing together with a statement warning that if there is no response by a date certain, the movant may file an affidavit of no response with the clerk and tender a proposed default order to the court for its consideration. Bankruptcy courts already have adopted varying approaches to these negative-notice procedures based on their own local practices and interpretations of the Bankruptcy Code.[86]

The Commission encourages the use of negative-notice procedures as another means of reducing the burden and expense of uncontested court hearings for the courts, attorneys and all parties. Recognizing the need for each court to adopt procedures relevant to its local practice, no specific form local rule on negative notice is proposed. However, such rules would typically address the following points:

(1) itemization of the types of matters where negative-notice procedures may be employed;

(2) determination of whether a matter will be docketed for a particular calendar date in the event of opposition or whether such date will only be noticed upon the filing of a responsive pleading;

86 For example, the District of Rhode Island enumerates motions for which opposition must be filed within fourteen days after service, and if no objection is timely filed, then the court may enter an order granting the relief requested in the motion. Bankr. D.R.I. 1005-1, 9013-2(a). The District of Vermont similarly provides that if the respondent fails to respond at least seven days prior to the scheduled date of a hearing, the court may consider the matter on the pleadings. Bankr. D. Vt. R. 9013-4.

(3) inclusion of a specific and clear notice to the recipient of the motion that the court may grant relief in the absence of an affirmative timely response; and

(4) specification as to whether the movant must take further action upon the default of the respondent or whether the court independently monitors the respondent's default for the consideration of a final order.

C. Lowering Barriers to Access

§ 3.06 Credit Counseling and Financial Management Course

(a) Congress should eliminate the prepetition credit counseling requirement as a qualification to be a debtor in section 109(h).

(b) Congress should eliminate the financial management course requirement as a condition of discharge in chapter 7 proceedings.

(c) Congress should amend the Fair Credit Reporting Act to provide an entry on a consumer's report related to their bankruptcy case that identifies the consumer's completion of a postdischarge financial management course.

Credit Counseling. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) added a new eligibility rule that requires an individual to complete a credit counseling course in the 180 days before filing.[87] The credit counseling must be "an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted [the] individual in performing a related budget analysis."[88] Section 111 provides criteria by which the USTP maintains a list of approved providers that can provide the credit counseling.[89]

As an eligibility rule, the credit counseling requirement is a gateway through which all individuals must pass before they are eligible to file bankruptcy, regardless of which chapter they choose. At the time of filing, an individual must file with the court a certificate of completion of the credit counseling course and any debt-repayment plan developed by the credit counseling agency.[90]

87 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 106, 119 Stat. 23, 37-38 (adding section 109(h) to the Bankruptcy Code).

88 11 U.S.C. § 109(h)(1); *see also* 28 C.F.R. §§ 58.12—58.24 (setting forth regulations of the USTP to be an approved credit-counseling agency).

89 *See* U.S. Trustee Program, List of Approved Credit Counseling Agencies Pursuant to 11 USC § 111, https://www.justice.gov/ust/list-credit counseling-agencies-approved-pursuant-11-usc-111.

90 *See* 11 U.S.C. § 521(b).

CONSUMER LAW UPDATE

Cases reported from January 1, 2019 through March 31, 2019

Prepared for Federal Judicial Center

© William Houston Brown
United States Bankruptcy Judge, Retired
williamhoustonbr@comcast.net

Appeals

Denial of confirmation not final order for appeal. The First Circuit Bankruptcy Appellate Panel applied *Bullard v. Blue Hills Bank*, 135 S.Ct. 1686 (2015), holding that the Chapter 13 debtor's appeal from denial of confirmation on IRS's objection was not from a final order. Although the order denying confirmation had resolved some legal issues, it did not "conclusively resolve the entire dispute between the parties," including the waiver of sovereign immunity and the value of IRS's claim. Moreover, the appeal did not satisfy 28 U.S.C. § 158(a)(3)'s requirements for interlocutory appeal. In re Bailey, ___ B.R. ___, 2018 WL 5099219 (B.A.P. 1st Cir. 2018).

Appeal moot when no stay obtained. The Chapter 13 debtor's home had been foreclosed, and the debtor had failed to obtain a stay of the sale, with the bankruptcy case then dismissed. No relief could be obtained on appeal; therefore, the appeal was moot and dismissed. In re Marshall, 595 B.R. 269 (B.A.P. 8th Cir. 2019).

Automatic Stay

Affirmative duty to prevent state court's stay violation. The Chapter 13 debtor's spouse and her attorney pursued sentencing in state court for civil contempt, after the debtor had been found in contempt for failure to pay property division. The state court sentenced the debtor to 30 days in jail, although that court was aware of the bankruptcy filing. The Bankruptcy Appellate Panel first determined that the bankruptcy court was not prevented by the *Rooker-Feldman* Doctrine from considering whether a stay violation had occurred, because the state and bankruptcy proceedings were parallel litigations. Addressing the automatic stay, the BAP noted that collection of property division was debt collection, which was stayed upon the bankruptcy filing, and the sentencing and confinement for civil contempt were not exceptions from the stay, distinguishing that contempt from criminal contempt. Here, the contempt order required the debtor to pay a civil debt, and there was nothing in the state court record to indicate that the contempt was intended to uphold the state court's dignity. The BAP found that "the sentencing hearing was a continuation of a judicial proceeding against the debtor to recover a pre-petition debt of the debtor and further, that no statutory or court-made exceptions apply." The BAP observed generally that "the responsibility to enforce the automatic stay is placed on creditors," and both the former spouse and her attorney "had a duty to take affirmative action to prevent the use of the sentencing hearing and Wohleber's confinement to coerce payment of the dischargeable property settlement." The matter was remanded to determine if those parties took such affirmative steps, and if not, to determine damages under § 362(k). In re Wohleber, 596 B.R. 554 (B.A.P. 6th Cir. 2019). For other discussion of the *Rooker-Feldman* Doctrine, see In re Davis, ___ B.R. ___, 2019 WL 1117822 (Bankr. M.D. Pa. Mar. 11, 2019) (The Doctrine applied to prevent challenge of state court foreclosure judgment.).

Under § 362(c)(3), automatic stay was not terminated as to property of estate. Examining the split in judicial authority on interpretation of § 362(c)(3), the Court adopted the position that when a debtor's case is filed within one year of the dismissal of a prior case, the automatic stay terminates thirty days after the second filing only as to the debtor. The Court acknowledged that as a result of the contrary interpretation by *In re Smith,* 910 F.3d 576 (1st Cir. 2018), "the majority opinion may be shifting." This Court concluded that the statutory language supported its reasoning, and the property of the estate, which included the residence, remained under protection of the automatic stay. In re Smith, ___ B.R. ___, 2019 WL 417827 (Bankr. E.D. Tenn. Feb. 1, 2019).

Residential landlord violated stay but debtor estopped from damage recovery. The Chapter 13 debtor's residential landlord did not learn of the bankruptcy filing for three years; therefore, there was no willful stay violation by the landlord's filing of state court declaratory relief action. But, after learning of the pending bankruptcy case, the landlord willfully violated the stay by defending the debtor's appeal of that judgment, and further violated the stay by causing abstracts of judgment to be entered in county records. However, the debtors' silence about the pending bankruptcy case and failure to assert the automatic stay in initiating appeal of state-court judgment estopped the debtor from recovery of damages for the stay violation related to defense of that appeal. Damages may be appropriate for the landlord's recording of abstracts of judgment. In re Paxton, 596 B.R. 686 (Bankr. N.D. Cal. 2019).

Stay still in effect after foreclosure. Although foreclosure sale had been conducted before the Chapter 13 petition's filing, the foreclosure trustee had not yet delivered a deed to the purchaser; therefore, under Washington law, the debtor retained an interest in the home, with the automatic stay in effect. In re Lopez, 596 B.R. 371 (Bankr. E.D. Wash. 2019).

Avoidance Actions

Fraudulent transfer liability of commingled entireties account. In judgment creditor's removed state-law fraudulent transfer litigation, the Third Circuit held that in calculation of the liability of a commingled entireties account into which deposits had been made of fraudulently transferred wages and other non-fraudulent sources, future courts should apply pro rata approach; however, in the current case the bankruptcy court did not err in applying the prior "non-necessities approach" in calculating the fraudulent transfer liability of the debtor and his non-debtor spouse. In re Titus, 916 F.3d 293 (3d Cir. 2019).

Trustee's strong-arm avoidance overcame state "savings" statute. The Ohio Legislature enacted a savings statute in 2013, and the Ohio Supreme Court had interpreted that statute as giving constructive notice to the world of recording of a defectively executed mortgage. The result is that a bankruptcy trustee cannot avoid a defectively executed but recorded mortgage as bona fide purchaser. However, the Sixth Circuit held that a trustee could still avoid a defectively executed mortgage in the status of lien creditor under § 544(a)(1), observing that "notice is not relevant to the status of a judicial lien creditor." Because the mortgage in this case was defectively executed, the mortgage was not perfected, but the trustee's judicial lien position was perfected upon the bankruptcy filing, taking priority over the unperfected mortgage lien. In re Oakes, 917 F.3d 523 (6th Cir. 2019).

University receiving refundable tuition payments from parents for adult children was not initial transferee. The Chapter 7 trustee sued for recovery of tuition payments made by the debtors for their adult children. The District Court held that "whether the schools were mere conduits or initial transferees of the tuition payments depends on when the payments were made," distinguishing payments made into an account that was subject to refund, if the student withdrew, from payments that were not subject to potential refund. As to refundable payments, the Court agreed with the reasoning of *Bonded Financial Services, Inc. v. European American Bank,* 838 F.2d 890 (7th Cir. 1988), and "even though the schools received the tuition payments directly from the debtor and eventually applied those payments toward his children's incurred tuition charges, the schools did not have dominion over the tuition payments until the children no longer had any legal right to a refund." Until the point in time of no refund potential, the "schools had insufficient dominion and control to be considered initial transferees. . . .By the same logic, the schools were the initial transferees of any nonrefundable tuition payments." Pergament v. Brooklyn Law School, et. al, 595 B.R. 6 (E.D. N.Y. 2019). See also In re Hamadi, ___ B.R. ___, 2019 WL 414336 (Bankr. D. Conn. Jan. 31, 2019) (Fact issue remained as to whether university accepted nonrefundable tuition payments in good faith and for value.).

Property of Estate and Exemptions

Judgment lien against one tenant impaired exemption on tenancy by entirety property. The Eighth Circuit held that registration of a foreign judgment against only the debtor-husband created a cloud on the tenancy by entirety property, enabling the Chapter 7 debtor to avoid the lien as impairing an otherwise tenancy exemption under Missouri law. Only the husband filed Chapter 7, scheduling the property and claiming homestead under Missouri law. The judgment creditor argued that its lien was not enforceable now and was only a "contingent future interest that may vest upon the happening of a future event." Although under Missouri law on tenancy by entirety, the judgment against one spouse would not constitute a presently enforceable lien on the property, it created a cloud on the title, and that cloud was sufficient to be a lien under the broad federal definition of a lien, which includes a "charge against or interest in property." 11 U.S.C. § 101(37). The Eighth Circuit concluded that the cloud on title created by the recording of the judgment was subject to avoidance under § 522(f). In re O'Sullivan, 914 F.3d 1162 (8th Cir. 2019).

Issue of Illinois exemption certified to state Supreme Court. The Seventh Circuit certified to the Illinois Supreme Court a question whether a statutory amendment to the state's Workers' Compensation Act exempted the proceeds of a workers' compensation settlement from claims of medical-care providers who treated the injury associated with the settlement. In re Hernandez, ___ F.3d ___, 2010 WL:1236953 (7th Cir. Mar. 18, 2019).

Debtors may amend schedules in reopened case. Holding that Rule 1009(a) did not create a specific period within which schedules may be amended, the Bankruptcy Appellate Panel remanded for consideration of whether the debtors properly claimed exemptions in their amended schedules. The bankruptcy court had read Rule 1009 in conjunction with Rule 9006(b) to hold that upon failure to amend exemptions before the case was closed, Rule 9006(b) required a showing of excusable neglect to amend the exemptions after a closed case was reopened. The BAP disagreed that Rule 9006(b) applied to Rule 1009(a), holding that the latter Rule's language "any time before the case is closed" did not create a "specified period" for debtors to amend schedules. "A reopening renders a case open, and Rule 1009(a) contains no distinction between an original case and a case closed and then reopened. Nor does the Rule limit amending schedules to any time prior to the first closing of the case. . . .With this conclusion, we join a number of courts in holding 'the debtor, under Rule 1009, may amend schedules without limitation of whether the case is open or reopened after closing.'" In re Mendoza, 595 B.R. 849, 856-57 (B.A.P. 10th Cir. 2019).

Noncompetition injunction denied to Chapter 7 trustee. The District Court affirmed denial of the Chapter 7 trustee's request for an injunction against the Chapter 7 dentist to prevent his practicing within 15 miles of the former location, with the request intended to assist the trustee's sale of the former dental professional corporation. The trustee had experienced lack of cooperation from the debtor in a sale, and the District Court acknowledged that "in some circumstances, a noncompetition order to maintain the value of the professional corporation's goodwill may be appropriate to enforce a debtor's duty to cooperate." But, the requested noncompetition injunction had a broad geographic range for a long period, and the debtor had already been practicing in competition for four years. There was no abuse of discretion in the denial. In re Wojtkun, 596 B.R. 74 (D. Mass. 2019).

Prepetition sales contract did not destroy homestead exemption. The Chapter 7 debtor had entered into a prepetition contract to sell the home, but the debtor then claimed homestead exemption under New York law, asserting that under the proposed sale the net proceeds would be less than maximum homestead. The trustee objected to the exemption on the grounds the debtor did not intend to continue living in the home, but the sale did not close. New York law did not require intent to permanently reside in the homestead, and the debtor was entitled to the homestead exemption notwithstanding the prepetition contract to sell. Such a contract was immaterial when the debtor still owned the property and resided there on the petition date. In re Ward, 595 B.R. 127 (Bankr. E.D. N.Y. 2018).

Discharge Issues

Settlement of dischargeability proceeding did not release bank's assignment on surrender value of life insurance. The Court had approved a settlement between the bank and Chapter 7 debtors that contained joint release language of the debtors' personal liability on the debt, but that language did not state that the bank's assignment on a life insurance policy was waived or released. Although the debtors had continued to pay the policy premium after the settlement, the policy remained collateral for a loan, and the bank could collect the cash value upon surrender of the policy. In re Christian, ___ B.R. ___, 2019 WL 548563 (Bankr. N.D. Tex. Feb. 11, 2019).

Prevailing creditor on dischargeability complaint entitled to attorney fees under Texas law. A state-court judgment was nondischargeable under §§ 523(a)(4) and (6), and under Texas Theft Liability Act, the prevailing creditor was entitled to recovery of attorney fees. The debtor had sold a vehicle belonging to the creditor, which amounted to larceny and embezzlement under § 523(a)(4). Fees would not have been recoverable under § 523(a)(6) for the debtor's willful and malicious breach of contract. In re Kakal, 596 B.R. 335 (Bankr. S.D. Tex. 2019). See also In re Davis, 595 B.R. 818 (Bankr. C.D. Cal. 2019) (Debtor as prevailing party in § 523(a)(2)(A) proceeding was entitled to attorney fees under parties' agreement and applicable California statutes.).

Civil damages under federal child pornography statute were preclusively nondischargeable under § 523(a)(6). In pre-Chapter 7 litigation in the District Court, an attorney who served as expert witness for criminal defendants in child pornography trials was found to have violated a federal statute for having images of child pornography on his computer. He had downloaded innocent images of minors from the internet, for use in his trial testimony, manipulating innocent poses and combining them with other images to depict the innocent minors as engaging in sexually explicit conduct. He had entered into pre-trial diversion with the United States Attorney, and then had been sued by two of the minors under 18 U.S.C. § 2252A(f) for statutory civil damages, with actual damages not less than $150,000 for each victim. The defendant filed Chapter 7 and the Bankruptcy Appellate Panel held that Sixth Circuit authority established a subjective standard for purposes of § 523(a)(6). Because of the debtor's entry into pre-trial diversion, he had admitted to violation of 18 U.S.C. § 2252A(a)(5)(B), which prohibits a person knowingly possessing or accessing material that contains child pornography, which has been obtained by any means of interstate commerce. The pertinent issue in the civil litigation was whether the plaintiffs suffered "personal injury" as a result of the violations of 18 U.S.C. § 2252A(f), entitling them to damages, and the Sixth Circuit had previously held that injury had occurred, in *Doe v. Boland,* 698 F.3d 877 (6th Cir. 2012). That prior opinion found an injury to include "the invasion of any legally protected interest of another." 698 F.3d at 881. To be nondischargeable under § 523(a)(6), the "injury must invade the creditor's legal rights . . .' in the technical sense, not simply harm to a person.'" *In re Musilli,* 379 Fed.App'x 494, 498 (6th Cir. 2010). It is not necessary that the defendant intended the precise injury. The prior Sixth Circuit decision had characterized the minors' injuries "as a violation of the children's legally protected interests in their reputation, emotional well-being and right to privacy." By use of the manipulated images of innocent minors, the defendant intended his expert testimony to create doubt whether an image was an identifiable real child, but his motivation for creating the pornographic images to aid criminal defendants' defenses did not absolve liability. Violation of the federal statute was willful and the injury was malicious as an act taken in conscious disregard of duty. The debtor's various arguments for legal justification in use of the images in judicial proceedings had been rejected by the Sixth Circuit in *Doe v. Boland,* and the BAP concluded that the $300,000 statutory damages were nondischargeable under § 523(a)(6). In re Boland, 596 B.R. 532 (B.A.P. 6th Cir. 2019).

Application of § 523(a)(6) to intentional breach of contract. Reviewing the split of authority on whether a breach of contract may support nondischargeability under § 523(a)(6), the bankruptcy court concluded that it was an open issue in the Tenth Circuit, citing *In re Sanders,* 2000 U.S. App. LEXIS 5763 (10th Cir. 2000). The debtor had borrowed $30,000 from the seller of a restaurant to fund part of the purchase price, and nothing was repaid, with a prepetition state-court judgment entered. In the subsequent dischargeability complaint, the plaintiff alleged that the debtor never intended to repay the loan. The opinion cites Sixth Circuit authority that breach of contract does not fall within the scope of § 523(a)(6), but the Fifth and Ninth Circuits have held that intentional breach of contract may be within that exception from discharge. Based on the state-court judgment, the court found that the debtor never intended to pay and that the injury was willful, knowing that the damages would be $30,000. In re Rylant, 594 B.R. 783 (Bankr. D. N.M. 2018).

Complaint stated plausible claim that debt for educational benefit under § 523(a)(8)(A)(ii) may be dischargeable. Denying the defendants' summary judgment motion, the Court examined the split in case law to determine whether the debtor stated plausible claims that § 523(a)(8)(A)(ii) obligations to repay funds received as an educational benefit were dischargeable and whether such obligations were distinguished from loans. The Court concluded that the defendants had not established that the claims were implausible. In re Golden, ___ B.R. ___, 2019 WL 442298 (Bankr. E.D. N.Y. Jan. 31, 2019). See also In re Homaidan, 596 B.R. 86 (Bankr. E.D. N.Y. 2019).

Failure to disclose former fiancé's personal property did not support false oath under § 727(a)(4)(A). The Chapter 7 debtor's former fiancé filed complaint to deny discharge for the debtor's failure to schedule that she had personal property that the plaintiff did not take when the two ceased sharing a residence. Reviewing the requirements under § 727(a)(4)(A), the Court found no evidence of intent to deceive or how the omissions obstructed the trustee's or creditors' investigation of the debtor's financial affairs. There was also no basis to except the alleged debt from discharge under §§ 523(a)(2)(A), (4) or (6). In re Milton, 595 B.R. 699 (Bankr. W.D. Pa. 2019).

Unaccounted-for withdrawals from accounts supported discharge denial under § 727(a)(5). Although creditor's false oath claims were not proven, the debtor's failure to account for cash withdrawals from several accounts supported denial of discharge under § 727(a)(5). The Court reviewed the requirements under that section, including its shifting burden of proof. As a CPA, the debtor was held to a higher standard than a less sophisticated debtor. Section 727(a)(5) does not require that "the debtor acted fraudulently or in bad faith; rather, the issue turns on whether a satisfactory explanation is—or is not—forthcoming." In this case, expert testimony about unaccounted-for cash withdrawals shifted the burden to the debtor for explanation. In re Fustolo, ___ B.R. ___, 2019 WL 458333 (Bankr. D. Mass. Feb. 4, 2019).

Discharge Injunction

Secured creditor violated discharge injunction by forbearance of foreclosure of liens to convince debtors to sign post-discharge notes. Affirming, the Eighth Circuit found no abuse of discretion in the sanctions against the secured creditor that used forbearance of its foreclosure remedy to persuade the former Chapter 7 debtors to sign new post-discharge notes. The opinion discusses pre-discharge reaffirmation and the potential for debtors to voluntarily repay debt, but "when assessing the voluntariness of the debtor's actions, we consider the creditors' use of pressure and coercion and its impact on the debtor." Actions alleged to be in violation of the discharge injunction, including coerciveness, must be assessed under the particular facts. Here, the debtors had obtained discharge but the bank continued to hold security interests in land and equipment. The bank obtained new notes for amounts in excess of the value of its security. In state-court litigation, the former debtors alleged that the new notes were unenforceable as improper reaffirmations of discharged debt, and the bank asserted counterclaims, including its forbearance from foreclosing. Before the state court could rule, the former debtors filed an adversary proceeding in the bankruptcy court for contempt and violation of the discharge injunction. The bankruptcy court abstained to allow the state court to rule, but observed that the debtors could return to the bankruptcy court if the state court held that the bank had impermissibly attempted to collect discharged debt. The Eighth Circuit held, under these facts, that the abstention was not preclusive on the bankruptcy court's ability to rule on the merits in the contempt proceeding. The Circuit Panel noted the Ninth Circuit's *Taggart* authority, on which certiorari has been granted, as well as Eighth Circuit BAP authority, *In re Everly,* 346 B.R. 791, 797-98 (B.A.P.8th Cir. 2006), that a creditor may have a good faith defense to alleged violations of the discharge injunction, but here the Panel found no factual or legal basis for the defendants' asserted good faith defense. First State Bank of Roscoe v. Stabler, 914 F.3d 1129 (8th Cir. 2019).

Creditor's alleged violation of discharge injunction by collecting from community property was subject to good faith defense. The Chapter 7 debtor failed to show by clear and convincing evidence that the creditor violated the discharge injunction and that its good faith defense was not applicable. The creditor had pursued garnishment to collect a judgment against the debtor's non-filing spouse, and the judgment debt may have been a dischargeable community debt under applicable Washington law on community property. "Under *Taggart,* sanctions are improper if the creditor has a good faith belief that the discharge injunction does not apply to its claim, even if that belief is unreasonable." In re Dickerson, ___ B.R. ___, 2019 WL 298933 (Bankr. W.D. Wash. Jan. 18, 2019).

Reopening Closed Case

Cause not shown to reopen to file certificate of financial management course. When the case had been closed for fifteen months, the former Chapter 7 debtor had not shown cause to reopen the case for the purpose of filing a certificate of completion of the financial management course required for discharge. There was no explanation for why that requirement had not been satisfied prior to closing or why the debtor waited so long to seek reopening—the longer the delay, the more potential prejudice to creditors. Reopening under § 350(b) was denied, but the debtor was not prevented from filing another case. In re Szczepanski, ___ B.R. ___, 2019 WL 1028495 (Bankr. E.D. Mich. Mar. 4, 2019).

Chapter 13 Issues

Confirmation

Debtors could not deduct ownership costs for vehicle secured by non-purchase money lien. The above-median debtors claimed ownership deduction of $497 from projected disposable income, when the title loan payments on the vehicle were only $66.67. The difference in these amounts meant unsecured creditors could receive $25,819.80 over the 60-month plan, and the trustee objected to confirmation. Reviewing *In re Ransom,* 562 U.S. 61 (2011), for "what constituted an applicable vehicle ownership expense under the IRS Local Standards," the word "applicable" means "'appropriate, relevant, suitable, or fit,'" such that the deduction must qualify under the debtor's particular circumstances." If these debtors were below-median, they would only have the actual $66.67 deduction for the title loan payment, and allowing above-median debtors to claim more than the actual payment would give them preferred treatment over their creditors. Under *Ransom's* direction, "the Court is to interpret the Means Test in a way that accomplishes the Congressional intent of ensuring 'that [debtors] repay creditors the maximum they can afford' so that creditors receive 'payments that the debtor could easily make.'" The IRS Local Standards "only allow an ownership deduction for the 'lease or purchase' of a vehicle, [therefore,] a non-purchase money security interest is not a specified expense deduction under the IRS Local Standards." The Court's research revealed that most bankruptcy courts and one district court agreed with this analysis, citing the most recent decision, *Feagan v. Townson,* 572 B.R. 785 (N.D. Ga. 2016). See footnote 39 and 40 for other decisions. Allowing the above-median debtors to obtain windfall of $25,819.80 at the expense of unsecured creditors cannot be reconciled with the Means Test. In re Taylor, 595 B.R. 419 (Bankr. D. Utah 2019).

Effects of confirmation

Vesting of property. In consolidated appeals to the Seventh Circuit, the City of Chicago prevailed on the effect of a local plan confirmation provision that maintained the debtors' vehicles in the Chapter 13 estates until completion of the plan. The Circuit panel considered the deviation from § 1327(b)'s normal vesting in the debtors upon confirmation to open the door for debtors "treat[ing] this provision as permission to violate traffic laws." The City's Municipal Code, "makes a car's owner, rather than its driver, liable for many fines, including those for speeding, running a red light, and illegal parking." The panel's decision repeats the City's representation that the seven debtors had incurred 72 fines, aggregating $12,000, since confirmations, and the Panel assumed that the fines would never be paid. The relief sought by the City was vacating the confirmation orders' suspension of vesting, and the Court granted the relief of "an order restoring the estates' assets to the debtors' personal ownership." With that determination, the Panel found it unnecessary to rule on whether the postpetition fines should be treated as administrative expenses. The thrust of the opinion is that the bankruptcy courts had not provided clear or sufficient reasons for retaining the vehicles in the bankruptcy estates, with the Panel commenting: "A case-specific order, supported by good case-specific reasons, would be consistent with § 1327(b), but none was entered in any of these cases." Although that section gives the bankruptcy court discretion to keep assets in the estates, exercise of such discretion "requires a good reason," and the Panel found it "hard to see how the court could justify routinely doing the opposite of what the statute provides." In Matter of Steenes, ___ F.3d ___, 2019 WL 1198901 (7th Cir. Mar. 14, 2019), motion for rehearing filed as to two debtors in the consolidated appeals.

Confirmation order controlled over conflicting valuation order. Commenting that the "case shows that the belt-and-suspenders approach . . .can cause trouble," the debtor had stripped off a second mortgage lien both in valuation at zero and confirmation of a plan. The valuation order provided stripping when the debtor both completed plan payments and received discharge, and because of a prior Chapter 7 discharge the debtor was not eligible for discharge in the 13 case. The confirmation order, however, provided only for stripping when the plan payments were completed. The mortgagee tried to rely on the valuation order but the confirmation order controlled, and the creditor violated that order by not releasing its lien. Although the creditor was in contempt, it was easily purged by release of the lien. No attorney fees were awarded to the debtor because the problem was as much the debtor's fault as the creditor's. In re Ranieri, ___ B.R. ___, 2019 WL 1422893 (Bankr. N.D. Ill. Mar. 29, 2019).

Lien Issues

Manufactured home did not become accession to real property. The creditor holding security interest in a manufactured home objected to confirmation, on the basis that § 1322(b)(2)'s anti-modification provision prevented bifurcation of its claim into secured and unsecured parts. The Eighth Circuit noted that the Bankruptcy Code does not resolve the issue of whether a manufactured home is real or personal property, and the Court looked to Iowa common law for when personal property may become a fixture. The intention of the party making the annexation is key, and there was no error in the bankruptcy court's finding that the method of attachment in this case did not indicate an intention to make the home a permanent accession to real property. The fact that the debtors owned the home but the creditor owned the lot, charging a monthly fee for its use, was important, and the home was supported by concrete blocks, rather than permanent foundation, with the transportation structure still underneath. The home did not meet Iowa's fixture test. In re Bennett, 917 F.3d 676 (8th Cir. 2019).

Chapter 13 debtor had no authority under § 544. Discussing the split of authority, the Court adopted the majority view that the Code gives § 544 avoidance authority exclusively to the trustee, and the Chapter 13 debtor could not use that power to avoid a mortgage lien. In re Dobbs, ___ B.R. ___, 2019 WL 137565 (Bankr. E.D. N.Y. Jan. 7, 2019).

Legal rate of interest applies after foreclosure judgment. Applying New Jersey common law on merger, the mortgage was merged into a final order of judgment of foreclosure; therefore, the mortgage was no longer the basis for determining post-judgment interest. The debtor obtained a sale from which the mortgage creditor would be paid, but the interest rate would be the legal, rather than contract, rate. In re Goione, 595 B.R. 477 (Bankr. D. N.J. 2019).

Plan Modification

Plan modification based on distribution of exempt retirement funds. In two opinions involving debtors who took distributions from their otherwise exempt retirement funds, the trustee moved for plan modifications; although the funds lost their exempt status by distribution and failure to roll over into another qualified plan within sixty days, the Court exercised discretion to deny modification. In one case, the exemptions had been claimed and allowed without objection under § 522(d)(12), while in the other case exemption had been claimed under the Texas exemptions. As to § 522(d)(12) exemption, §§ 522(b)(4)(C) and (D) address impact of distribution and provide that distributed funds remain exempt if rolled over within sixty days. In the case using Texas exemptions, the Court was bound by *In re Hawk,* 871 F.3d 287 (5th Cir. 2017); although a Chapter 7 case rather than 13, *Hawk* applied the Texas statute, requiring that distributions be rolled over to retain exempt status. Notwithstanding the distributed funds becoming nonexempt, the trustee's motions to modify to increase payments to unsecured creditors were denied, based on particular facts in each case. In both cases, the debtors had good-faith reasons for the distributions, needing to use the funds for unexpected home repair and medical bills. In re Sullivan, 596 B.R. 325 (Bankr. N.D. Tex. 2019); In re Arlin, ___ B.R. ___, 2019 WL 328724 (Bankr. N.D. Tex. Jan. 24, 2019).

Modification denied for exceeding 60 months. The debtors, who were short on payments to complete the plan, proposed modification to pay $2,219 within approximately one month and to have the trustee use "post-expiration" funds on hand along with that additional payment to complete the plan, but the Court concluded that it could not approve the modification, because to do so would permit the plan to exceed 60 months. The confirmed plan's 60 months had already expired when the motion was filed. In re Talison, ___ B.R. ___, 2019 WL 1096694 (Bankr. Mar. 4, 2019).

Discharge

In joint case, one spouse not eligible for discharge due to unpaid domestic support obligation, but other spouse granted discharge. Considering the issue whether in a joint case one debtor's ineligibility for discharge due to his failure to pay required post-petition domestic support obligations prevented the other spouse's discharge, the Court concluded that the plain language of § 1328(a) provided that the co-debtor who had completed her required plan payments was entitled to discharge. Section 1328(a) refers to a singular “debtor,” and the DSO certification requirement added in 2005 also referred to a singular “such debtor,” who must certify payment of required obligations. The spouse who was not liable on the domestic support obligation was not “such a debtor” required to certify payment of that obligation, and she was entitled to a full-completion discharge. In re Hernandez, ___ B.R. ___, 2019 WL 642841 (Bankr. N.D. Tex. Feb. 14, 2019).

Revocation of discharge denied. Finding no binding authority in the Seventh Circuit on § 1328(e), there is substantial authority under § 727(d)(1), and the two statutes should be read in the same manner, requiring proof of “fraud in fact” that the debtor acted with intent to deceive. The debtor’s scheduling of the cause of action with “unknown value” did not establish such fraudulent intent, even though the cause of action was settled shortly after the bankruptcy filing. The debtor had told his attorney and the Chapter 13 trustee of the settlement. In re Maxwell, ___ B.R. ___, 2019 WL 1076999 (Bankr. N.D. Ill. Mar. 6, 2019). Compare In re McCutcheon, ___ B.R. ___, 2019 WL 1282832 (Bankr. M.D. Ga. Mar. 18, 2019) (Denying Chapter 13 debtor’s motion for summary judgment in former business partner’s complaint seeking revocation of confirmation under § 1330(a), due to material issues of fact, the opinion observed that plaintiff’s alleged awareness of fraud prior to entry of confirmation order did not prevent his seeking to revoke confirmation as having been obtained by fraud. Section 1330(a), unlike § 1328(e)(2), does not require that the plaintiff lack pre-confirmation knowledge of the fraud.).

Dismissal and Conversion

Dismissal for failure to comply with credit counseling. The bankruptcy court did not abuse discretion in dismissing the serial filer’s sixth case for failure to satisfy the prepetition credit counseling requirement. Despite checking the box on the petition to indicate receiving that counseling, the debtor did not demonstrate actual receipt within the 180 days, and the certificate of completion was not filed. The bankruptcy court also had authority to dismiss with bar to another filing within 180 days. In re Marshall, 596 B.R. 366 (B.A.P. 8th Cir. 2019).

Debtor's absolute right to dismiss. Reviewing the split of authority on whether a Chapter 13 debtor has an absolute right to dismiss under §1307(b), the Court cited *Law v. Siegel,* 571 U.S. 415 (2014), for proposition that bankruptcy courts have no authority to override express provisions of the Code, and § 1307(b) provides that the court shall dismiss a case upon the debtor's request. On a motion to reconsider voluntary dismissal, the creditor did not show a legal or factual basis for reconsideration. In re Marinari, ___ B.R. ___, 2019 WL 647028 (Bankr. E.D. Pa. Feb. 15, 2019).

Dismissal for bad faith. Reviewing standards for dismissal for cause under § 1307(c), "cause" may include lack of good faith under *In re Alt,* 305 F.3d 413 (6th Cir. 2002). Finding that this case was filed with the motive of forestalling or escaping post-judgment collection proceedings in U.S. District Court, the case was lacking good faith. Judgment had been entered against the debtor's former husband, but collection efforts could include assets that were transferred to the debtor by the former spouse. In re Curtis, 596 B.R. 624 (Bankr. W.D. Mich. 2019). See also In re Feldman, ___ B.R. ___, 2019 WL 994515 (Bankr. E.D. N.Y. Feb. 26, 2019) (Debtor, who was attorney, filed case in bad faith, finding numerous misstatements and omissions in petition and schedules; dismissal was with prejudice to refiling for one year.). Compare In re Hernandez, 754 Fed.Appx 632 (9th Cir. 2019) (Affirming denial of dismissal, none of bad-faith factors in *In re Blendheim,* 803 F.3d 477 (9th Cir. 2015), were present.).

Conversion not in bad faith. Reviewing the good-faith factors in the Eleventh Circuit, under *In re Kitchens,* 702 F.2d 885 (11th Cir. 1983), the fixed-income, older debtors did not convert from Chapter 7 to 13 in bad faith, even though conversion allowed them to discharge what might be a nondischargeable debt under § 523(a)(6) in Chapter 7. In re Wade, ___ B.R. ___, 2019 WL 548548 (Bankr. N.D. Ga. Feb. 11, 2019)

Attorney Fees

Chapter 13 debtor's attorney not entitled to recovery under § 330 of fees that were incurred in defending prior attorneys' sanctions motion. The debtor's prior attorneys had sought to impose sanctions on the current attorney, and that attorney successfully defended against sanctions. However, the fees incurred by the attorney did not benefit the bankruptcy estate. The issue was not whether those fees were necessary or reasonable as to the attorney, but the fees were not necessary for administration of the estate and were not allowable under § 330(a)(1). In re Schaller, 595 B.R. 730 (Bankr. E.D. Mich. 2019).

Claims

Arbitration denied in complaint implicating allowance and disallowance of claims. Applying *Moses v. CashCall,* 781 F.3d 63 (4th Cir. 2015), the bankruptcy court held that a complaint presented constitutionally core claims and "referring those core claims to arbitration would inherently conflict with the purposes of the Bankruptcy Code in contravention of Fourth Circuit precedent." Moreover, the Virginia Attorney General's motion to intervene had been granted, allowing that office to object to the creditor's proof of claim, and a contract with an arbitration clause could not bind the nonparty Attorney General. In re Taylor, 2018 WL 6131473 (Bankr. E.D. Va. 2018).

Standing to file proof of claim. In an individual's Chapter 11 case, the Court reviewed requirements for standing to file a proof of claim, finding that the assignee of a note and mortgage may have standing, conditioned upon the assignee providing proof of assignment of the note, or that the note was endorsed in blank with the assignee having physical possession of the endorsed note. The claimant also failed to show that it was servicer of the note, because a servicer must show that it is the authorized agent of an entity with the right to enforce the note. In re Benyamin, ___ B.R. ___, 2019 WL 623867 (Bankr. S.D. N.Y. Feb. 13, 2019).

Mortgagee entitled to recover postpetition attorney fees and $300 flat fee for preparing proof of claim. Applying Alabama law on recovery of attorney fees for an oversecured mortgage creditor, postpetition fees incurred by the creditor were recoverable as additional obligations secured by the mortgage. The opinion also discusses authorized fees and charges by the creditor under the most recent HUD

Mortgagee Letter. In addition, the Court discussed recovery of a flat $300 fee for preparation of a proof of claim by the attorney for an oversecured creditor, rejecting that such activity was merely ministerial. "The risks and penalties associated with a flawed proof of claim are not insignificant, particularly for a residential mortgage creditor." Although preparation may not be complicated, "the consequences of an incomplete or inaccurate claim travel with the creditor throughout the case and potentially have significant legal and evidentiary repercussions." In re Mandeville, 596 B.R. 750 (Bankr. N.D. Ala. 2019).

Overpayment of child care benefits was priority domestic support obligation. The Chapter 13 debtor's obligation to the Illinois Department of Human Services for its overpayment of child care benefits was a first priority claim under § 101(14A)'s definition of domestic support obligations and § 507(a)(1)'s priority. There are two tiers of first-level priority, and the debt owed directly to a governmental entity was a second-tier priority under § 507(a)(1)(B). Noting the split of authority on whether overpayment of government assistance benefits is in the nature of support, the Court agreed with the reasoning of *In re Etnire,* 568 B.R. 80 (Bankr. C.D. Ill. 2017), giving "full effect to the text of the definition of a DSO. . . .A debtor's direct liability to reimburse assistance payments made by a governmental unit is plainly encompassed by the definition of a DSO and is eligible for priority status under section 507(a)(1)(B)." This debtor was also bound by the res judicata effect of the state court's pre-bankruptcy determination of the validity and amount of the Department's debt. In re Hawk, 595 B.R. 556 (Bankr. C.D. Ill. 2019).

Debtor's objection to claim for attorney fees. Ford Motor Credit's proof of claim included $4,402.86 in attorney fees, and the debtor objected, asserting that reasonable attorney fees would be only $750. The Court overruled the objection, finding that a valid objection must include one or more of the grounds under § 502(b). The objecting party has the obligation to point out which statutory basis exists, and the secured creditor is entitled to seek attorney fees in its proof of claim, "if it had an enforceable right under applicable state law to collect the fees," citing *Travelers Cas. & Sur. Co. of Am. V. Pac. Gas & Elec. Co.,* 549 U.S. 443 (2007). Ford's claim to "contract-based attorneys' fees" was an enforceable right under applicable Louisiana law. The opinion also overruled an objection to another claim, based on assertion that the claim was time-barred under Louisiana's three-year prescription period, because the debtor had acknowledged the claim within the three-year period by scheduling it in her prior bankruptcy case. That acknowledgement caused the prescription period to run anew. In re Stephenson, ___ B.R. ___, 2019 WL 1423089 (Bankr. W.D. La. Mar. 28, 2019).

Fair Debt Collection Practices Act

Nonjudicial foreclosure not subject to FDCPA. The Supreme Court unanimously held that a law firm conducting nonjudicial foreclosure for Wells Fargo was not acting as a debt collector within the meaning of the FDCPA, because § 1692f(6) of that Act provides an exception from coverage for those enforcing security interests. The opinion examined the "primary" definition of "debt collector" in the Act, but found that § 1692f(6) was a more limited definition, and while foreclosure is a means of collecting debt, the limited definition means that "one who does no more than enforce security interests does *not* fall within the scope of the general definition." Congress treated "security-interests enforcement differently from ordinary debt collection in order to avoid conflicts with state nonjudicial foreclosure schemes." Legislative history supported the Court's interpretation of the exception. The opinion confines itself, as Justice Sotomayor's concurring opinion notes, to nonjudicial foreclosure actions that comply with applicable state law. Obduskey v. McCarthy & Holthus LLP, 586 U.S. ____, 2019 WL 1264579 (Mar. 20, 2019).

Garnishment to collect vacated judgment violated FDCPA. After judgment had been obtained against the party who cosigned a student loan for a friend, garnishment began to collect the judgment, but the defendant moved the state court to discharge the judgment and the motion was served on the law firm obtaining the judgment, with no response filed. The state court entered a discharge of the judgment. On cross summary judgment motions, the District Court found no factual dispute that the law firm violated the FDCPA by garnishment of wages to collect a vacated judgment, and the bona fide error defense was unavailable to the firm as a matter of law. To establish that defense, the debt collector's mistake must be objectively reasonable, and after being advised by the debtor's employer that it had received court documents related to a prior bankruptcy discharge and vacating of the judgment, the law firm's only investigation was a paralegal's PACER search for bankruptcy filings. There was no evidence that the law firm investigated whether the state court's judgment was still in effect. Micks v. Gurstel Law Firm, P.C., ___ F.Supp.3d ___, 2019 WL 418850 (D. Minn. Feb. 1, 2019).

Proof of claim requirements did not create FDCPA cause of action. In a three-count complaint, the Chapter 13 debtor alleged violations by the debt buyer of the FDCPA, as well as of Rule 3001, and the defendant moved for dismissal. Citing *Midland Funding, LLC v. Johnson,* 137 S.Ct. 1407 (2017), the Court concluded that "the Supreme Court has determined that when a creditor's alleged misconduct involves the filing of a proof of claim in a bankruptcy case for a debt that would be enforceable under state law, the Bankruptcy Code and Rules provide the exclusive means for addressing the allowance of the claim and the creditor's misconduct." Stopping short of holding that a FDCPA action "may never be brought in the context of a bankruptcy," the Court found no FDCPA cause of action here when the alleged misconduct involved a disputed proof of claim and failure to follow the Rule's requirements, with the FDCPA count dismissed. Under its prior review of "requirements of Rule 3001(c)(2)(A) and the implications of a creditor's failure to follow them," *Maddux v. Midland Credit Management, Inc.,* 567 B.R. 489 (Bankr. W.D. Va. 2016), causes of action for violation of that Rule survived dismissal. In re Derby, ___ B.R. ___, 2019 WL 1423084 (Bankr. W.D. Va. Mar. 28, 2019).

Commercial debt not covered by FDCPA. Finding that the pro se Chapter 7 debtor incurred commercial, rather than consumer, debt, the portion of the plaintiff's complaint alleging FDCPA violations was dismissed. The FDCPA is not applicable to commercial debts, and the evidence supporting the nature of these debts was business purpose. In re Pasley, 596 B.R. 577 (Bankr. W.D. Ky. 2019).

Fair Credit Reporting Act

Alleged inaccurate or materially misleading credit reporting on status of mortgage after plan completion. In District Court litigation under the Fair Credit Reporting Act, the parties disputed whether the mortgage servicer provided inaccurate or materially misleading information to three major credit reporting agencies that the mortgage was delinquent after the consumer successfully completed a Chapter 13 plan. The opinion reviews the standard for a furnisher's requirement to conduct a reasonable investigation under § 1681s-2(b) of the FCRA, as well as the requirements under the Act for recovery of damages. Disputed issues of material facts prevented summary judgment on the furnisher's duties under the Act and whether the furnisher's potential violation of the Act caused emotional distress damages. Hrebal v. Seterus, Inc., ___ F.Supp.3d ___, 2019 WL 332201 (D. Minn. Jan. 25, 2019). See also Jaras v. Equifax, et. al, No. 17-15201, unpublished (9th Cir. Mar. 25, 2019) (finding lack of standing of plaintiffs under pleading requirements of *Spokeo v. Robins,* 136 S.Ct. 1540 (2016)).

CONSUMER LAW UPDATE

Cases reported from September 21, 2018 through December 31, 2018

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© William Houston Brown
United States Bankruptcy Judge Retired
williamhoustonbr@comcast.net

Automatic Stay

Section 362(a)(4) encompasses only affirmative conduct. The Tenth Circuit panel followed the logic and holding of *In re Cowen,* 849 F.3d 943 (10th Cir. 2017), to hold that a subrogation lien arising solely by operation of law was not a violation of the automatic stay under § 362(a)(4). *Cowen* involved § 362(a)(3), but the same statutory term "act" is in § 362(a)(4). The subrogation lien was not an "act to create, perfect, or enforce any lien." *In re Garcia,* ___ Fed.Appx. ___, 2018 WL 5045613 (10th Cir. Oct. 17, 2018). *See also In re Denby-Peterson,* 576 B.R. 66 (Bankr. D. N.J. 2018) (Adopting minority position, repossessing creditor did not "exercise control over" property of the estate by passive retention of the vehicle pending receipt of evidence that the vehicle was insured.).

Entire stay terminates under § 362(c)(3)(A). The First Circuit held under § 362(c)(3)(A), upon the repeat filing by Chapter 7, 11 or 13 debtors within one year of dismissal of a prior pending case, the automatic stay terminates entirely on the 30th day after filing of the subsequent case as to the debtor, property of the debtor and property of the bankruptcy estate. The statute was poorly drafted, but although most lower courts had interpreted the statute to not terminate the stay as to property of the estate, the Circuit construed the statute under its perceived congressional purpose as limiting the application of the stay in repeat-filer cases. The opinion explores the competing interpretations of the statute, with no prior Circuit authority on the issue. Unless the repeat filer obtains continuation of the stay under § 363(c)(3)(B), that debtor and property have only temporary stay protection. *Smith v. State of Maine Bureau of Revenue Services,* ___ F.3d ___, 2018 WL 6520887 (1st Cir. Dec. 12, 2018). *See also In re Goodrich,* 587 B.R. 829 (Bankr. D. Vt. 2018); and *In re Dev,* ___ B.R. ___, 2018 WL 5729214 (Bankr. E.D. N.C. Oct. 26, 2018) (Reviewing conflicting positions on § 362(c)(3)(A), Court adopted emerging minority view that stay terminates entirely as to the debtor, property of the debtor and property of the estate.); *Banco Cooperativo de Puerto Rico v. Herrera (in re Herrera),* 589 B.R. 444 (B.A.P. 1st Cir. 2018) (Discussing §§ 362(c)(3)(A) and (j) and potential for creditor's comfort order that stay had terminated.); *In re Goodrich,* 591 B.R. 538 (Bankr. D. Vt. 2018) (Discussing burden of proof for repeat filer to overcome presumption of bad faith and conditioning extension of stay.)

Compare In re Wood, 590 B.R. 120 (Bankr. D. Md. 2018) (Reviewing majority and minority approaches to § 362(c)(3)(A), Court adopted reasoning of *In re Tubman,* 364 B.R. 574 (Bankr. D. Md. 2007), that stay terminated only as to the debtor and property of the debtor, remaining in place as to property of the estate.).

Attorney fees incurred by debtors for appeal. The Ninth Circuit construed its prior authority, *In re Schwartz-Tallard,* 803 F.3d 1095 (9th Cir. 2015) (en banc), and § 362(k) to authorize attorneys' fees and costs to a debtor who incurred those "in successfully challenging an initial award made pursuant to § 362(k)." *Schwartz-Tallard* "reasoned that § 362(k)(1) operates as a fee-shifting statute, albeit where only one party, the debtor, can collect attorneys' fees and costs." And, such statutes "allow for recovery of attorneys' fees incurred in establishing a party's claim for fees. . . .When an appeal is necessary to secure such damages and attorney's fees and costs, appellate attorneys' fees and costs should also be granted to a successful debtor, regardless of which party brings the appeal." *Easley v. Collection Service of Nevada (In re Easley),* ___ F.3d ___, 2018 WL 6693470 (9th Cir. Dec. 20, 2018).

Automatic stay's prevention of lien execution tolled lien under § 108(c). A divided Ninth Circuit panel affirmed its Bankruptcy Appellate Panel, holding that § 108(c) tolled the time for execution of a state-law lien. The majority read § 362(a) broadly in conjunction with § 108(c), finding that a one-year lien on personal property arising from the judgment creditor's order for the defendant's appearance and examination ("ORAP lien") fit within § 362(a)'s "commencing or continuing a civil action." The majority expressly held "that the period in which a creditor may enforce a judgment by executing on a lien constitutes the continuation of the original action that resulted in the judgment." The dissenting judge read the ORAP lien as a mere tool for enforcing the judgment that did not fit within § 108(c)'s scope. *Daff v. Good (In re Swintek),* 906 F.3d 1100 (9th Cir. 2018).

Limitations for foreclosure tolled by stay. Under Texas law, foreclosure on real estate must be brought within four years of accrual of the action, which is typically the maturity of the note. Section 108 "incorporates state law tolling provisions," including those of common law, which required tolling of foreclosure period for each day that the mortgagee was prevented from foreclosure by the automatic stay. Here, tolling included the day the stay was implemented and the day it was lifted. *HSBC Bank USA, N.A. v. Crum,* 907 F.3d 199 (5th Cir. 2018).

Creditor's retention of voluntary payment did not violate stay. The Chapter 7 debtor voluntarily paid a prepetition debt, which had been secured by non-purchase money lien that was subject to avoidance under § 522(f)(1)(B). The lender had taken no action to collect the debt, and the bankruptcy court found no stay violation in retention of the voluntary payment. Although § 524(f) acknowledges potential voluntary payment of prepetition debt, it does not specifically address whether retention of payment would violate the stay, with Court concluding that there was no statutory basis to find that retaining voluntary payment was stay violation. Issues concerning the potential lien avoidance were unresolved. *In re Adams,* 589 B.R. 211 (Bankr. S.D. Ga. 2018).

Assignee of mortgage had standing to move for stay relief. Standing to seek stay relief only required that "movant has the right under applicable state law to enforce the mortgage," and the holders of mortgage note endorsed in blank established standing to seek stay relief to pursue foreclosure. *Osuji v. Deutshce Bank, N.A.,* 589 B.R. 502 (E.D. N.Y 2018).

Postpetition foreclosure bidder violated stay. In extensive opinion primarily addressing potential nonbankruptcy remedies for bidder's recovery of money paid at foreclosure, that bidder violated the automatic stay by tendering payment to complete purchase at foreclosure sale held 3 ½ hours after filing of Chapter 7 petition. Wire transfer of funds was made after bidder was aware of bankruptcy filing, and bidder could have moved for stay annulment rather than willfully violating stay. Stay violations were factors Court considered in bidder's claims for equitable subrogation and other remedies. *Elbar Investments, Inc. v. Okedokun (In re Okedokun),* ___ B.R. ___, 2018 WL 5879817 (Bankr. S.D. Tex. Nov. 6, 2018).

Staying criminal prosecution. Reviewing case law and statutes relevant to staying criminal prosecution of a debtor, the Court concluded that *In re Davis,* 691 F.2d 176 (3d Cir. 1982), was still good law and its principles were applied, finding that the debtor had adequate remedies at law, had not shown that he would be irreparably harmed by the State's prosecution or that the district attorney was pursuing the criminal action in bad faith or for harassment. *Sheasley v. Jenereski, et al. (In re Sheasley),* ___ B.R. ___, 2018 WL 6716107 (Bankr. W.D. Pa. Dec. 18, 2018).

Arbitration

Arbitration denied. In reopened Chapter 7 case, the debtor's complaint sought to discharge a loan that was alleged not to be a "qualified education loan" under § 523(a)(8)(B), and the defendant moved to compel arbitration. Reviewing the most recent Supreme Court authority, the Court concluded that *Shearson/american Exp. Inc. v. McMahon,* 482 U.S. 220 (1987), was still good law, applying its test of "whether arbitration would create an inherent conflict with the purposes of the Bankruptcy Code." Dischargeability is a core proceeding and the Court exercised its discretion to deny arbitration. *Roth v. Butler Univ.,* 2018 WL 6039099 (Bankr. S.D. Ind. Nov. 16, 2018). *See also Taylor v. Allied Title Lending, LLC,* 2018 WL 6131473 (Bankr. E.D. Va. Nov. 20, 2108) (Denying arbitration motion in complaint alleging that loan was usurious and unenforceable and that claim should be disallowed, Court found that arbitration would present inherent conflict with purposes of Bankruptcy Code. Moreover, Virginia Attorney General had intervened, and arbitration provision could not bind third party intervenor.); *Thomas v. Midland Funding, LLC (In re Thomas),* 592 B.R. 99 (Bankr. W.D. Va. 2018) (Arbitration motion denied in FDCPA litigation involving proofs of claim allegedly violating Rule 3001. "It is nonsensical for the Court to order parties to submit to an arbitrator the task of applying and enforcing a procedural apparatus applicable only before this Court. The question of whether an alleged violation of Rule 3001 occurred, and if so whether any relief is appropriate, is not a question of fact or law for arbitration.").

Jurisdiction

Bankruptcy court lacked jurisdiction to hear debtor's counterclaims. Creditors had obtained judgment against Chapter 7 debtors in Illinois Federal District Court and filed a § 727 complaint. The debtors filed counterclaims asserting civil conspiracy, conversion, and malicious prosecution related to the District Court litigation, and the Court concluded it lacked jurisdiction to hear the private-right, common-law tort counterclaims. Moreover, the debtors were barred by collateral estoppel for those claims that were raised in the prior District Court litigation, and res judicata barred their raising claims that could have been asserted. *Arma Yates, LLC, et al. v. Robertson (In re Robertson),* ___ B.R. ___, 2018 WL 4945726 (Bankr. D. Utah Oct. 10, 2018).

Avoidance

Parents' education tuition payments for adult child were constructively fraudulent but payments for minor child were not. The Chapter 7 trustee sued for recovery of constructively fraudulent transfers made by parents to Oberlin College for the adult children's tuition and other education expenses. For one child, some expenses were paid before she reached 21 and others after that age. Reviewing the developing body of law, the Court concluded that it was "constrained by the language of the Bankruptcy Code and the [New York Debtor and Creditor Law]—those statutes define the terms 'value' and 'fair consideration' to require either the transfer of property or the satisfaction of an antecedent debt in return for an insolvent debtor's payments." For the payments to the college made after these children reached 21-years age, the parents received no such transfers, and those payments were avoidable as constructively fraudulent, assuming the parents were insolvent when the payments were made. As to payments made to the college for one child before she reached 21, those satisfied the parents' obligation to provide a minor child with education, for which reasonably equivalent value was received, and those payments were not avoidable. *Geltzer v. Oberlin College, et al. (In re Sterman),* ___ B.R. ___, 2018 WL 6333588 (Bankr. S.D. N.Y. Dec. 19, 2018).

Claim disallowance did not void first lien under § 506(d). The Chapter 13 debtor had objected to the mortgage claim, based on lack of standing, and the mortgage holder did not respond, resulting in disallowance of the claim. However, disallowance of the claim did not affect validity of mortgage lien. Implicit in the holding of *In re Blendheim,* 803 F.3d 477 (9th Cir. 2015), "is a conclusion that § 506(d) should apply only when a claim disallowance addresses the merits of the underlying debt." Here, the bankruptcy court's disallowance of the claim did not determine the validity of the lien, only that the creditor lacked standing to enforce its claim. *Bank of New York Mellon v. Lane (In re Lane),* 589 B.R. 399 (B.A.P. 9th Cir. 2018).

Property of Estate and Exemptions

Ninth Circuit certified community property question to California Supreme Court. Finding no controlling California precedent, the Circuit Court certified to the State's Supreme Court the question of whether a form of title presumption set forth in the California Evidence Code overcomes the community property presumption in another section of the California Family Code. The issue involved property acquired by the Chapter 7 debtor and his non-debtor wife as joint tenants, and the trustee asserted that the community-property interest was subject to the estate's avoidance. *Brace v. Speier (In re Brace),* 908 F.3d 531 (9th Cir. 2018).

Deceased debtor's interest in joint tenancy was extinguished. Construing Colorado's joint tenancy with right of survivorship, the Tenth Circuit held that the Chapter 7 debtor's and estate's interests in property held in joint tenancy with right of survivorship were extinguished by the debtor's postpetition death. His spouse was not a joint filer. As a result of the death, the surviving spouse owned the entire property, and there was no transfer of property subject to the trustee's avoidance. Also, § 362(h) conferred no power to sell. *Cohen v. Chernushin, et al. (In re Chernushin),* ___ F.3d ___, 2018 WL 6729716 (10th Cir. Dec. 21, 2018).

Debtor unable to amend exemptions to claim increased equity in Washington homestead. The Chapter 7 debtor claimed equity in her home and when the equity increased during the case, she attempted to amend to claim the increased equity, but the trustee objected. Washington law permits exemption of the *lesser* of net value or $125,000. The debtor was limited to exemption of the actual equity at the time of filing the petition. A strong dissent took the position that Ninth Circuit precedent and Rule 1009(a) permitted the debtor to amend to claim exemption in postpetition increased equity value. *Wilson v. Rigby,* 909 F.3d 306 (9th Cir. 2018).

Debtor's attorney sanctioned for bad faith exemption. The Chapter 7 trustee had avoided an unperfected security interest in vehicle, after which the debtor's attorney amended exemptions to claim the full value of the vehicle, notwithstanding the security interest having been voluntary transfer. Under § 522(g)(1) and existing case law in the Circuit, the debtor was unable to claim exemption following the trustee's avoidance. The Bankruptcy Appellate Panel found *Law v. Siegel* inapplicable, because the issue was not disallowance of an exemption that was otherwise allowed by statute. Sanction against the attorney in the amount of trustee's fees and costs was affirmed, and additional fees and costs for the frivolous appeal were awarded. *De Jesus Gomez, al al. v. Stadtmueller (in re De Jesus Gomez),* ___ B.R. ___, 2018 WL 6065609 (B.A.P. 9th Cir. Nov. 20, 2018).

IRA received from marital property settlement not exempt. Construing *Clark v. Rameker,* 134 S.Ct. 2242 (2014), the Eighth Circuit Bankruptcy Appellate Panel held that a debtor's interests in IRA and 401(k) accounts received in marital property settlement were not exempt under § 522(b)(3)(C). The term "retirement funds" refers to money set aside for when an individual ceases work, and that term does not include interests received as a result of marital property division. *Clark* was read as suggesting that exemption is available only to those retirement accounts created by individuals who contribute to those accounts. *Lerbakken v. Sieloff & Assoc. PA (In re Lerbakken),* ___ B.R. ___, 2018 WL _________ (B.A.P. 8th Cir. Oct. 18, 2018).

Trustee's sale of co-owned property. Affirming, the District Court held that the Chapter 7 trustee could sell a single-family residence co-owned by the debtor with his spouse and minor son as tenants in common, when partition was not practicable and benefit of sale outweighed detriment to the co-owners. The elements of § 363(h) were satisfied. *Bell v. McLemore,* ___ F.Supp.3d ___, 2018 WL 5919213 (M.D. Tenn. Nov. 13, 2018).

Debtor had custody of wife's granddaughter for purposes of Tennessee's enhanced homestead exemption. A Tennessee statute provides an enhanced $25,000 homestead exemption to an individual with custody of a minor child, but that statute does not define "custody." The Court looked to other Tennessee law for that definition, and this Chapter 7 debtor and his wife had been appointed by a state court with proper jurisdiction as guardians of the wife's minor grandchild. This appointment included all the rights, duties and responsibilities of one with custody under Tennessee law, and the Court found that the debtor was entitled to the enhanced homestead. *In re Bush,* ___ B.R. ___, 2018 WL 4791087 (Bankr. M.D. Tenn. Oct. 2, 2018).

New Mexico's wage garnishment exemption. Sustaining Chapter 7 trustee's objection, the Court construed New Mexico's exemption for wage garnishment to extend only to those wages or salary due to be paid to the debtor but not to such funds already paid to the debtor by employer. Once paid to the judgment debtor, the payment loses its character as wages for purposes of the garnishment exemption. *In re Johnson,* ___ B.R. ___, 2018 WL 5098786 (Bankr. D. N.M. Oct. 17, 2018).

Debtor did not abandon homestead when separating from husband. Applying Illinois law, when the spouses separated, and the wife moved into leased duplex with her children, she did not abandon the former homestead. She had retained personal property in the former home and remained liable for the mortgage debt, with the property titled in both parties. The rental property did not give the debtor a new homestead, and she was entitled to claim the homestead in the former marital home. *In re Colton,* 591 B.R. 829 (Bankr. C.D. Ill. 2018).

Chapter 7 Issues

Discharge

Taxes for fraudulent returns not dischargeable. Reviewing the two prongs of § 523(a)(1)(C), filling a fraudulent return and attempting to evade or defeat tax obligations, the Court found the Chapter 7 debtor had filed fraudulent returns for two tax years, and § 523(a)(1)(C) contained no time restrictions or limitations period. Moreover, those tax obligations were not dischargeable because the debtor willfully evaded payment. The taxes for 1998 and 1999 were not dischargeable in the 2010 case, nor was the interest imposed on unpaid taxes. However, under § 523(a)(7), any penalties related to events that occurred more than three years before the 2010 Chapter 7 filing would be dischargeable. *Terrell v. Internal Revenue Service (in re Terrell),* ___ B.R. ___, 2018 WL 6616660 (Bankr. W.D. Okla. Dec. 14, 2018).

Home improvement contractor's false representations. The First Circuit Bankruptcy Appellate Panel found that the debtor made false representations to the homeowners concerning renovations to their home. Reviewing the requirements under §

523(a)(2)(A), the BAP cited its prior authority for "three distinct categories of misconduct—false pretenses, false representation or actual fraud—albeit with elements that overlap." The BAP found evidence that the debtor made false representations, including his company's ability to complete renovations within budget and use to be made of deposits. Moreover, "an implied misrepresentation of conduct intended to create a false representation constitutes a false pretense for § 523(a)(2)(A) purposes." There was also enough evidence to pierce the corporate veil of the debtor's company. *Dewitt v. Stewart (In re Stewart),* ___ B.R. ___, 2018 WL 5726990 (B.A.P. 1st Cir. Nov. 1, 2018). *Compare They Might Be, Inc. v. Carter (In re Carter),* ___ B.R. ___, 2018 WL 4945128 (Bankr. M.D. Fla. Oct. 11, 2018) (Rock band failed to prove that debtor acted with intent to deceive for purposes of § 523(a)(2)(A).); s*ee also Kassebaum v. Smith (In re Smith),* 591 B.R. 741 (Bankr. D. Minn. 2018) (Corporate shareholder failed to show that bookkeeper's recordkeeping constituted false representation.); *CoVantage Credit Union v. Stangel (In re Stangel),* ___ B.R. ___, 2018 WL 4945692 (Bankr. E.D. Wis. Oct. 10, 2018) (Credit Union proved actual fraud for debtor's insufficient fund checks made payable to herself and deposited in Credit Union account.).

Willful and malicious injury by sending text messages. Finding a disputed fact issue, summary judgment was denied on the complaint alleging that the event promoter violated § 523(a)(6) by continuing to blast emails to the creditor in violation of the Telephone Consumer Protection Act after the creditor was placed on the "do-not-call" registry. *Walz v. Smith (In re Smith),* ___ B.R. ___, 2018 WL 4846647 (Bankr. N.D. Ga. Oct. 3, 2018). *See also WLC Enterprises, Inc. v. Rylant (In re Rylant),* ___ B.R. ___, 2018 WL 6443989 (Bankr. D. N.M. Dec. 7, 2018) (Breach of contract judgment was nondischargeable under § 523(a)(6), because debtor "concocted a scheme to take Plaintiff's restaurant assets without paying for them." Res judicata did not apply to state court judgment when no determination had been made of defendant's state of mind in breaching contract for payment.); *Greer v. Bruce (In re Bruce),* ___ B.R. ___, 2018 WL 6267093 (Bankr. S.D. Ohio Oct. 18, 2018) (Preclusive effect not given to state court judgment under §§ 523(a)(4) or (6).); *Chuipek v. Gilmore (In re Gilmore),* 590 B.R. 819 (Bankr. N.D. Ill. 2018) (Collateral estoppel effect given to prior state court judgment for purposes of § 523(a)(6).); *Lehigh Valley Hospital v. Dietrich (In re Dietrich),* ___B.R.

___, 2018 WL 6601872 (Bankr. E.D. Pa. Dec. 13, 2018) (Debtor who had consented to treatment in hospital committed willful and malicious injury for purposes of § 523(a)(6) by spending Blue Cross insurance payments rather than pay hospital, which was not a participating provider with Blue Cross. The hospital also proved that the debtor made false representations to the hospital under § 523(a)(2)(A).).

False statements were material but not grounds under § 727(a)(4)(A). The U.S. Trustee's complaint alleged false oath, but although the Court found evidence of false, material statements made by Chapter 7 debtor in schedules and statement of financial affairs, they were not made with fraudulent intent. Rather, false statements were found to be innocent mistake or error, and debtor did not act with reckless disregard for truth. The Court interpreted Sixth Circuit authority, *In re Keeney,* 227 F.3d 679 (6th Cir. 2000), for the required elements of § 727(a)(4)(A). *McDermott v. French (In re French),* ___ B.R. ___, 2018 WL 6016692 (Bankr. E.D. Mich. Nov. 15, 2018). *Compare Wise v. Wise (In re Wise),* 590 B.R. 401 (Bankr. E.D. Mich. 2018) (Pattern of errors and omissions in schedules and statement of financial affairs provided inference of intent to deceive, required for false oath finding.); *Doeling v. Peluso (In re Peluso),* ___ B.R. ___, 2018 WL 5099656 (Bankr. D. N.D. Oct. 18, 2018) (Inaccurate schedules and statement of financial affairs supported false oath denial of discharge under § 727(a)(4)(A).); *Dantzler v. Zulpo (In re Zulpo),* 592 B.R. 231 (Bankr. E.D. Ark. 2018) (Failure to schedule jointly-owned real estate and other nondisclosures supported false oath under § 727(a)(4), and debtors failed to establish justification for lack of reasonable business recordkeeping under § 727(a)(3).).

Revocation of Discharge

Discharge not revoked when unscheduled assets were not property of estate. The United States Trustee's complaint sought revocation of discharge as fraudulently obtained, alleging that the debtor made false oaths by not scheduling luxury watches. Reviewing the burden of proof and statutory elements under § 727(d), the Court found a failure of proof that the watches were owned by the debtor at filing or that false statements were made with fraudulent intent. *Snyder v. Zaligson (In re Zaligson),* 591 B.R. 724 (Bankr. D. Minn. 2018).

Chapter 13 Issues

Confirmation

Bankruptcy court could not sua sponte object to confirmation. Distinguishing between "self-executing" provisions of the Code and those sections that were not "self-executing," and discussing *Espinosa*'s impact on that distinction, District Court held that the bankruptcy court could not sua sponte object to confirmation based on the above-median debtor's calculation of disposable income. Section 1325(b)(1) gives only the trustee and unsecured creditors authority to object to confirmation based on failure to commit projected disposable income to plan payments, and that section is not "self-executing." The Court construed *Espinosa* as placing a duty on bankruptcy courts to object to plans that violate self-executing provisions of the Code, such as §§ 1328(a)(2) and 523(a)(8). "In the absence of guidance from a higher court to the contrary, this Court further holds that objections on the basis on non-self-executing provisions must be made by a party that the Code authorizes to object." Here, the bankruptcy court could not object to confirmation "sua sponte based on the mere fact that it believed Brigg's proposed plan improperly calculated her disposable income" by deducting the IRS Local Standard for mortgage/rental expense when she had less mortgage expense than the Standard. *Briggs v. Johns,* 591 B.R. 664 (W.D. La. 2018).

Trustee's "double-dipping" objection to above-median confirmation denied. The trustee objected to confirmation based on above-median debtor deducting the IRS Local Standard housing deduction when the actual mortgage expense was on a marital residence owned by the debtor's nonfiling spouse, while also claiming the marital adjustment for the spouse's income not regularly paid for the debtor's household expenses. The trustee didn't take positions on splits of authority on either the income or expense issues, rather arguing that the debtor could not "double-dip" by taking both, and the Court found no such 'double-dipping' rule. To make a valid objection, the trustee must take a position that the marital deduction or the housing expense, or both, were wrong. *In re Moss,* 591 B.R. 338 (Bankr. N.D. Ill. 2018).

Lien Modification

Modification of mortgage on mixed-use property. Reviewing the split of authority on whether a Chapter 13 debtor may modify a mortgage on property used for both business and residential purposes and when the use determination is made, the bankruptcy court adopted the filing date as the appropriate time for the determination of use. Using that date, when the property was used both as a residence and as a daycare business, the court considered the legislative history of § 1322(b)(2) as favoring home mortgage creditors, concluding that the mortgage could not be modified when it was used as the residence, notwithstanding use of a part of the property for business. As to mixed use, the opinion identifies three approaches: 1) the "bright-line only" approach, protecting against modification *only* if the property is the debtor's principal residence; 2) the "bright-line includes" approach, which protects against modification If the property *includes* use as the principal residence; and 3) the case-by-case approach, considering factors such as the parties' intention for use of the property. For the determining date, the opinion identifies 1) the petition date; 2) the loan date; and 3) the hybrid approach, which looks to the totality of circumstances at the petition date as well as of the underlying agreement. *In re Lister,* ___ B.R. ___, 2018 WL 6273357 (Bankr. S.D. Ohio Sept. 25, 2018).

Discharge

Direct mortgage payments unpaid by debtor were not "provided for" in plan. The confirmed plan stated that the debtor would directly pay two home mortgages to the credit union, but there was no specification of payment terms or other treatment of those mortgages. At the time of confirmation, the debtor was current on the two debts, but she subsequently defaulted, leading to foreclosure of the second mortgage and the credit union's proceeding to determine that the debtor's personal liability had not been discharged. Discharge had been entered as to all debts "provided for" in the plan, but the Eleventh Circuit concluded that "for a debt to be 'provided for' by a plan under § 1328(a), the plan must make a provision for or stipulate to the debt in the plan. Because Debtor's plan did nothing more than state that the Credit Union's mortgage would be paid outside the plan, it was not 'provided for' and was not discharged." The issue of whether the mortgage debts would have been excluded from discharge as long-term debt under § 1322(b)(5) was not addressed by the Circuit Court as unnecessary. The opinion reviews authority on the meaning of the term "provided for," concluding that it requires the plan to "make a provision for" or "stipulate" to something, and by doing nothing other than stating payment would be made "outside the plan" the plan did not "provide for" the mortgages. This plan left the mortgage debts to be "governed by the preexisting contractual terms, not by any provision of the plan." Moreover, a discharge of the mortgage obligations would violate § 1322(b)(2)'s anti-modification provision. *Dukes v. Suncoast Credit Union,* 909 F.3d 1306 (11th Cir. 2018).

Section 523(a)(8)(A)(ii) does not include "loan." Denying Navient's motion to dismiss debtors' complaint, reviewing the split of authority on whether § 523(a)(8)(A)(ii)'s "educational benefit" included loans, and finding no controlling authority in the Tenth Circuit, the Court concluded that Congress made a distinction between "loan" in § 523(a)(8)(A)(i) and "educational benefit" in § 523(a)(8)(A)(ii). The Court adopted the "trending narrower view of Section 523(a)(8)(A)(ii) espoused in *in re Campbell,* 547 B.R. 49 (Bankr. E.D. N.Y. 2016)." Notwithstanding the split of authority, Navient pursued collection at the risk of violating the discharge injunction; therefore, the debtor stated a valid claim for potential violation and contempt. *McDaniel v. Navient Solutions, LLC (In re McDaniel),* 590 B.R. 537 (Bankr. D. Colo. 2018).

Paying more than original loan balance would be undue hardship. The 59-year old debtor employed in aging and disability services couldn't maintain a minimal living standard without discharge of substantial portion of student loan debt. The Court identified factors included in "minimal standards" in modern American society and found that it would be an undue hardship for the debtor to pay the full loan with accruing interest. If she paid the minimum income-based payment of $203 monthly, with accruing 9% interest, she would be left after 25 more years with $90,000 more debt than original loan. All but the original balance of $16,613.73 was discharged, and the debtor should arrange a monthly payment that would amortize that amount over a reasonable 5 to 10-year term. *Metz v. Navient Education Loan Corp. (In re Metz),* 589 B.R. 750 (Bankr. D. Kan. 2018). *See also Pierson v. Educational Credit Management Corp. (In re Pierson),* ___ B.R. ___, 2018 WL 4849658 (Bankr. N.D. Ohio Oct. 4, 2018)

(*Brunner* test was satisfied, notwithstanding fact that no payments would currently be required under applicable income-driven repayment programs. *Brunner* requires court to determine whether debtor can maintain minimal standard of living if required to repay the student loan debt. The loan would continue to accrue interest, and the Sixth Circuit had previously rejected a *per se* rule that participation in income-driven repayment programs was required by the *Brunner* test. The debtor demonstrated good faith by making some payments on the loans, and his disability would likely persist, preventing significant improvement in his financial circumstances.).

Dismissal and Conversion

On case dismissal, funds held by trustee returned to debtor, rather than paid to levying child support creditor. Construing § 1326(a)(2)'s plain language, the Fourth Circuit affirmed holdings that upon dismissal of a Chapter 13 case in which the plan had not been confirmed, the Code required the trustee to return postpetition payments to the debtor. The State Department of Social Services, Division of Child Support, had levied under applicable state law against the trustee, seeking to obtain $3,000 paid by the debtor to the trustee pending confirmation, but the Circuit held that the Bankruptcy Code preempted the state code. "Any state authority under Virginia Code § 63-2-1929 for levy on the Trustee directly conflicts with the federal statutory mandate in § 1326(a)(2) that the Trustee refund the post-petition payments to Webb." *Commonwealth of Virginia v. Webb, et al.,* 908 F.3d 941 (4th Cir. 2018).

Denial of dismissal not final order for appeal. Applying *In re Jackson Masonry, LLC,* 906 F.3d 494 (6th Cir. 2018), Bankruptcy Appellate Panel held that an order denying a creditor's motion to dismiss the Chapter 13 case was not final for purposes of giving the creditors a right to appeal under 28 U.S.C. § 158(a). Leave to appeal a non-final order was also denied. *In re Lane,* 591 B.R. 298 (B.A.P. 6th Cir. 2018).

Nondisclosures justified conversion. Debtors' nondisclosures of income and employment, as well as failure to correct inaccuracies in schedules, supported findings of cause for conversion to Chapter 7. *Dietlein v. Dietlein (In re Dietlein),* 592 B.R. 864 (D. Nev. 2018).

Claims

Disallowance of mortgage claim. Reviewing prima facie validity of claim and its rebuttal under Rule 3001(f), the debtor stated a plausible basis to disallow claim by alleging claimant lacked possession of note and was not holder with enforcement rights. Application of the *Rooker-Feldman* Doctrine was analyzed, as well as res judicata effect of foreclosure. Debtor stated claim for lender's violation of Pennsylvania Unfair Trade Practices and Consumer Protection Law as well as the Fair Debt Collection Practices Act. *Faulkner v. M & T Bank (in re Faulkner),* ___ B.R. ___, 2018 WL 4810673 (Bankr. E.D. Pa. Oct. 3, 2018). *See also Moore v. Wells Fargo Bank, N.A.,* 908 F.3d 1050 (7th Cir. 2018) (Mortgagor's claim for violation of RESPA was barred by *Rooker-Feldman* Doctrine after foreclosure.); *In re McGough,* ___ B.R. ___, 2018 WL 5734285 (Bankr. W.D. Wis. Oct. 6, 2018) (Deciding priority of competing mortgage liens, argument of equitable subrogation was one to be made by lender rather than debtor.); *In re Leblanc,* ___ B.R. ___, 2018 WL 5733603 (Bankr. E.D. La. Oct. 30, 2018) (Discussing annulment of erroneous mortgage cancellation.).

Disallowance of claim did not result in discharge of student loan. In a prior Chapter 13 case the student loan creditor's proof of claim was disallowed, based on debtor's objection and failure of creditor's response, but that did not result in discharge of student loan debt. There was no determination of undue hardship under § 523(a)(8). In the current case, the debtor's objection to claim was overruled, holding that nonprofit corporation holding assignment of consolidated student loans had nondischargeable debt, absent showing of undue hardship. The plan did not provide for payments on the debt, which would survive discharge. *Ray v. Educational Credit Management Corp. (in re Ray),* 591 B.R. 834 (Bankr. W.D. Wis. 2018).

Debtor's Attorney

Suspension of firm upheld. The District court affirmed the 90-day suspension of Law Solutions Chicago, LLC (d/b/a UpRight Law, LLC), with the record supporting the bankruptcy court's findings that the firm failed to adequately represent the debtor in a "simple" consumer case. Disgorgement of fees was appropriate under § 526(c)(1) when the firm failed to provide the debtor with a properly executed written contract. The suspension and sanctions were narrowly tailored as required by *In re First City Bancorporation of Texas, Inc.,* 282 F.3d 864 (5th Cir. 2002). *Law Solutions Chicago, LLC v. United States Trustee,* 592 B.R. 624 (W.D. La. 2018). *See also Fitzpatrick v. Law Solutions Chicago, LLC,* 584 B.R. 203 (E.D. Tenn. 2018) (Dismissing in part complaints filed by trustee, for failure to show loss when fees had been disgorged by defendants.); *United States Trustee v. Law Solutions Chicago, LLC,* 2018 WL 5892374 (W.D. Mo. Nov. 9, 2018) (Denying defendants' motion to withdraw reference, and adopting bankruptcy court's report and recommendation.).

Chapter 13 no-look fee subject to Hawai'i's general excise tax. Construing the State's excise tax, the Chapter 13 debtor's attorney could not collect the required excise tax in addition to the agreed upon no-look fee. The district's Rights and Responsibilities Agreement between debtor and attorney did not contain provision for the excise tax to be passed on the client or the bankruptcy estate. *In re Anderson,* ___ B.R. ___, 2018 WL 6445718 (Bankr. D. Hawai'i Dec. 7, 2018).

Chapter 13 debtors not required to seek approval to employ special counsel. The Chapter 13 debtors moved to employ special counsel for representation in state-court litigation, but § 327(e) did not apply to Chapter 13 debtors when no request was being made to pay the special counsel from estate funds. *In re Blume,* 591 B.R. 675 (Bankr. E.D. Mich. 2018).

Student Loan Litigation

District Court denies Navient's motion to dismiss Pennsylvania's complaint. The Commonwealth of Pennsylvania sued Navient Corporation and Navient Solutions, LLC, student loan originators, marketers, servicers and collectors for various actions allegedly harming student loan borrowers in the Commonwealth and nationwide, and Navient moved to dismiss under Fed. R. Civ. P. 12(b)(6). The complaint was like one filed against Navient in the same court by Consumer Finance Protection Bureau, in which a similar motion to dismiss was filed and denied, as it was in this complaint. *Pennsylvania v. Navient Corp., et al.,* ___ F.Supp.3d ___, 2018 WL 6606218 (M.D. Pa. Dec. 17, 2018).

CONSUMER LAW UPDATE

Cases reported from July 1, 2018 through September 20, 2018

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© William Houston Brown
United States Bankruptcy Judge Retired
williamhoustonbr@comcast.net

Abstention

Permissive abstention in removed divorce action. The Chapter 7 debtor removed a state court divorce action, and the wife moved to remand, also seeking relief from the automatic stay to let the state court determine equitable distribution. The court concluded that mandatory abstention was not required, because the wife sought not only remand but stay relief; however, permissive abstention was appropriate because state law issues were clearly predominate. The wife was given stay relief to allow the state court to determine divorce, as well as issues of equitable distribution, alimony, attorney's fees, costs and sanctions. *In re Topfer,* 587 B.R. 622 (Bankr. M.D. Pa. 2018).

Arbitration

Alleged violation of discharge injunction is core and arbitration denied. In two opinions, the court denied the creditors' motions to compel arbitration. The complaints were putative class actions involving dischargeability of student loans and alleged violations of the discharge injunction, and the court concluded that each complaint was a core proceeding and that "arbitration would present a severe and inherent conflict with the Bankruptcy Code, and additionally, that it would necessarily jeopardize the objectives of the Bankruptcy Code." *In re Golden,* 587 B.R. 414 (Bankr. E.D. N.Y. 2018); *In re Homaidan,* 587 B.R. 428 (Bankr. E.D. N.Y. 2018). *See also In re Gianasmidis,* ___ F.Supp.2d___, 2018 WL 3720053 (D. Mass. Aug. 3, 2018) (Massachusetts prejudgment interest statute did not apply to allow pre-arbitration award of interest, but oversecured creditors were entitled to postpetition, or pendency, interest.).

Automatic Stay

Sovereign immunity waived for purposes of emotional distress damages. IRS had violated the automatic stay by sending collection notices after the filing of a Chapter 13 case, and the Ninth Circuit considered the interplay between §§ 106(a) and 362(k), holding that the waiver of sovereign immunity found in § 106(a)(3) was broad enough to include an award of emotional distress damages for a willful stay violation. Such damages are not punitive but rather are monetary damages within the scope of the statute's waiver. The opinion noted disagreement with the First Circuit's *In re Rivera Torres,* 432 F.3d 20 (1st Cir. 2005), where that Circuit had adopted a "temporal approach" to waiver, considering whether emotional distress damages were understood by Congress to be available under § 106(a)(1) at the time of the 1994 amendments. The Ninth Circuit rejected that temporal approach for several reasons, including that § 106(a)'s waiver was unambiguous, applying a plain meaning to the statute. *Hunsaker v. United States,* ___ F.3d ___, 2018 WL 4122882 (9th Cir. Aug. 30, 2018).

Suit to collect unpaid Chapter 7 fees violated stay once case was converted to Chapter 13. Distinguishing stay violations in Chapter 7 and 13, the Chapter 7 debtor's attorney did not violate the stay in the Chapter 7 case by filing state court action to collect fees for postpetition services, but upon conversion of the case to Chapter 13, the unpaid fees were treated as prepetition under § 348(d), and the fee claim was subject to the automatic stay. The attorney willfully violated the Chapter 13 stay, for which actual damages of attorney fees and costs were imposed. *In re Ludkowski,* 587 B.R. 330 (Bankr. N.D. Ill. 2018).

State tax authority did not violate stay by levy on trustee for funds owed to debtor's attorney. New Mexico levied on the Chapter 13 trustee to collect taxes owed by a debtor's attorney, and the confirmed plan provided for the trustee to pay the debtor's attorney fee. The tax levy was broad enough to cover the fee to be disbursed by the trustee, who was holding funds that were not estate property. The levy did not violate the automatic stay because it was not against property of the bankruptcy estate, with the opinion reviewing split of authority on the effect of vesting in the debtor upon confirmation. *In re Gonzales,* 587 B.R. 363 (Bankr. D. N.M. 2018).

Avoidance

Chapter 13 debtor could use strong-arm avoidance power without first seeking derivative standing. The state court foreclosure judgment triggered the *Rooker-Feldman* Doctrine, preventing the bankruptcy court from deciding that the mortgage, which had been unrecorded prior to the Chapter 13 filing, had never attached as a lien, but the Sixth Circuit found that the debtor's other theory of avoidance under § 544(a)'s strong-arm power was not barred. This avoidance claim did not violate *Rooker-*

Feldman "because it does not invite the bankruptcy court to review the state court's handiwork." The state court judgment only determined that the mortgage debt was secured by a "certain mortgage," with a lien attaching, but no findings were made by the state court of perfection. In Kentucky, "a mortgage in general need not be perfected to be valid between mortgagor and mortgagee." When the Chapter 13 case was filed, the potential avoidance action under § 544(a) became property of the estate, and the trustee consented to the debtor having derivative standing to file the avoidance complaint. Citing its prior precedent, the Circuit panel rejected the defendant's argument that the debtor lacked derivative standing when she filed the complaint because the bankruptcy court only granted her oral motion for such standing seven months after the complaint's filing; "such a bright-line rule would be inconsistent with the equitable nature of derivative standing. As we have previously recognized, 'the ability to confer derivative standing. . .is a straightforward application of bankruptcy courts' equitable powers.'" Remand was ordered for determination of the § 544(a) avoidance. *In re Isaacs,* 895 F.3d 904 (6th Cir. 2018).

Tax foreclosure could be fraudulent transfer. The holding of *BFP v. Resolution Trust Corp.,* 511 U.S. 531 (1994), was limited to mortgage foreclosures, and the district court held that other types of forced sales, including tax lien foreclosures, were not subject to *BFP.* Without ruling on the merits, the court found the Chapter 13 debtors' adversary proceeding stated a valid claim, with the amount of the tax lien not necessarily reflecting the property's value. The "County is not entitled to the conclusive presumption of having provided reasonably equivalent value for the foreclosure." *Hampton v. Ontario County, N.Y.,* 2018 WL 3454688 (W.D. N.Y. July 18, 2018).

Judicial Estoppel

Failure to amend schedules judicially estopped debtor. The Chapter 13 debtor had acquired an equitable interest in his son's real property, and the schedules listed an "equity sharing agreement in son's house," but the property address and mortgage creditor were not listed. The equity sharing agreement by its terms expired and thereafter, the debtor moved into the son's house and obtained a quitclaim deed. The mortgage lender was not notified of the transfer and the debtor did not amend schedules to disclose the transfer. After default on the mortgage, the lender initiated foreclosure. The debtor and his son filed suit, alleging wrongful foreclosure and violation of the automatic stay. The Fifth Circuit affirmed the district court's application of judicial estoppel, stating that the Chapter 13 debtor had a continuing duty to amend schedules to disclose the quitclaim deed and putative claims against the lender. *Fornesa v. Fifth Third Mortgage Co.,* 897 F.3d 624 (5th Cir. 2018).

Exemptions and Property of Estate

Avoiding judicial lien on debtor's one-half interest. The Tenth Circuit agreed with the First, Third and Eleventh Circuits and the Ninth Circuit Bankruptcy Appellate Panel on the method for calculating a debtor's avoidance of a judicial lien when the debtor owned a one-half interest in homestead property subject to the lien. "Based on the plain language of § 522(f) and the structure of the Bankruptcy Code as a whole, we conclude that the impairment calculation must use the value of other liens on the home corresponding to the debtor's percentage of ownership, rather than the full amount of the liens." The debtor's ex-wife owned one-half interest in the home and she was not a debtor in the Chapter 13 case, which was then converted to Chapter 7. The Tenth Circuit had granted direct appeal from the bankruptcy court's interpretation that § 522(f) permitted avoidance of the disputed lien entirely. The Circuit construed the statute in light of the Supreme Court's emphasis on the "debtor's interest" in property in *Farrey v. Sanderfoot,* 500 U.S. 291 (1991), and "property" in § 522(f)(2)(A)(ii) refers to the "debtor's interest, rather than the undivided whole parcel." Under the debtor's approach, "judicial liens could be avoided in excess of the debtor's homestead exemption," and "interpreting the term 'property' to refer to Taylor's half interest is also consistent with the Bankruptcy Code as a whole," because "property" refers to the "property of the debtor." Quoting the Third Circuit's opinion, *In re Miller,* 299 F.3d 183, 186 (3d Cir. 2002), "the correct approach is to view the debtor as owning one half of the property to which one half of the mortgage debt is thus attributable and therefore to regard 'property' in subsection (ii) to mean the debtor's interest in the property and then to allocate the lien among the interests in the property proportionately." *William F. Sandoval Trust v. Taylor (In re Taylor),* ___ F.3d ___, 2018 WL 3849032 (10th Cir. Aug. 14, 2018).

Proceeds that would have lost exempt status by failure to reinvest homestead sale proceeds nevertheless goes to debtors on voluntary dismissal of Chapter 13. The Fifth Circuit referred to *Harris v. Viegelahn,* 135 S.Ct. 1829 (2015), to hold that § 349(b) required that upon voluntary dismissal of the case, the debtors were to be paid the proceeds of the postpetition sale of their homestead, even though they otherwise had lost the exempt status of those proceeds by failure to reinvest the proceeds in another home under Texas law. Under *Harris* and other Fifth Circuit precedent, "§ 349(b)'s purpose is to undo the bankruptcy case as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case." Moreover, the trustee had no authority to distribute property to creditors upon dismissal. *Viegelahn v. Lopez*, 897 F.3d 663 (5th Cir. 2018).

Section 522(h) and setoff by Social Security Administration. Prior to filing bankruptcy, the debtor had received an overpayment from the Social Security Administration (SSA) and subsequently, the debtor was awarded disability benefits, with the accumulated benefits set off by the prior overpayment. The debtor used § 522(h) to initiate a recovery of the setoff under § 553(b). As stated by the Seventh Circuit, "the SSA had a pre-petition claim against Berg for return of its earlier overpayment; SSA owed a pre-petition debt to Berg because of the award of back-benefits; the obligations were mutual; and both the claim and the debt were valid and enforceable." The issue was whether SSA had improved its position within the 90 days prior to the bankruptcy filing, and the Circuit affirmed on direct appeal a determination that the improved position was $2,015, which was to be returned to the debtor. The underlying issue was when the debtor's Social Security benefits began to accrue, with the debtor arguing that the benefits accrued only when the SSA made its determination of back benefits, which was within the 90 days pre-petition, and under this theory the SSA would have improved its position by the entire setoff of $19,400. The Circuit agreed with the SSA that the benefits began to accrue monthly when the debtor became disabled, even though the SSA did not make its disability determination until later. Under that theory, the SSA improved its position within the 90 days only by $2,015. The Seventh Circuit agreed with the Third Circuit's *Lee v. Schweiker,* 739 F.2d 870 (3d Cir. 1984), concluding that "understanding of Social Security benefits as accruing as soon as the recipient survives the month and is lawfully entitled to them is consistent with the Bankruptcy Code's concepts of 'debt' and 'claim' as they are used in section 553(b)(2)." *Berg v. Social Security Administration,* ___ F.3d ___, 2018 WL 3947123 (7th Cir. Aug. 17, 2018).

Bankruptcy courts lack authority to deny exemption on ground not found in Bankruptcy Code, including bad faith. The Eighth Circuit Bankruptcy Appellate panel, in an appeal by Chapter 7 trustee, held that under federal law bankruptcy courts lacked any authority to deny a debtor's exemption unless grounds existed in the bankruptcy code. The debtor had not disclosed assets in the original schedules, and the trustee objected to amended schedule of exemptions as being in bad faith and prejudicial to creditors. Prior to *Law v. Siegel,* it "had been the law in the Eighth Circuit that a bankruptcy court may consider a debtor's bad faith and any prejudice to the debtor's creditors in determining whether to allow the debtor to amend his claim of exemptions," but that authority had been abrogated by *Law v. Siegel.* Although perhaps dicta, the Supreme Court's opinion was found to be clear that "federal law provides no authority for bankruptcy courts to deny an exemption on a ground not specified in the Code," quoting *Law v. Siegel,* 571 U.S. at 425. An exemption under state law might be governed by a different rule. *In re Belew,* ___ B.R.. ___, 2018 WL 4231821 (B.A.P. 8th Cir. Sept. 6, 2018).

Exemption in tax refund prevented IRS setoff. The Chapter 7 debtors claimed exemption in $3,208 tax refund under state law, and the IRS asserted that the exemption was subject to its setoff right. The opinion reviews the split of authority on the interplay between setoff and exemption, and the district court concluded that the bankruptcy court had authority to disallow setoff on the basis that § 522 superseded § 553, and there was no abuse of discretion nor misapplication of law. The debtors' overpayment of taxes for one year became property of the bankruptcy estate and IRS did not timely object to the debtors' claim for exemption. The district court adopted "the majority position that interpreting § 522 to supersede § 553 avoids nullifying either provision in its entirety," and "the Court finds that prioritizing § 522 over § 553 best supports the fundamental goals of the Bankruptcy Code." *United States v. Copley,* ___ B.R. ___, 2018 WL 4326810 (E.D. Va. Sept. 9, 2018).

Debtors retained homestead after trustee's forced sale. The Washington homestead statute required debtors to reinvest proceeds of a sale within one year, but that requirement only applied to a voluntary sale by the debtors. When the homestead was sold by the Chapter 7 trustee, it was in the nature of a forced sale, and the statute provided an exception from the timely reinvestment for execution and forced sales. The debtors were entitled to receive their homestead exemption from the sale proceeds. *In re Good,* ___ B.R. ___, 2018 WL 4057236 (Bankr. W.D. Wash. Aug. 24, 2018).

Discharge

Debtor had inadequate notice of new claim for discharge denial. The plaintiff creditor's request to amend its pleadings to add a new claim for denial of discharge for failure to obey a lawful order of the court was first made two months after trial. The debtor was not put on notice prior to the trial and was prejudiced by this late addition of the new claim. The opinion reviews requirements under Fed. R. Civ. P. 15(b)(2)**.** *In re Fustolo,* 896 F.3d 76 (1st Cir. 2018).

Collateral estoppel under federal common law. In a Chapter 7 case, the City of Chicago had obtained prepetition judgment in district court against the future debtor for violations of the False Claims Act, and that judgment was given collateral estoppel effect under the federal common law, with the court discussing the necessary factors for application of that doctrine. One of the elements was that the party against whom estoppel is invoked must have been fully represented in the prior action, but the court rejected the debtor's argument that he was not properly represented. Alleged negligence of the prior attorney was not a factor in whether to apply collateral estoppel. *In re Spielman,* ___ B.R. ___, 2018 WL 3740505 (Bankr. N.D. Ill. Aug. 6, 2018).

Three-year lookback tolling did not apply to § 507(a)(8)(A)(i). "Each subsection of § 507(a)(8)(A) is an independent ground for declaring an income tax obligation non-dischargeable," and the parties agreed that only subsection (i) was in dispute in this case. When debtors filed their Chapter 7 case, more than three years had passed since their 2008 tax return was due after extension granted by IRS, but IRS argued that the three-year period was tolled while the debtors were in a prior Chapter 11 case that had been dismissed. The court found that subsection (i) does not contain a tolling provision as is found in subsection (ii). Moreover, when *Young v. United States,* 535 U.S. 43 (2002), was decided, "no subsection of § 507(a)(8)(A) contained a tolling provision," and the amendment to the Code in 2005 imposed tolling for subsection (ii) but not for subsections (i) and (iii), which "is a strong indication that those subsections are not to be tolled. Further, because Congress was presumably aware of the holding in *Young,* this Court must assume that Congress's decision to add a tolling provision for § 507(a)(8)(A)(ii) and not for (i) or (iii) was intentionally meant by Congress to overrule the holding in *Young."* The opinion acknowledges that this result "seems to create the very loophole that the holding in *Young* was meant to fill," but solving that policy issue is one for Congress, with the court applying the statute as written. *In re Clothier,* ___ B.R. ___, 2018 WL 3869268 (Bankr. W.D. Tenn. Aug. 13, 2018).

Pleading requirements for fraud. The Fifth Circuit held that Fed. R. Civ. P. 9(b) and Bankruptcy Rule 7009 require heightened pleading requirements when a complaint alleges fraud under § 523(a)(2)(A). *In re Lindsey*, ___ Fed.Appx ___, 2018 WL 3409995 (5th Cir. 2018).

Resignation from job did not establish undue hardship. When the debtor resigned six months before filing Chapter 7 from bank manager position to escape job stress and spend more time with child, the bankruptcy court did not err in finding a lack of proof that her present financial situation was expected to be long-term. The bankruptcy court also properly applied Eighth Circuit authority and considered whether the debtor had sufficient ability to earn enough to make payments under various Student Loan Programs. *In re Kemp,* ___ B.R. ___, 2018 WL 4039982 (B.A.P. 8th Cir. Aug. 24, 2018).

Status as parolee did not establish undue hardship. In a pro se complaint, the Chapter 7 debtor contended that he would be on parole throughout the period of repayment of student loan, but the terms of his parole did not establish anything concerning current income, employment prospects or other required elements to satisfy the *Brunner* test. The debtor argued that the totality-of-circumstances test should have been applied, but the Bankruptcy Appellate Panel noted that it was bound by the Sixth

Circuit's adoption of the *Brunner* test. *In re Chenault,* 586 B.R. 414 (B.A.P. 6th Cir. 2018). *See also In re Reagan,* 587 B.R. 296 (Bankr. W.D. Pa. 2018) (Denying creditor's summary judgment motion, mere fact that debtor had entered into prepetition income-based repayment plan with current zero monthly payments did not mean debtor would be unable to establish first prong of *Brunner* test.).

Omissions were material but U.S. Trustee failed to prove intention to deceive. The Chapter 7 debtor omitted wedding set and diamond ring, later appraised at approximately $50,000, but the debtor amended schedules after § 341 meeting. Although those omissions satisfied the materiality element of a false oath under § 727(a)(4)(A), the court found that the debtor was credible in testimony and the U.S. Trustee did not establish that the debtor omitted the jewelry with intent to deceive or with reckless disregard for the truth. *In re Garcia,* 586 B.R. 909 (Bankr. N.D. Ill. 2018). *Compare In re Sirico,* ___ B.R. ___, 2018 WL 4378653 (Bankr. M.D. La. Sept. 12, 2018) (Trustee established grounds for denial of discharge under § 727(a)(4) for false oaths and omission from statement of financial affairs by failing to disclose sale of residence that netted debtors over one million dollars.).

Chapter 7 Issues

Means Test

Debtors could deduct contractually scheduled secured payments, regardless of whether collateral would be retained. Denying credit union's motion to dismiss case for abuse, debtors were not required to retain collateral in order to deduct contractually scheduled payments on secured debt for purposes of § 707(b)(2)(A)(iii), here a second mortgage that the debtors did not intend to continue paying. Discussing the split of authority, the court construed the statute as plainly "only requir[ing] that the creditor be a 'secured creditor' and that amounts be 'scheduled as contractually due' within" each month of the sixty months following the petition filing. However, because the credit union's second mortgage was wholly unsecured, contractual payments to it could not deducted; the credit union was not a secured creditor for purposes of the means test.

Even though these payments were not deductible, the debtors were left with monthly disposable income below the threshold for presumptive abuse. Moreover, the credit union failed to establish bad faith or abuse under the totality-of-circumstances test. *In re Plichta,* ___ B.R. ___, 2018 WL 4223440 (Bankr. N.D. Ill. Sept. 5, 2018).

Discharge Injunction

See denial of arbitration motions in cases involving alleged discharge injunction violations under Arbitration above.

Revocation of Discharge

Failure to turn over tax refunds supported revocation of discharge. Affirming, the Bankruptcy Appellate Panel found no error in revocation of discharge under § 727(d)(2) when the Chapter 7 debtor knowingly and fraudulently failed to turn over income tax refunds received postpetition. *In re Thiel,* 587 B.R. 92 (B.A.P. 8th Cir. 2018).

Conversion

Abuse-of-discretion standard applied to denial of motion to convert Chapter 7 to 11. Debtors filed Chapter 7 for purpose of preventing foreclosure sale of property, and when trustee reached compromise agreement with judgment creditor the debtors moved to convert the case to Chapter 11, but the bankruptcy court denied the motion. In a matter of first impression, the Eleventh Circuit applied the abuse-of-discretion standard to the bankruptcy court's denial of a motion to convert under § 706(a). Cause existed for the bankruptcy court to deny the conversion, and there was no abuse of discretion. *In re Daughtrey,* 896 F.3d 1255 (11th Cir. 2018).

Reopening Case

Debtor's motion to reopen case to file financial management course certificate was denied. Debtor's motion to reopen case did not allege any reason or excuse why the debtor had not timely filed a certificate of completion of the financial management course, when the case had been closed over five years. *In re Kessler,* ___ B.R. ___, 2018 WL 4182111 (Bankr. E.D. Mich. July 18, 2018). *See also In re Judson,* 586 B.R.

771 (Bankr. C.D. Cal. 2018) (Cause did not exist to reopen case to allow debtors to file reaffirmation agreement.).

Chapter 13 Issues

Eligibility

Student loan debt exceeding debt limit made debtor ineligible. Reversing the bankruptcy court at 578 B.R. 414, the district court concluded that § 109(e)'s debt limitation was a "gateway" into Chapter 13 for those who are eligible, and that section's lack of an "internal enforcement provision" left § 1307(c)'s dismissal or conversion as the appropriate remedies for ineligibility. The bankruptcy court had concluded that neither § 109(e) nor § 1307(c) expressly required dismissal when educational debt alone exceeded the unsecured debt limit, but the district court concluded that § 109(e) "plainly bars Debtor from proceeding under Chapter 13, and under § 1307(c) his case must either be dismissed or converted." Expressing sympathy for the debtor with a large educational debt, the court noted that Congress alone could create an exception to § 109(e). *In re Pratola,* ___ B.R. ___, 2018 WL 4181498 (N.D. Ill. Aug. 31, 2018).

Disposable Income

Plan retaining income tax refunds not confirmed. Concluding that future income tax refunds were part of the debtor's projected disposable income that must be devoted to the payment of unsecured creditors in the presence of an objection to confirmation, the plan that provided for refunds to be retained by the debtor could not be confirmed over the trustee's objection. The regular practice of the court was to require tax refunds to be turned over to the trustee unless the debtor showed a specific need for the refund. Moreover, the retention of tax refunds by the debtor was an indication of lack of good faith under § 1325(a)(3). *Matter of Stacks,* ___ B.R. ___, 2018 WL 3954187 (Bankr. N.D. Ga. Aug. 15, 2018).

Plan

Debtor's proposed plan contained twenty-three nonstandard provisions. The Northern and Southern Districts of Mississippi had adopted a form plan under Bankruptcy Rule 3015.1, and that form included a final paragraph for nonstandard provisions. Rather than use that form, the attorney for debtor filed a plan containing the district's standard provisions but also including twenty-three nonstandard provisions. The proposed nonstandard provisions improperly attempted to change the Mississippi form plan, and the court made a distinction between the debtor's exclusive right to file a plan and the court's authority to determine the form of the plan. The nonstandard provisions did not provide sufficient notice to affected creditors, and some of the nonstandard provisions were unnecessary restatements of applicable rules, or were in conflict with the law and applicable rules, while others requested advisory opinions from the court. The plan was not confirmable. *In re Parkman,* ___ B.R. ___, 2018 WL 4091804 (Bankr. S.D. Miss. Aug. 13, 2018).

Equal Monthly Payments

Plan proposing delay in equal monthly payments while attorney fees were paid was not confirmed. The proposed plan provided maintenance of regular mortgage payments, stepping up the monthly payments to cure the prepetition arrearage after the debtor's attorney fees were paid in full. The opinion reviews the lines of authority on whether a plan, absent the secured creditor's consent, may provide for a "two-step" arrangement of paying attorney fees prior to initiating equal monthly payments on secured claims. Section 1325(a)(5)(B)'s requirement for equal monthly payments applies to both cure and maintenance of secured claims. A plan may provide for payment of the debtor's attorney fees concurrently with the secured claim, but to pay the fees before making equal monthly secured payments would require consent of the secured creditor. *In re Micell,* 587 B.R. 492 (Bankr. N.D. Ill. 2018).

Valuation

Valuation of manufactured home. The Fifth Circuit applied *Associates Commercial Corp. v. Rash,* 520 U.S. 953 (1997), and § 506(a), to hold that when the debtor retained a manufactured home the valuation would not include delivery and setup costs, because those were not services that the debtor would receive as a result of retention.

These were not costs of "sales or marketing," but rather were additional costs such as service agreements. *21st Mortgage Corp. v. Glenn (In re Glenn),* ___ F.3d ____, 2018 WL 3846202 (5th Cir. Aug. 13, 2018).

Wholly Unsecured Claims

Discharge of in personam liability in prior Chapter 7 and avoidance of unsecured junior lien did not compel disallowance of unsecured claim. In analysis of the effects of lien avoidance, the court concluded that the debtor's prior Chapter 7 discharge removed the debtor's in personam liability but did not eliminate an unsecured claim in the subsequent Chapter 13 case. If no unsecured claim were left after the prior discharge, "the debtor would be ineligible to use § 1322(b)(2) to avoid the lien. Therefore, lien avoidance is only statutorily permissible if § 506(a) is interpreted as 'creating' an unsecured claim for the purposes of Chapter 13 bankruptcy." *In re Washington,* 587 B.R. 349 (Bankr. C.D. Cal. 2018).

Interest not required on unsecured claims. The trustee objected to confirmation, arguing that § 1325(b)(1) required either payment of all projected disposable income or payment of interest on unsecured claims in order to provide those claims present value. The debtors argued that the Code only required payment of unsecured claims in full. Reviewing the split of authority, the court agreed "that the placement of the phrase 'as of the effective date of the plan' is the key to interpreting the statute." Placement of the phrase at the end of the introductory § 1325(b)(1) indicates "Congress intended that it apply to both subsections (A) and (B)," but the only interpretation of the phrase "as applied to both subsections (A) and (B), is the date as to which the court is to determine whether either (A) or (B) is applicable and satisfies a trustee's objection." This plan satisfied § 1325(b)(1) by its 100% payment of unsecured claims without interest. *In re McKinney,* ___ B.R.___, 2018 WL 4378655 (Bankr. S.D. Ind. Sept. 13, 2018).

Turnover of Cars

City must return impounded car. In another opinion from Chicago involving the City's impounding of cars for traffic violations and refusal to return them to Chapter 13 debtors, the City argued that §§ 362(b)(3) and (4) protected its refusal. The Court construed § 362(b)(3) in light of its reference to § 546(b)(1)(B) as intended to be an exception for the purpose of allowing filing of a continuation statement when a security interest was subject to lapse or to permit perfection of a lien that was not perfected at time of bankruptcy filing, and that exception did not apply to the City's retention of possession. Section 362(b)(4) did not apply because the City's action was intended to enforce a money judgment. *In re Peake,* ___ B.R. ___, 2018 WL 3946169 (Bankr. N.D. Ill. Aug. 16, 2018). *See also In re Shannon,* ___ B.R. ___, 2018 WL 4293239 (Bankr. N.D. Ill. Sept. 7, 2018) (Neither §§ 362(b)(3) nor (b)(4) applies and the City is required by the automatic stay to return the car to the debtors. Moreover, the City is bound by terms of the confirmed plan, which provided for payment of the City's unsecured claim, when the City filed an unsecured proof of claim and did not object to confirmation. The City had refused to turn over the car, and it had filed an amended proof of claim asserting secured status.).

Postpetititon Debt

Above-median debtors granted approval to incur debt for child's college expense. The confirmed plan provided that debtors could not incur new debt exceeding $500 without notice to the trustee and court approval. Although expressing concern that the debtors were making a poor economic decision, approval was given to enter into a PLUS loan to partially fund their daughter's college education, when the loan payments would not begin until the debtors had completed plan payments, and the plan would pay 100% of unsecured claims. Determination of approval for postpetition debt is made on case-by-case facts and circumstances. *In re Nacci,* 586 B.R. 733 (Bankr. N.D. Ohio 2018).

Discharge in Chapter 13

Direct payments on mortgage were payments under the plan. The confirmed plan provided for payments to the trustee to cure arrearage, while the debtors were to make direct payment on the ongoing mortgage, but the debtors defaulted on those direct payments. Discharge had been entered after the trustee filed notice of cure of arrearage, but the trustee subsequently filed a complaint to revoke discharge. The court did not revoke the discharge, because the trustee had been advised by the mortgage creditor of default prior to entry of discharge. However, the court agreed with the majority view that direct payments from the debtors were payments under the plan for purposes of § 1328(a). *In re Finley,* ___ B.R. ___, 2018 WL 4172599 (Bankr. S.D. Ill. Aug. 28, 2018).

Section 523(a)(4) exception from discharge. Noting that § 523(a)(6)'s willful and malicious injury exception does not apply in Chapter 13 plan-completion discharge, but that § 523(a)(4)'s exception does apply, the latter covered the state court judgment for the debtor's sending of harassing text messages. With "little case law construing § 523(a)(4)," the court found the statute's "willful *or* malicious" requirement satisfied by the facts showing a subjective motive to injure the plaintiffs. The state court judgment satisfied the statute's requirement for "damages awarded in a civil action." *In re Ang,* ___ B.R. ___, 2018 WL 3965208 (Bankr. S.D. Cal. Aug. 16, 2018).

Section 523(a)(16) not included in § 1328(a). The Ninth Circuit noted that the exceptions from discharge under section 1328(a) do not include section 523(a)(16), and the Court held that the debtor's in personam obligation on condominium association fees that accrued after the case filing were prepetition debts, which were created when she took title to the property. As prepetition debt, the obligation was discharged. The Court agreed with the Seventh Circuit's reasoning in a Chapter 7 case, *Matter of Rosteck,* 899 F.2d 694 (7th Cir. 1990), that such association obligations were unmatured contingent debt that arose prepetition and that merely matured when the assessments became due postpetition. The Court acknowledged that a contrary view was taken in the Fourth Circuit's *In re Rosenfeld,* 23 F.3d 833 (4th Cir. 1994), where that Court held that association assessments ran with the land, arising each month from the debtor's postpetition ownership of the property. Under that rationale, in a Chapter 7 case, the postpetition assessments were not dischargeable. Applying the *Rosteck* reasoning, the condominium association had two state law remedies, an in rem lien, with its right to foreclosure, and in personam remedy for suing the homeowner. The in rem lien and foreclosure right continued, but the in personam obligation was discharged. The debtor's "personal obligation to pay CA assessments was not the result of a separate, post-petition transaction but was created when she took title to the condominium unit. As a result, the debt for the assessments arose pre-petition and is dischargeable under Section 1328(a), unless the Bankruptcy Code provides an exception to discharge." *Goudelock v. Sixty-01 Association of Apartment Owners*, 895 F.3d 633 (9th Cir. 2018).

Dismissal

Homestead sale proceeds go to debtor on voluntary dismissal of Chapter 13. The Fifth Circuit referred to *Harris v. Viegelahn,* 135 S.Ct. 1829 (2015), to hold that § 349(b) required that upon voluntary dismissal of the case, the debtors were to be paid the proceeds of the postpetition sale of their homestead, even though they otherwise had lost the exempt status of those proceeds by failure to reinvest the proceeds in another home under Texas law. Under *Harris* and other Fifth Circuit precedent, "§ 349(b)'s purpose is to undo the bankruptcy case as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case." Moreover, the trustee had no authority to distribute property to creditors upon dismissal. *Viegelahn v. Lopez*, ___ F.3d ___, 2018 WL 3626628 (5th Cir. 2018).

Attorneys

Chapter 7 debtors' attorney's use of BK Billing factoring services. The attorney for Chapter 7 consumer debtors used the factoring services of BK Billing, LLC, selling the attorney's accounts receivable for "postpetition" legal services. In return, the attorney received 70 to 75% of an account, while BK Billing could collect the account, using the attorney's name for collection purposes. BK Billing established a business model, with certain forms, under which the attorney entered into two separate retention agreements with clients, one for services up to the petition filing, and the second agreement executed after the petition filing for postpetition services. The opinion outlines key features of the business model, and the court found that the attorney did not disclose the factoring arrangement in his fee disclosures under § 329 and Rule 2016(b). An element of nondisclosure was that part of the fee was shared with BK Billing, and the terms of financing by a third party must be disclosed fully. As an officer of the court, the attorney had a duty of candor as well as full disclosure. The factoring resulted in the attorney charging some clients a higher fee than would have been charged under a conventional fee agreement. The court identified problems with the BK Billing model of designating some services as postpetition in order to render them nondischargeable. The postpetition agreements were found to be void, and neither the attorney nor BK Billing could collect on those agreements, with the court noting that some provisions of BAPCPA "present serious impediments to this kind of bifurcated services scheme, such as the BK Billing Model." The attorney was ordered to disgorge the value of all fees actually collected by BK Billing from the debtors after their petitions were filed. *In re Wright, et al.,* ___ B.R. ___, 2018 WL 4211570 (Bankr. N.D. Okla. Sept. 4, 2018).

Use of appearance counsel. In an opinion that "highlights the perils of the use of appearance counsel" at the § 341 meeting or other hearings, such attorneys are generally not disclosed in advance to the trustee or the court, such counsel often know little or nothing about the case, and the practice promotes lack of accountability. Here, the use of appearance counsel violated a number of New York's Rules of Professional Responsibility, including having the debtor's informed consent and ensuring adequate preparation to address issues at the § 341 meeting. Disgorgement of attorney fees by the debtor's retained attorney was ordered due to failure to provide adequate representation at the § 341 meeting. *In re D'Arata,* ___ B.R. ___, 2018 WL 3740680 (Bankr. S.D. N.Y. Aug. 3, 2018).

Disgorgement of Chapter 13 fees for failure of attorney to file protective proof of claim. The attorney solicited the debtors to prevent foreclosure of their home, and the filing of Chapter 13 accomplished that; however, the mortgage creditor did not file a proof of claim, preventing the trustee's payments on the mortgage debt. The trustee notified the attorney of the need to file a proof of claim on behalf of the creditor, but the attorney failed to do so timely, resulting in the trustee's disbursement of funds to unsecured creditors. Subsequently, the debtors obtained new counsel, who filed plan modification to pay the mortgage claim, and that attorney filed a motion for disgorgement of fees from the prior attorney. The opinion reviews attorney requirements under § 526 but could not find that the attorney's failure to file a protective proof of claim triggered any remedy under § 526. However, under § 329 the $3,500 fee paid to the first attorney exceeded the reasonable value of his services, and disgorgement of the full fee was ordered. *In re Freeman,* ___ B.R. ___, 2018 WL 4362045 (Bankr. E.D. Mich. Sept. 10, 2018).

Authority for sanctions against creditor's attorney. Affirming, the district court found no abuse of discretion in an order sanctioning the creditor's attorney to pay $2,000 to the clerk of court and $3,000 to the Chapter 13 debtor for failure to notify the court prior to its stay relief hearing that Wells Fargo, who was represented by the attorney, had sold its interest in the debtor's residence to another party. The sale occurred two weeks prior to the hearing on the motion for stay relief filed by the attorney. The bankruptcy court had authority to sanction attorneys under Bankruptcy Rule 9011 and Fed. R. Civ. P. 11, as well as under its inherent authority. "Here, the Bankruptcy Court used its inherent authority to sanction [the attorney] for misleading the Bankruptcy Court about facts essential to the exercise of the judicial function," and there was no abuse of discretion. In addition to monetary sanctions, the bankruptcy court properly required the attorney to consult with experienced bankruptcy counsel to develop "a protocol with regard to motion for relief from stay practice, reasonably calculated to avert the mistakes" made in this case. *In re Moniello,* 2018 WL 4405611 (D. Conn. Sept. 17, 2018).

Claims

Disallowance of proof of claim did not extinguish lien. The Chapter 13 trustee had objected to second mortgage holder's proof of claim because the creditor's name did not match the documents attached to claim, and with no response, the claim was disallowed. However, the confirmed plan treated the debt as long term with monthly payments. After entry of discharge, the servicer on the mortgage changed, and the former debtors argued that the lien was voided by claim disallowance. The district court affirmed the conclusion that the disallowance did not extinguish or void the lien, which the debtors had treated as valid in their plan. *Shoemake v. SN Servicing Corp.,* 586 B.R. 741 (M.D. Tenn. 2018).

Tax claim under § 505. The Chapter 13 debtor objected to the IRS claim, which sought to hold debtor liable as responsible person for unpaid trust fund taxes. Under § 505(a), the court had jurisdiction to determine the amount or legality of the debtor's tax liability, but that section did not give the court jurisdiction to require IRS to reallocate its prepetition application of funds received by levy against corporate assets. The corporation was not a debtor, and the Chapter 13 debtor was liable for willful nonpayment of trust fund taxes. *In re Donaldson,* 586 B.R. 822 (Bankr. N.D. Miss. 2018).

Fair Debt Collection Practice Act

The Third Circuit found that the Supreme Court in *Henson v. Santander Consumer USA, Inc.,* 137 S.Ct. 1718 (2017), did not answer the question of whether one in the principal business of debt collection would be covered by the Fair Debt Collection Practices Act when it was collecting debt that it owned, and the Circuit held that plain text of the statute included such a debt collector. In *Henson,* that issue was not before the Court, and the Third Circuit looked to the Act's application to a "debt collector" who is engaged in the "principal business of which is the collection of any debts" as an alternative to application to one "who regularly collects" debts owed to another party. 15 U.S.C. § 1692a)(6). The term "any debts" in the "principal business" portion of the statute did not distinguish between debts owed to the collector or another party. This creditor's principal business was collecting debts; therefore, it was subject to the FDCPA under that portion of the definition. *Tepper v. Amos Financial LLC,* ___ F.3d ____, 2018 WL 3733862 (3d Cir. 2018).

CONSUMER LAW UPDATE

Cases reported from April 1, 2018 through June 30, 2018

Prepared for Federal Judicial Center

© William Houston Brown
United States Bankruptcy Judge Retired
williamhoustonbr@comcast.net

Automatic Stay

City of Chicago's retention of seized vehicle was not excepted from stay. Prior to the Chapter 13 filing, the City seized the debtor's vehicle for parking violations, and the debtor filed an adversary proceeding for turnover. The court rejected the City's argument under § 362(b)(3), holding this exception only applied to actions to maintain perfection, and the City did not hold a valid possessory lien. The City also failed to show that § 362(b)(4)'s tests of pecuniary purpose and public safety applied. The debtor had an equitable interest in the vehicle and the City was required to turn over under § 542, and failure to comply would be sanctioned $100 per day. *In re Cross,* 584 B.R. 833 (Bankr. N.D. Ill. 2018). *See also In re Howard,* 584 B.R. 252 (Bankr. N.D. Ill. 2018) (City did not have a possessory lien under Illinois law or municipal code, and willful failure to return impounded car warranted $50 daily fine.).

Arbitration

Arbitration was not compelled in discharge injunction litigation. The Second Circuit affirmed the bankruptcy court's denial of credit card issuer's motion to compel arbitration of a putative class action alleging violation of the Chapter 7 debtor's discharge injunction. The debtor's complaint alleged that Credit One had failed to remove a charge-off notation in his credit report after the debt was discharged, and the parties agreed that it was a core proceeding. The Circuit held that the issue was non-arbitrable, because "the issue strikes at the heart of the bankruptcy court's unique powers to enforce its own orders." Although the Federal Arbitration Act established a policy of favoring arbitration, it is not absolute, and the Court found "an inherent conflict between arbitration of [the debtor's] claim and the Bankruptcy Code." The bankruptcy court did not abuse its discretion in denying Credit One's motion to compel arbitration. *In re Anderson,* 884 F.3d 382 (2d Cir. 2018). *See also In re Bateman,* ___ B.R. ___, 2018 WL 2324207 (Bankr. M.D. Fla. May 22, 2018) (Arbitration of contempt proceeding for violation of discharge injunction inherently conflicted with Bankruptcy Code.). *Compare In re Cain,* 585 B.R. 127 (Bankr. S.D. Miss. 2018) (In Chapter 13 debtor's non-core complaint alleging violation of Truth in Lending Act, motion to compel arbitration was granted.).

Notice

Notice was properly given to attorney who had represented creditor. After obtaining a default judgment, the creditor's attorney deposed the defendant four years prior to the Chapter 7 filing. The debtor scheduled the creditor using the attorney's name and address, and there was no evidence that the attorney failed to receive the notice of bankruptcy filing. The notice was found sufficient, with no evidence of termination of the attorney-client relationship. A complaint to revoke discharge was untimely, and the bankruptcy court's determination that notice to the attorney was sufficient was not clearly erroneous. The Tenth Circuit cited a holding from the Seventh Circuit, *In re Herman,* 737 F.3d 449, 454 (7th Cir. 2013), that notice to an attorney who represents a creditor in collecting a debt outside of bankruptcy "can be imputed to the creditor." *In re McNally,* ___ Fed.Appx ___, 2018 WL 2974411 (10th Cir. June 13, 2018).

Appeals

Rule 8002(a)'s deadline is jurisdictional. The Bankruptcy Appellate Panel noted that the Ninth Circuit had consistently construed Rule 8002(a)'s time deadline for appeals from a non-Article III court as jurisdictional, and nothing in *Hamer v. Neighborhood Housing Services of Chicago,* 138 S.Ct. 13 (2017), required reexamination of this longstanding construction. The BAP was precluded from hearing an untimely appeal. *Wilkins v. Menchaca,* ___ B.R. ___, 2018 WL 3197481 (B.A.P. 9th Cir. June 28, 2018). *See also In re Jackson,* ___ B.R. ___, 2018 WL 2172693 (B.A.P. 6th Cir. May 11, 2018) (Agreeing that Rule 8002(a)'s time bar is jurisdictional, because that deadline is imposed by 28 U.S.C. § 158(c)(2).).

Avoidance

Federal Direct PLUS loan proceeds were not avoidable as fraudulent transfers to university. The Chapter 7 trustee sued Johnson & Wales University for avoidance and recovery of alleged constructively fraudulent transfers of proceeds from Federal Direct

PLUS loans that were made to the University. The debtors were the parents of a student who was above age 18, and one parent had been required to execute notes to obtain the PLUS loans. Congress had established PLUS loans to allow eligible parents to enable student children to pursue college education, and to conclude that the loan proceeds were property of the debtor for purposes of §§ 544 and 548 would undermine the purposes of the Higher Education Act's creation of PLUS loans. Avoidance would not serve § 548's purposes, because the loan proceeds would not have been available to creditors in the absence of the transfers. The debtor did not have a property interest in the Direct PLUS loan proceeds within the meaning of § 541, and the trustee could not avoid the payment of proceeds to the University. *In re Demauro,* ___ B.R. ___, 2018 WL 3064231 (Bankr. D. Conn. June 19, 2018).

Pre-divorce transfer was avoidable. Discussing "reasonably equivalent value" under § 548 and looking to Michigan law on spousal support obligations, the Chapter 7 debtor did not receive value in exchange for a pre-divorce transfer of $21,900 from his retirement account to his spouse. The spouse did not have a statutory right to spousal support under Michigan law because this transfer was made prior to divorce proceedings; therefore, she could not have waived spousal support in exchange for the transfer, and the trustee could avoid the monetary transfer. However, upon the filing of the divorce action and entry of divorce decree, the spouse did waive her right to spousal support in exchange for transfer of the debtor's interest in the marital home, and this waiver constituted value to the bankruptcy estate under § 548(d)(2)(A). The trustee could not avoid the debtor's transfer of an interest in the home. *In re Libra,* 584 B.R. 550 (Bankr. E.D. Mich. 2018).

Exemptions and Property of Estate

Extraterritorial use of personal property exemptions. Chapter 7 debtors could not claim West Virginia exemptions because they had moved to that state less than 730 days prepetition, and the issue was whether they could claim personal property exemptions under Louisiana law, the state where they had resided for the 180 days preceding the 730 days. Affirming the district court's use of a "state-specific" approach to extraterritoriality, Louisiana law did not restrict application of its personal property exemptions to property located within the state, and Louisiana liberally construed its exemptions; therefore, extraterritorial effect was given to use of Louisiana's personal property exemptions for a debtor residing in West Virginia at the time of filing Chapter 7 bankruptcy. The state-specific approach was also consistent with the view of two other circuits, the Ninth and Eighth. *Sheehan v. Ash,* 889 F.3d 171 (4th Cir. 2018).

Order granting or denying exemption is final appealable order, and title to property is not required for exemption. The Ninth Circuit panel held that *Bullard v. Blue Hills Bank,* 135 S.Ct. 1686 (2015), was not "so fundamentally inconsistent with our existing case law as to require a different result," continuing its precedent that an order granting or denying an exemption claim is a final appealable order. Also, California's automatic homestead requires only that the debtor continuously reside in the property as a principal residence, with title or ownership not required. Because the bankruptcy court did not determine the debtor's intention to continue to reside in the property, remand was ordered. *In re Gilman,* 887 F.3d 956 (9th Cir. 2018).

Fraudulent transfer action put debtor on notice of trustee's objection to exemption. Before filing Chapter 7, the debtor had transferred interests in two properties into a tenancy by entirety ownership, a form of title recognized under applicable Hawaii law, and the debtor then claimed those interests as exempt under § 522(b)(3). At the meeting of creditors, the debtor described this transfer as having been "exemption planning," and the spouse had not paid anything for receipt of her tenancy by entirety interests. The Chapter 7 trustee did not file an objection to the exemption claim, but within 30 days of the conclusion of the meeting of creditors the trustee did file an adversary proceeding to avoid the transfers as fraudulent under § 544(b) and applicable Hawaii law. The complaint was served, trial was held and the bankruptcy court found that the trustee had carried the burden of proving by clear and convincing evidence that the transfers were made with actual intent to hinder, delay and defraud existing and future creditors.

Subsequently, as appeal was pending by the debtor, turnover was ordered, with the bankruptcy court ruling that the adversary proceeding satisfied requirements of Rule 4003(b) as an objection to the exemption claims. The district court affirmed, as did the Ninth Circuit. The debtor argued that Rule 4003 required a specific objection to his exemption claims and because there was no objection filed within the required 30 days after conclusion of the § 341 meeting of creditors, the exemptions had been allowed. Disagreeing with that argument and identifying factors to consider, the Circuit observed that Rule 4003 does not require such a "formalistic approach," with the bankruptcy court having broad equitable powers to recognize the avoidance complaint as the equivalent of a formal objection, so long as certain procedural requirements were satisfied. *Lee v. Field,* 889 F.3d 639 (9th Cir. 2018).

Judicial estoppel application. The Eleventh Circuit held that the district court did not abuse its discretion in dismissing a former debtor's lawsuits, based on failure to disclose the causes of action in the original bankruptcy petition, as well as in six amendments to schedules. The debtor had disclosed other causes of action, allegedly worth far less than the omitted ones, indicating a motive to conceal valuable assets. The Circuit panel noted that the outcome was consistent with its en banc holding in *Slater v. U.S. Steel Corp.,* 871 F.3d 1174 (11th Cir. 2017), because *Slater* overruled "precedent that allowed courts to automatically infer a plaintiff's intent to mislead solely on the plaintiff's failure to disclose a civil claim in a bankruptcy proceeding." Here, the district court did not infer intent to mislead but made its determination based on facts and circumstances, and there was no abuse of discretion. Also, the former debtor's voluntary dismissal of the bankruptcy did not moot application of judicial estoppel. *Weakley v. Eagle Logistics,* ___ F.3d ___, 2018 WL 3188663 (11th Cir. June 29, 2018).

Section 541(b)(8) did not remove pawned property from estate. California law required a pawnbroker to give 10-day notice of right of redemption, but prior to expiration of the 10 days, the debtor filed Chapter 13, and then she filed an amended plan proposing to redeem the pawned jewelry in monthly payments. The pawnbroker did not object to confirmation, but contended that § 541(b)(8) acted to remove the pawned property from the bankruptcy estate. The Bankruptcy Appellate Panel held that when the Chapter 13 was filed, the pawned jewelry became property of the estate, including the debtor's right to redeem. Distinguishing this case from the Eleventh Circuit's *Title Max v. Northington,* 876 F.3d 1302 (11th Cir. 2017), under California law, § 541(b)(8) does not automatically remove pawned property from the bankruptcy estate without notice to the debtor. That law provides that if pawned property is not redeemed prior to the termination of the loan period, the pawnbroker must give notice of a ten-day right to redeem, effectively extending the redemption period. Here, the pawnbroker's 10-day notice was given in violation of the automatic stay, and the notice was void. *In re Sorensen,* ___ B.R. ___, 2018 WL 3032973 (B.A.P. 9th Cir. June 15, 2018).

Lack of intention to permanently reside. The dispute over Ohio's homestead exemption was whether the Chapter 7 debtors had been domiciled in Ohio for 730 days prepetition, and the bankruptcy court's determination was a mixed question of fact and law, but primarily factual, which was reviewed for clear error. The evidence could establish either Ohio or Maryland as the debtors' domicile at the time of filing, and the bankruptcy court's findings that the debtors were not domiciled in Ohio and could not claim homestead in Ohio property were not clearly erroneous. The determinations were supported by the "bankruptcy court's express findings regarding the debtors' credibility." *In re Felix,* 582 B.R. 915 (B.A.P. 6th Cir. 2018).

Reinvestment of proceeds from homestead and claiming homestead in leasehold. The Chapter 7 trustee sought turnover of $75,000 proceeds from the trustee's sale of the debtor's homestead. Title had been taken by the debtor's father, who obtained a loan to facilitate the purchase, but the debtor contributed funds for the purchase and the debtor acquired a lease-purchase agreement from his father. Applying the recent Ninth Circuit decision, *In re Gilman,* 887 F.3d 956 (9th Cir. 2018), title to property is not necessary to claim homestead exemption under California law. Here, the debtor's intention was to retain the homestead as the "dwelling" for himself and family, and the debtor had reinvested more than the $75,000 exemption in the leasehold property. *In re Sain,* 584 B.R. 325 (Bankr. S.D. Cal. 2018).

Wildcard exemption in accumulated sick leave. Under § 522(d)(5), the Chapter 13 debtor was permitted to amend her exemption claim in accumulated and unused sick leave. The debtor was a government employee and had sufficient property interest under Puerto Rico law in the prepetition sick leave to allow wildcard exemption, citing *Fonseca v. Gov't Employees, Ass'n,* 542 B.R. 628 (B.A.P. 1st Cir. 2015). Also, under § 1306 the continuing accumulation of sick leave becomes property of the estate and the debtor could claim exemption of the post-petition accumulation, up to § 522(d)(5)'s statutory limit. *In re Padilla Cruz,* ___ B.R. ___, 2018 WL 2315912 (Bankr. D. Puerto Rico May 18, 2018).

NFL concussion injury settlement created disability benefit exempt under § 522(d)(10)(C). The NFL's Settlement Agreement in concussion injury litigation created a new disability policy, through which injured parties could receive disability benefits, and those benefits were exempt under § 522(d)(10)(C). *In re Williams,* ___ B.R. ___, 2018 WL 3197795 (Bankr. S.D. Fla. June 26, 2018).

Sanction Authority

Bankruptcy court has sanction authority. The bankruptcy court had sanctioned an attorney who had been associated with a bankruptcy-services business, and the attorney argued that an Article I court lacked constitutional authority to sanction. The Circuit panel found that the sanction was within the bankruptcy court's authority because it involved an order of disgorgement of fees under section 329 and turnover under section 542, all matters "arising in" a case under Title 11. "The bankruptcy court had authority to enter sanctions for events that occurred while trying to enforce the order compelling turnover and the show-cause orders." *Critique Services, LLC v. Reed (In re Reed),* 888 F.3d 930 (8th Cir. 2018).

Discharge

Section 523(a)(2)(B)

The Eleventh Circuit had held that statements "respecting the debtor's financial condition" may include statements about single assets. *In re Appling,* 848 F.3d 958, 960 (11th Cir. 2017). However, Appling's statements concerning the tax refund were oral; therefore, § 523(a)(2)(B)'s requirement of "a statement in writing" was not satisfied, and the debt to the law firm was dischargeable. The Circuit decision set up a circuit split on the issue of whether representations about a single asset, rather than overall financial condition, could fall within § 523(a)(2)(B). The Fifth and Tenth Circuits had held that statements about a single asset were not statements respecting a debtor's financial condition. *In re Bandi,* 683 F.3d 671 (5th Cir. 2012); *In re Joelson,* 427 F.3d 700 (10th Cir. 2005). The Eleventh and Fourth Circuits had held that single-asset statements could be statements respecting a debtor's financial condition. *In re Appling,* 848 F.3d 958 (11th Cir. 2017); *Engler v. Van Steinburg,* 744 F.3d 1060 (4th Cir. 1984). In its mostly unanimous decision (three Justices did not join Part III-B of the opinion concerning the legislative history of § 523(a)(2)), the Court focused on a plain meaning of the statute, including § 523(a)(2)(B)'s reference to a "statement respecting the debtor's financial condition." The opinion points out that the statement does not define critical words, such as "respecting," "statement," and "financial condition;" therefore, the Court looked to ordinary usage definitions, finding that "respecting" must be defined broadly. The Court then rejected the law firm's argument that the statute's language only referred to "a statement that captures the debtor's overall financial status." Adopting that view would read "respecting" out of the statute. The Court acknowledged that a statement is one respecting a debtor's financial condition "if it has a direct relation to or impact on the debtor's overall financial status. [But], a single asset has a direct relation to and impact on aggregate financial condition, so a statement about a single asset bears on a debtor's overall financial condition and can help indicate whether a debtor is solvent or insolvent, able to repay a given debt or not. Naturally, then, a statement about a single asset can be a 'statement respecting the debtor's financial condition.'" *Lamar, Archer & Cofrin, LLP v. Appling,* ___ S.Ct. ___, 2018 WL 2465174 (June 4, 2018).

Section 523(a)(5)

Attorney fees in prepetition divorce and child custody proceedings were nondischargeable. Reviewing circuit authority on dischargeability of attorney fees awarded in divorce cases, but resulting from litigation over child custody and visitation, the court agreed with a majority of courts giving broad meaning to the statutory term "in the nature of support of a child of the debtor." Agreeing with the Tenth Circuit's *In re Jones,* 9 F.3d 878 (10th Cir. 1993), and the Fifth Circuit's *In re Dvorak,* 986 F.2d 940 (5th Cir. 1993), "the issue of custody of the child should be considered to be in the nature of support even where the issue of custody did not also concern the financial support of the child." Fees related to child visitation also would be in the nature of support. *In re Belleville*, 584 B.R. 854 (Bankr. C.D. Ill. 2018).

Section 523(a)(8)

Under 1995 version of § 523(a)(8), some loans were in repayment for less than 7 years and other loans were dischargeable after 7-year repayment period. The Chapter 7 case was filed in 1995, when the 7-year period was in § 523(a)(8), and the case was reopened to allow the debtor to bring this adversary proceeding. The court found Stafford loans to have been in repayment for less than 7 years and thus nondischargeable, while other loans had been in repayment for more than 7 years and were discharged. *In re Biegler,* ___ B.R. ____, 2018 WL 2972356 (Bankr. N.D. N.Y. June 8, 2018).

Debtor entitled to undue hardship discharge. The 64-year-old Chapter 7 debtor established that her progressive hearing impairment and age impacted her ability to earn sufficient income to repay her student loan debt while maintaining a minimal standard of living. Applying totality-of-circumstance test of *In re Bronsdon,* 435 B.R. 791, 797 (B.A.P. 1st Cir. 2010), the court rejected application of "a per se requirement that a debtor enroll in an ICRP before seeking a hardship discharge under § 523(a)(8)," because nothing in the Bankruptcy Code requires it. The fact that student loan debt was a dominant purpose for filing bankruptcy was not a determinative factor. The debtor's failure to make meaningful payments on student loan debt prior to bankruptcy was "the result of her meager income and not evidence of bad faith." *In re Erkson,* 582 B.R. 542 (Bankr. D. Maine 2018).

Partial discharge of student loan debt. Although the Chapter 7 debtor failed to satisfy second prong of *Brunner* that her financial condition was likely to persist for a significant portion of the repayment period as to the entire student loan debt, she was "granted a partial discharge to give her the opportunity to satisfy the portion of the loan she can pay." Using the U.S. Department of Education's Federal Student Aid Repayment calculator, the debtor's monthly payments were set at $108, to be adjusted annually, and the court ordered that "any unpaid debt on the student loan be discharged if the debt has not been repaid in full after 20 years." *In re Modeen,* ___ B.R. ___, 2018 WL 2970990 (Bankr. W.D. Wisc. June 8, 2018).

Chapter 7 Issues

Dismissal

Case dismissed as abusive. On motion of U.S. Trustee and applying factors of totality-of-circumstances, substantial-abuse test found in pre-BAPCPA *In re Stewart,* 175 F.3d 796 (10th Cir. 1999), the case was dismissed. Primary factor was debtor's ability to pay, and these debtors had more than $11,000 monthly income. Monthly expenses were analyzed, and monthly, voluntary contribution of $771.86 to retirement account was found to be part of disposable income. This proposed amount was in addition to the employer's mandatory monthly contribution to a federal retirement account, and the excess was not a reasonably necessary expense. The opinion reviewed the split of authority on retirement contributions as disposable income. *In re Smith,* 585 B.R. 168 (Bankr. W.D. Okla. 2018).

Definition of "consumer debt." In an examination of what qualifies as a "consumer debt" for purposes of § 707(b) dismissal of a Chapter 7 case, the Code's definition in § 101(8) makes the purpose of the debt the "critical inquiry." A pre-bankruptcy judgment had been entered in state court concerning the debtor's improper spending of inheritance funds that belonged to the debtor's son, and the court reviewed judicial authority on interpretation of "consumer debt." The actual damage portion of the state-court judgment was found to be a consumer debt, but the punitive damage portion was not. Non-economic damages awarded by the state court were found to be "compensation for the Debtor's use of the Inheritance Funds for a personal, family, or household purpose and constitute consumer debt under section 101(8) of the Code." *In re Durant,* ___ B.R. ___, 2018 WL 3078046 (Bankr. D. Maryland June 19, 2018).

Lease Assumption and Reaffirmation

Reaffirmation not required under § 365(p). The District Court concluded that § 524(c) reaffirmation is not required when a debtor has assumed a lease under § 365(p), with the court reviewing the split of authority on the issue. In the Chapter 7 case, the debtor stated intention to reaffirm debt on a vehicle, but the creditor was actually lessor, and the debtor's statement of intention should have been to assume the lease. The trustee did not assume the lease, and § 365(p)(2) permitted the debtor to initiate assumption by notifying the lessor in writing of that decision. The parties subsequently entered into an assumption agreement, but after receiving discharge, the debtor defaulted in lease payments, and the debtor then surrendered the vehicle. Upon assumption by the debtor, the lease "becomes a liability of the debtor, and not a liability of the estate, under § 362(p)(2)(B). The issue on appeal was whether an assumed lease remains enforceable if the agreement was not reaffirmed under § 524(c), and the court concluded that "there would be no purpose to Section 365(p) if a reaffirmation was required. . . .If Congress intended to require reaffirmation, there is no reason Congress set forth an extensive 365(p) process for lease assumptions if it could have just explicitly made lease assumptions part of the reaffirmation process." Moreover, § 365(p) is the more specific provision, and a canon on construction weighs in favor of the specific. The court affirmed the bankruptcy court's determination that the vehicle lease had been assumed. *Bobka v. Toyota Motor Credit Corp.,* ___ B.R. ___, 2018 WL 2382766 (S.D. Cal. May 24, 2018), appeal filed to Ninth Circuit, May 30, 2018.

Revocation of Discharge

Revocation of discharge under § 727(d). The Bankruptcy Appellate Panel reviewed requirements for revocation of Chapter 7 discharge, holding that the trustee was required to plead and prove that the trustee was unaware of the alleged fraud at the time the discharge was entered. Although this complaint was timely, the trustee had awareness of some alleged omissions of assets before discharge was granted, and the trustee had not moved under Rule 4004(b)(2) for an extension of time to object to discharge. *In re Fitzhugh,* 2018 WL 1789596 (B.A.P. 9th Cir. Apr. 13, 2018).

Discharge Injunction

Creditor's good faith belief that action did not violate discharge injunction precluded contempt. Affirming its Bankruptcy Appellate Panel, the Ninth Circuit held that creditors' pursuit of state-court claim for attorney's fees was not a knowing violation of the discharge injunction because the creditors had a subjective good faith belief that their action was not barred by the discharge injunction, and they could not be in contempt even if their belief was unreasonable. Under the Ninth Circuit's two-part test for propriety of a contempt sanction, *In re Bennett,* 298 F.3d 1059, 1069 (9th Cir. 2002), "the movant must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction." The creditors contended that their claim for fees was justified because the debtor "returned to the fray," and the creditors "relied on the state court's judgment that the discharge injunction did not apply to their claim for post-petition attorneys' fees." *In re Taggart,* 888 F.3d 438 (9th Cir. 2018). *See also In re Loy,* 584 B.R. 302 (Bankr. N.D. Ind. 2018) (State of Indiana did not violate discharge injunction by attempts to collect only nondischargeable penalty portion of unemployment compensation overpayment.); *In re Traversa,* 858 B.R. 215 (Bankr. E.D. Pa. 2018) (Denying motion to reopen case to pursue discharge injunction violation by municipal court concerning traffic citation.).

IRS willfully violated discharge injunction and good faith not defense. The First Circuit held, with a dissent, that an employee of IRS willfully violated the Chapter 7 discharge injunction when employee knows of the discharge order and intentionally takes an action violating the order, and IRS's good faith belief that it had right to collect discharged debt is not relevant to the determination of willful violation. If IRS believed the discharge order was ambiguous as to the tax obligation at issue, IRS had opportunities to contest that. The panel examined 26 U.S.C. § 7433(e), which provides for potential recovery of damages for an officer's or employee's willful violation of the automatic stay or discharge injunction. While "willfully" is not defined in that statute, it links willful to Bankruptcy Code §§ 362 and 524; therefore, the panel looked to interpretations of willful under those statutes. The dissenting judge found the majority opinion to be "the first opinion by a circuit court of appeals construing the phrase 'willfully violates' in 26 U.S.C. § 7433(e), enacted in 1998, and, importantly, the first to deprive the United States, through the IRS, of its sovereign immunity under that statute even where the United States acted on a reasonable and good faith belief that a discharge injunction did not apply to its collection efforts against a tax debtor." *Internal Revenue Service v. Murphy,* 892 F.3d 29 (1st Cir. 2018). *But see In re Thal,* ___ B.R. ___, 2018 WL 2182304 (Bankr. S.D. Fla. May 9, 2018), adopting the majority view that a former debtor must exhaust administrative remedies under regulations pursuant to 26 U.S.C. §§ 7430 and 7433 before seeking recovery of damages from the bankruptcy court for violations of the discharge injunction.

Chapter 13 Issues

Lien On 910 Vehicle

Debtor failed to establish business use of 910 vehicle. For purposes of determining predominant use of vehicle purchased within 910 days of bankruptcy filing, the court reviewed the lines of authority on how to make that determination, adopting totality-of-circumstances test. The court also agreed with the view "that if the predominant use of the vehicle is to perform business or trade functions, then incidental personal use will not trigger application of the Hanging Paragraph." The debtor failed to carry the burden of proving that the predominant use was for business purposes, and the secured claim could not be bifurcated. *In re Royal,* ___ B.R. ___, 2018 WL 3054716 (Bankr. S.D. Cal. June 11, 2018). *See also In re McGinness,* ___ B.R. ___, 2018 WL 1162876 (Bankr. E.D. Tenn. Mar. 2, 2018) (Discussing three approaches to totality-of-circumstances test in determining whether use was personal and holding that the predominate use test is the most appropriate. Here, the predominate use was job-related.).

Assignee had standing to assert hanging paragraph protection on 910 car. The assignment of a security interest did not destroy its status as purchase money; therefore, the assignee of a dealer's purchase-money financing had standing to assert that the hanging paragraph protected against bifurcation; however, the optional gap insurance and extended maintenance agreement were not sufficiently related to the debtor's acquisition of the vehicle to be protected. Adopting the "dual status rule," a portion of the debt was bifurcated as unsecured, and the prepetition payments were allocated between the secured and unsecured debts. *In re Jones,* 583 B.R. 749 (Bankr. W.D. Wash. 2018).

Manufactured Home

Creditor failed to prove manufactured home was real property. The debtors' plan proposed to treat the claim of a manufactured home as partially secured, and the creditor objected that § 1322(b)(2) prevented modification of its secured claim, asserting that the home was "real property." The Eighth Circuit Bankruptcy Appellate Panel applied three factors under Iowa law, where the home was located, considering whether the home was a fixture or real property: "(1) it is actually annexed to the realty or to something appurtenant thereto; (2) it is put to the same use as the realty with which it is connected; and (3) the party making the annexation intends to make a permanent accession to the freehold." Citing *Ford v. Venard,* 340 N.W.2d 270, 271 (Iowa 1983). The third factor of intent is the principal consideration. There was a factual dispute whether the home was installed on a permanent foundation, and the bankruptcy court found the debtors' testimony more credible on the installation. The finding that the home was not a fixture was not clearly erroneous and the bankruptcy court properly considered applicable law. *In re Bennett,* 584 B.R. 15 (B.A.P. 8th Cir. 2018).

Confirmation

Plan unfairly discriminated in favor of student loan creditor. Reviewing various factors used by courts to analyze whether a proposed plan unfairly discriminates, the totality-of-circumstances test was applied, with the court finding that the proposed monthly payment of $850.00 to $1,112.40 on student loan debt of $192,936.15, which had contractual monthly payments of $1,894.00, was unfair discrimination as to the other unsecured creditors, who would receive nothing. The opinion noted that paying less than the contractual amount on student loan debt would leave the debtors in default of the debt during the 60-month plan. Under the totality-of-circumstances test, a debtor may be able to justify favorable treatment to a student loan debt, but this plan failed the test. *In re Quinn,* ___ B.R. ___, 2018 WL 3012900 (Bankr. E.D. Mich. June 5, 2018).

Debtor may not modify district's plan. Subsequent to the district's adoption of a form plan under Bankruptcy Rule 3015.1, the debtor proposed a plan that struck out the form plan's section 4.1 concerning tax refunds while the case is pending, and the court denied confirmation. Distinguishing between the debtor's exclusive right to *file* a plan and the court's *determination of plan form,* any prior practice concerning tax refunds ceased when the courts adopted their district's form plan. *In re Diaz,* ___ B.R. ___, 2018 WL 2425969 (Bankr. W.D. Tex. May 14, 2018).

Disposable Income

401(k) contributions were not disposable income. The District Court adopted what it found to be the majority view of bankruptcy courts, as expressed in the approach of *In re Johnson,* 346 B.R. 256 (Bankr. S.D. Ga. 2006), holding that postpetition voluntary retirement contributions were excluded from disposable income. The bankruptcy court had denied confirmation of the original plan, finding that the debtor's postpetition 401(k) contributions would be disposable income and that those contributions would be limited by good faith, setting a limit of 3% contributions as reasonable, perhaps to be increased under a totality-of-circumstances test. The employed debtor's proposed contribution would have been 18% of his income. Although the debtors amended their plan to comply with the 3% limit, and that plan was confirmed, they appealed denial of their original proposed plan. The District Court reviewed the lines of authority on the relationship between §§ 541(b)(7) and 1325(b)(2), identifying the same three approaches described by the Sixth Circuit in *In re Seafort,* 699 F.3d 662 (6th Cir. 2012). The District Court here adopted a plain-meaning view of § 541(b)(7), concluding "that Congress intended to exclude retirement contributions from available disposable income as defined by the code in section 1325(b)." The Court also rejected the *Seafort* view that when a debtor's retirement loan was repaid, the prior loan payment becomes disposable income. Although the Court agreed that a debtor's postpetition retirement contribution is an element of the statutory good-faith test, "the amount contributed by a debtor within the legal limits established by the Internal Revenue Service cannot be the sole basis for determining that a plan has been filed in bad faith." *Miner v. Johns,* ___ B.R. ___, 2018 WL 2347095 (W.D. La. May 23, 2018).

Equal Monthly Payments

Plan proposing delay in equal monthly payments while attorney fees were paid was not confirmed. Ford Motor Credit objected to a plan providing special terms for payment of the debtor's attorney fees on the same priority level as Ford, and Ford objected that the plan violated the Code's requirement for equal monthly payments to secured creditors. The debtor argued that § 1325(a)(5)(B)(iii) did not dictate when equal monthly payments must begin and that § 1326(b)(1) permitted payment of debtors' attorney fees "before or at the time of each payment to creditors." The opinion reviewed split of authority on the statutory terms, disagreeing with the apparent majority view. "First, there is no basis in the statute for finding that § 1326(b)(1) trumps the right of an objecting secured creditor to equal monthly payments under § 1325(a)(5)(B)." Although a debtor may propose to pay the same amount for pre-confirmation adequate protection as will be paid on the secured claim in the confirmed plan, both subsections

1325(a)(5)(B)(iii)(I) and (II) must be satisfied; therefore, continuing the same payments would not be confirmable if it denied the creditor equal monthly payments. The court also found no support for the argument that "equal monthly payments" in § 1325(a)(5)(B)(iii) referred to payments to the trustee rather than to the creditor. This plan's proposal to pay Ford a lesser amount until the debtor's attorney fees were paid was not confirmable over Ford's objection. *In re Williams,* 583 B.R. 453 (Bankr. N.D. Ill. 2018). See also *In re Carr* under **Debtors' Attorney.**

Effect of Confirmation

Condominium association's prepetition arrearage was fixed by confirmation. The condominium association moved for relief from the order finding the debtor current on all payments due the association. The debtor had completed a 60-month plan that provided for curing defaults and maintaining payments on the association's lien, and the association had not objected to confirmation. The association argued that it's prepetition arrearage was substantially larger than the plan's $5,000 arrearage and that it was not attempting to collect the difference from the debtor personally but that an in rem claim would continue against the condominium. The court rejected that position due to the res judicata effect of the confirmation order, with the association's prepetition arrearage claims, both in personam and in rem, fixed in amount by confirmation. However, the debtor's postpetition obligations to the association were not fixed by confirmation, because the plan did not provide for payment of postpetition special assessments. *In re Hadfeg,* 585 B.R. 208 (Bankr. S.D. Fla. 2018).

Discharge

Penalties for fraudulently obtaining unemployment benefits were nondischargeable. Michigan had assessed penalties for the future Chapter 13 debtors obtaining unemployment benefits by fraud, and the debtors argued that the penalties were dischargeable because § 523(a)(7) is not applicable in Chapter 13 under § 1328(a)(2). The Sixth Circuit held that the debt could be covered by both §§ 523(a)(2) and (a)(7), and the government placed no reliance on § 523(a)(7). Section 523(a)(2) provides that any debt obtained by actual fraud is excepted from discharge, and the Court rejected the argument that the more specific § 523(a)(7) was exclusive, citing *Husky Int'l Electronics, Inc. v. Ritz,* 136 S.Ct. 1581 (2016), for the principle that "various subsections of § 523(a) are not necessarily mutually exclusive." *Andrews & Kozlowski v. Michigan Unemployment Insurance Agency,* 891 F.3d 245 (6th Cir. 2018).

Dismissal

Dismissal required notice and hearing opportunity for debtor. A local rule provided for dismissal for failure to commence timely plan payments, and the Circuit read § 1307(c)(4) to provide for dismissal at a party's request after opportunity for hearing. The case was dismissed under the local rule without a hearing, based on the trustee's certification of nonpayment, but a local rule cannot be inconsistent with the Bankruptcy Code. *No v. Gorman,* 891 F.3d 138 (4th Cir. 2018).

Repeat filer's case properly dismissed for unreasonable delay prejudicial to creditors. The Bankruptcy Appellate Panel found that the bankruptcy court did not abuse its discretion in dismissing a Chapter 13 case filed by a repeat filer who had received a prior Chapter 7 discharge. After entry of Chapter 7 discharge, the debtor stopped paying apartment rents. After the landlord commenced state proceeding to terminate the lease, the debtor filed Chapter 13, and the landlord moved to dismiss under § 1307(c), specifically alleging lack of good faith due to resulting delay in possession. After hearing, the bankruptcy court dismissed the case, finding unreasonable delay, implicitly referring to § 1307(c)(1). The BAP found no abuse of discretion in dismissal. *In re Stevenson,* 583 B.R. 573 (B.A.P. 1st Cir. 2018).

Debtor's Attorney

Attorney sanctioned for filing Chapter 13 for ineligible debtor. In a motion by the U.S. Trustee questioning the attorney's filing of Chapter 13 cases for individuals subject to mortgage foreclosures but in which the attorney did not address the mortgage obligation or propose surrender of the home, the court made numerous findings, including that this debtor was ineligible for Chapter 13 because of exceeding the debt limits. The attorney made inaccurate representations in the schedules on the debtor's behalf, and the filing was part of a pattern of this attorney and his firm to delay collection efforts of the mortgage holders, justifying redress under § 105(a). The opinion reviews the authority of the bankruptcy court "to oversee and correct for attorney conduct." As monetary sanction, the attorney was ordered to refund the fee paid by the debtor, as well as pay $4,000 to the debtor to allow her to obtain further bankruptcy relief, and the U.S. Trustee was entitled to recover fees and expenses. *In re Tabor,* 583 B.R. 155 (Bankr. S.D. Ill. 2018).

Debtors' attorneys have fiduciary duty to fully disclose details of compensation. The attorney's fee agreement with debtors included understanding that attorney's fees would be paid on accelerated basis under plans providing only adequate protection payments to secured car lenders until fees were fully paid, but that understanding should have been part of written fee agreement and disclosed to court. The car lenders had adequate notice but failed to object to confirmation of plans delaying equal monthly payments; therefore, § 1325(a)(5)(B)(iii)(I) did not apply in the absence of objection. The opinion found a fiduciary duty under applicable Illinois law, as well as under the general principle that the attorney-client relationship is fiduciary. Moreover, the attorneys had a heightened duty to disclose "the implications" of their fee agreements. *In re Carr,* 584 B.R. 268 (Bankr. N.D. Ill. 2018). *See also In re Stewart,* 583 B.R. 775 (Bankr. W.D. Okla. 2018) (Chapter 7 debtor's attorney sanctioned by disgorgement of $25,000 compensation when attorney failed to disclose amount and source of fees and expenses.).

Entry of Chapter 13 discharge prevented allowance of additional debtor's attorney fees. The Bankruptcy Appellate Panel held that the debtor's attorney was prevented by the entry of discharge from seeking additional attorney fees as an administrative expense, even though the fees were reasonable and the attorney's services were effective for the debtor. The confirmed plan had provided for presumptive fees of $6,500 to be paid through the plan, but further provided that "the attorney may not receive fees directly from the debtor other than the initial retainer." A month after discharge, the attorney moved for supplemental fees of $5,590 and $224.07 expenses for work related to a mortgage dispute. The bankruptcy court found the supplemental amounts to be reasonable but sustained the trustee's objection that the fees were an administrative expense that could not be allowed after discharge. The opinion's conclusion is that because the debtor's plan provided for attorney fees to be paid through the plan and because the attorney did not seek payment prior to entry of discharge, those fees were discharged administrative expenses. *In re Howard,* 2018 WL 2107787 (B.A.P. 9th Cir. May 7, 2018).

Claims

Creditor's attorney established commercial reasonableness of fees related to state-court mortgage litigation. The Chapter 13 debtors objected to second mortgage creditor's attorney's fees and costs related to prepetition state-court litigation, but under Seventh Circuit authority, the reasonableness of attorney fees in federal court is governed by a procedural, not substantive, standard. *See Metavante Corp. v. Emigrant Sav. Bank,* 619 F.3d 748 (7th Cir. 2010). As a result, federal law, rather than Illinois law, controls the amount of reasonable fees for the creditor, with the court construing § 1322(e)'s reference to "applicable nonbankruptcy law" to include federal law when it controls. Federal law looks to "commercial reasonableness," and a significant factor is whether the attorney's client paid those fees. Fees and costs of $93,735.68 were approved as commercially reasonable. *In re Allegretti,* 584 B.R. 287 (Bankr. N.D. Ill. 2018). *See also In re McCormick,* ___ F.3d ___, 2018 WL 3233105 (8th Cir. July 3, 2018) (Affirming its BAP and the bankruptcy court on allowance of attorney fees and costs of secured creditor.).

IRS's secured claim allowed. The Chapter 13 debtors objected to IRS's proof of claim, which asserted a tax lien on an unliquidated workers' compensation claim, and the Bankruptcy Appellate Panel held that the debtors failed to carry their burden of presenting evidence sufficient to overcome the presumption of validity and amount of the IRS's secured claim. *In re Austin,* 583 B.R. 480 (B.A.P. 8th Cir. 2018).

Priority claim under Affordable Care Act. Sustaining the Chapter 13 debtor's objection, the government failed to show that the debtor's liability for failure to obtain health insurance under the Affordable Care Act was in the nature of an "excise tax" rather than a penalty. The debtor owed $664 as her "individual shared responsibility payment (ISRP)" under the Act, and the government asserted that this was an excise tax entitled to priority under § 507(a)(8). The Supreme Court did not consider this issue in the context of the Bankruptcy Code in *National Federation of Independent Business v. Sebelius,* 567 U.S. 519 (2012), and the bankruptcy court concluded that "the most natural reading, for purposes of the Bankruptcy Code, is that the ISRP is a penalty," for purposes of § 507(a). The government's claim was not entitled to priority. *In re Parrish,* 583 B.R. 873 (Bankr. E.D. N.C. 2018).

No. 18-489

In The
Supreme Court of the United States

BRADLEY WESTON TAGGART,

Petitioner,

v.

SHELLEY A. LORENZEN, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* THE HONORABLE EUGENE WEDOFF (RET.), THE HONORABLE LEIF CLARK (RET.), AND A GROUP OF LAW PROFESSORS IN SUPPORT OF PETITIONER

DAVID R. KUNEY
Counsel of Record
9200 Cambridge Manor Court
Potomac, MD 20854
301-299-9544
davidkuney@dkuney.com

Attorney for Amici Curiae

February 2019

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF THE AMICI CURIAE[1]

The amici curiae, whose names are set forth below, include two retired United States bankruptcy judges and a group of law professors. Your amici teach courses on bankruptcy law, conduct research, and are frequent speakers and lecturers at seminars and conferences on bankruptcy law. Our interest in submitting this brief is to assist the Court by identifying the relevant statutory history leading to the enactment of §§ 524(a)(1) and (a)(2) of the U.S. Bankruptcy Code,[2] as well as legal scholarship and empirical studies demonstrating the effectiveness of the discharge provisions in achieving the Congressional goals, both for individual debtors and the larger economy. This statutory history provides critical guidance in framing the appropriate legal standard for violations of the discharge injunction under § 524(a)(2). The Ninth Circuit's decision will significantly weaken the protection of the Code's discharge provisions and will thereby cause unwarranted financial injury both to individual debtors and to the larger economy.

The Honorable Eugene Wedoff (ret.) served as a United States Bankruptcy Judge in the Northern District of Illinois in Chicago from 1987 to 2015 and as Chief Judge from 2002 to 2007. Judge Wedoff was

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1. Pursuant to Supreme Court Rule 37, counsel of record for petitioner and respondents have consented to its filing. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel contributed any money to fund its preparation or submission.

2. 11 U.S.C. §§ 101 *et seq*. (the "Code").

formerly a partner at Jenner & Block. He served as chair of the Advisory Committee on Bankruptcy Rules from 2004 to 2014 and as a governor, secretary, and president of the National Conference of Bankruptcy Judges through 2015. He is the immediate past president of the American Bankruptcy Institute.[3] He is a Fellow of the American College of Bankruptcy and a conferee of the National Bankruptcy Conference.

The Honorable Leif M. Clark (ret.) served as a United States Bankruptcy Judge for the Western District of Texas from 1987 to 2012. Prior to that, he was a partner with Cox & Smith (now Dykema Cox Smith). He served on the endowment boards for both the American Bankruptcy Institute and the National Conference of Bankruptcy Judges, evaluating grant requests for empirical work in bankruptcy. He assisted in developing and administering judicial training programs for judges in Central and Eastern Europe. He is a member of the American College of Bankruptcy and a conferee of the National Bankruptcy Conference, and continues to speak on bankruptcy topics nationwide.

Professor Margaret Howard is the Law Alumni Association Professor of Law, Emerita, at Washington and Lee University School of Law, Lexington, Virginia. She holds a B.A. from Duke University, a J.D. and M.S.W. from Washington University in St. Louis, and an LL.M. from Yale University. She has served as the

[3] The views set forth herein are the personal views of Judge Wedoff and the named amici and may not reflect any position of the American Bankruptcy Institute, which has not participated in this appeal.

Scholar in Residence at the American Bankruptcy Institute, and as the American Bankruptcy Institute's Vice President in charge of the Research Grants Committee. She is a fellow of the American College of Bankruptcy and the American Law Institute. Her publications include *A Theory of Discharge in Consumer Bankruptcy,* 48 Ohio St. L.J. 1047 (1987), and *Stripping Down Liens: Section 506(d) and the Theory of Bankruptcy*, 65 Am. Bankr. L.J. 373 (1991).

David R. Kuney is as an Adjunct Professor at the Georgetown University Law Center, and was previously such at American University's Washington College of Law and New York Law School. He was formerly a partner at the law firm of Sidley & Austin. He serves on the Board of Directors of the American Bankruptcy Institute. He is a fellow in the American College of Bankruptcy and the American College of Real Estate Lawyers.

Professor Bruce A. Markell is the Professor of Bankruptcy Law and Practice at Northwestern Pritzker School of Law, part of Northwestern University. He is a former bankruptcy judge and a former member of the Ninth Circuit's Bankruptcy Appellate Panel. He is a co-author of four casebooks in bankruptcy, contracts, secured transactions, and securitization. He is a founding member of the International Insolvency Institute, a member of the Board of Editors of *Collier on Bankruptcy*, an elected member of the American Law Institute, a conferee of the National Bankruptcy Conference, and a fellow of the American College of

Bankruptcy, where he was the Scholar in Residence from 2013 to 2016.

Professor Michael D. Sousa is an Associate Professor of Law at the University of Denver Sturm College of law. He received his J.D. from Rutgers University School of Law, his LL.M. in bankruptcy from St. John's University School of Law, his Master's of Arts degree in anthropology from the University of Denver, and is currently pursuing a Ph.D. in sociology from the University of Colorado–Boulder. He is a member of the Advisory Board for the LL.M. in Bankruptcy Program at St. John's University School of Law and sits on the Editorial Boards for both the American Bankruptcy Institute Law Review and the American Bankruptcy Law Journal.

Professor Jack F. Williams is a Professor of Law at Georgia State University and the Center for Middle East Studies, where he teaches and/or conducts research on bankruptcy and business organizations; mergers and acquisitions; and taxation and statistics. He is the Scholar in Residence of the Association of Insolvency and Restructuring and a fellow in the American College of Bankruptcy. He holds a B.A. in economics from the University of Oklahoma, a J.D. with High Honors from George Washington University National Law Center, and a Ph.D. in archaeology from the University of Leicester in Leicester, United Kingdom.

SUMMARY OF THE ARGUMENT

The bankruptcy discharge is one of the foundational aspects of bankruptcy law. Commentators have observed that the bankruptcy discharge "ranks ahead in importance of all other [provisions] in Anglo-American bankruptcy history. . . ." John C. McCoid, II, *Discharge: The Most Important Development in Bankruptcy History*, 70 Am. Bankr. L.J. 163, 164 (1996). The discharge is the "crown jewel of [bankruptcy] legislation." F. Regis Noel, *A History of the Bankruptcy Law* 200 (1919).

In order to ensure that the discharge is effective, Congress provided that the discharge gives rise to a statutory injunction and voids any judgment or action taken in derogation of the discharge. 11 U.S.C. §§ 524(a)(1) and (a)(2). Section 105 of the Code authorizes a bankruptcy court to enforce the injunction through a contempt sanction. Indeed, contempt may be the sole remedy for a violation of the discharge injunction.[4]

Despite this, the Ninth Circuit held that a creditor's knowing violation of the discharge injunction could not be remedied by a contempt sanction if the creditor had a good faith, subjective belief that the discharge did not pertain to *its claim*. *Lorenzen v. Taggart*

[4] Various courts have held that the exclusive remedy for violation of the discharge injunction is a contempt proceeding. *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 508 (9th Cir. 2002). *See also Cave v. Valley Collection Services, LLC,* No. cv-15-00390, 2015 WL 12938941 (D. Ariz. June 18, 2015).

(*In re Taggart*), 888 F.3d 438 (9th Cir. 2018). The court held that even an "unreasonable belief" can satisfy the good faith standard. *Id.* at 444 (a "good faith belief, even if unreasonable" insulates creditors from a contempt finding). In effect, the court's ruling makes ignorance of the law a complete defense to a knowing violation of the discharge injunction, even if the creditor's ignorance of the law is based on unreasonable assumptions or conduct (for example, a failure to investigate the discharge's scope).[5]

This Court has long held that civil contempt does not countenance a good faith belief defense. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949).[6] The same rule has been applied in the bankruptcy context by the other circuits which do not permit a subjective "good faith" test to be a valid defense for disregarding the discharge injunction, and certainly none permit an unreasonable belief to be a defense. For example, the Eleventh Circuit held that "the focus of the court's inquiry in civil contempt proceedings is not on the subjective beliefs or intent of the alleged contemnor in complying with the order, but whether in fact their conduct complied with the order at issue." *In re Hardy*, 97 F.3d 1384, 1390 (1996) (citation omitted).

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[5] This Court recently rejected a similar defense of "ignorance of the law" in another consumer protection context. *Jerman v. Carlisle, McNellie, Rini, Kramer & Urlich, LPA*, 130 S.Ct. 1605, 1607 (2010) (discussed below).

[6] "Since the purpose [of civil contempt] is remedial, it matters not with what intent the defendant did the prohibited act." *Id*. at 191.

Your amici urge this Court to reject the subjective standard of "unreasonable" good faith in *Taggart*, and thus reverse the Ninth Circuit on the following grounds, in addition to those asserted by the petitioner.

First, while the Code contains no express statement on the legal standard for a contempt sanction, the history and structure of the discharge provisions do provide the basis for the correct legal standard. Congress intended for the discharge to provide a "fresh start," and since passage of the 1898 Bankruptcy Act has increasingly provided for protection of that fresh start, culminating in the statutory injunction of § 524(a)(2) in the current Bankruptcy Code. The principal purpose of § 524(a)(2) is to prohibit the kind of conduct that occurred here—seeking payment of claims that have been discharged. The history and structure demonstrate that Congress did not intend to permit creditors to disregard the discharge based on an assertion of a subjective, good faith belief that their conduct somehow fell outside the scope of the discharge.

Second, the Ninth Circuit's decision will permit abusive creditor conduct. Congress has noted that institutional creditors often seek to intimidate debtors into surrendering their valid discharge rights. *See* S. Rep. No. 1688 at 2-3 (1960) (Comm. Rep.); *see also Midland Funding, LLC v. Johnson*, 137 S.Ct. 1407, 1416-18 (2017) (Sotomayor, J., dissenting) (noting practice of institutional debt collectors to sue on time barred claims in the hope that consumers will not respond to the lawsuit). The Ninth Circuit's decision will encourage the filing of claims on discharged debt by aggressive creditors who will be able to argue that despite their *actual* knowledge of the discharge order, they were unaware that it applied to *their* claims and so cannot be found in contempt. The decision removes much of the risk in a creditor's seeking to collect upon a discharged claim.

Third, a large body of empirical data and peer-reviewed scholarship demonstrate that the discharge has been effective in achieving the Congressional goals and purposes. Nearly one million individuals seek bankruptcy relief each year.[7] Reversal of the Ninth Circuit's decision is imperative in order to prevent harm to significant numbers of bankruptcy debtors. It is the bankruptcy discharge that alters the often-grim reality facing many bankruptcy debtors and restores them to being productive members of the economy. The "failure to achieve discharge can amount to a financial death sentence." *In re Hyman*, 502 F.3d 61, 66 (2d Cir. 2007).

For over 100 years, this Court has acknowledged that the discharge provisions carefully balance the needs of the debtor and the larger economy. *Local Loan Co. v. Hunt*, 292 U.S. 234, 245 (1934) holding that the discharge is *both* a "fundamental private necessity" and a matter of "great public concern." The

[7] The number of non-business bankruptcy filings in 2017, 2016, and 2015 was as follows: 770,901, 808,781, and 911,086, respectively. *March 2017 Bankruptcy Filings Down 4.7 Percent*, United States Courts (Apr. 19, 2017), http://www.uscourts.gov/news/2017/04/19/march-2017-bankruptcy-filings-down-47-percent.

Congressional intent to ensure a meaningful and effective discharge for bankruptcy debtors, as well as the implementation of this Court's recognition of these goals, mandates reversal of the Ninth Circuit's decision.

ARGUMENT

I. The text, structure and history of the U.S. bankruptcy laws demonstrate that Congress intended to provide a vigorous contempt sanction for violation of the discharge injunction of § 524(a)(2).

A. The Bankruptcy Act of 1898 reflects Congress' goal of providing ample protection against creditors seeking to disregard the bankruptcy discharge.

The discharge provisions are the heart and soul of bankruptcy for individual debtors. Over 200 years ago Sir William Blackstone wrote that through the discharge "the bankrupt becomes a clear man again; and, by the assistance of his allowance and his own industry, may become a useful member of the commonwealth." 2 *William Blackstone, Commentaries**484. More recently, Professor Charles Tabb writes, "[T]he introduction of the discharge [into modern bankruptcy law] could well be considered the single most important event in bankruptcy history." Charles J. Tabb, *Bankruptcy Anthology* 524 (2002).

Despite the central importance of the bankruptcy discharge, the Ninth Circuit held that a creditor can avoid remedial sanctions for violating the discharge injunction of § 524(a)(2) based merely on the creditor's good faith belief that the discharge injunction does not apply to *its* claim, even if such belief is unreasonable. The Ninth Circuit held that respondents' faulty understanding of the effect of the discharge is a complete defense to the imposition of sanctions for their violation of the injunction. In short, the ruling by the Ninth Circuit makes ignorance of the law a defense to violating the discharge injunction, even if that ignorance is the result of unreasonable conduct or a failure to make due inquiry.

Congress did not intend for creditors to be able to disregard the discharge injunction based upon such a subjective showing of good faith. While the Code does not contain an express sanction for violation of the discharge injunction, the structure and history of the discharge provisions culminating in the enactment of § 524(a)(2) *do* provide ample guidance for the correct outcome in this case. In framing the appropriate legal standard to govern the imposition of contempt for violation it is critical to "look to the provisions of the whole law, and to its object and policy." *Kelly v. Robinson*, 479 U.S. 36, 43 (1986). *See also Jerman v. Carlisle, McNellie, Rini, Kramer & Urlich*, 130 S.Ct. 1605, 1607 (2010) (holding that in determining whether mistake of law is a defense the Court should look to the "statute's context and history"). The same applies here.[8]

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[8] Further, bankruptcy law "must be liberally construed to give the debtor the full measure of the relief afforded by Congress,

Beginning in at least 1898, and continuing to the 1978 Code, Congress has enacted statutory protections that increasingly sought to prohibit creditor conduct that ignores the discharge, including suing debtors on discharged claims and to limit the need for judicial involvement in the discharge process. The Ninth Circuit's decision runs directly counter to the statutory history, weakens the discharge injunction, and encourages precisely the kind of creditor abuse that Congress has sought to eliminate.

The modern notion of the bankruptcy discharge came into being when Congress enacted the Bankruptcy Act of 1898.[9] This was the fourth federal bankruptcy law, and it demonstrated a decidedly "prodebtor discharge policy."[10] Until then, American bankruptcy law had essentially looked to English bankruptcy law, which had first introduced the notion of a discharge in the Statute of Anne in 1705.[11]

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lest its benefits be frittered away by narrow formalistic interpretations." *Wright v. Union Cent. Life Ins. Co.*, 311 U.S. 273, 279 (1940) (citation omitted).

[9] Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898) (repealed 1978). "The Bankruptcy Act of 1898 marked the beginning of the era of permanent federal bankruptcy legislation. The 1898 Act remained in effect for eighty years until being replaced by the Bankruptcy Reform Act of 1978." Charles J. Tabb, *The History of the Bankruptcy Law in the United States*, 3 Am. Bankr. Inst. L. Rev. 5, 23 (1995) (hereafter, "*History of Bankruptcy*").

[10] Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325, 364 (1991) (hereafter, "*Discharge*").

[11] "[The Statute of Anne] introduced the discharge of debts for the benefit of a debtor who cooperated in the bankruptcy

The 1898 Act altered the discharge process in two ways that pertain here. First, the 1898 Act removed the need for creditors' consent.[12] But more pertinent here, the 1898 Act sought to limit the need for judicial involvement in the granting of the discharge. Instead the Act provided for judicial intervention only to address a creditor's claim that the discharge was subject to some exception or denial.

> The United States Congress in 1898 did not just decline to give the bankruptcy court control over the discharge. At the same time, that control was taken away from creditors. The long-standing requirement of either creditor consent or a minimum dividend as a prerequisite to obtaining a discharge was eliminated. No check on discharges other than the statutory limitations remained. This innovation marked as much as anything else the arrival of the "modern" American pro-debtor discharge policy.
>
> Tabb, *Discharge*, *supra*, at 364.

proceeding. . . . At the same time, however, the Statute of Anne raised the stakes even higher for uncooperative debtors by providing for the death penalty for fraudulent bankrupts." Tabb, *History of Bankruptcy*, at 10.

[12] Under the third bankruptcy Act, enacted in 1867, discharge could be denied if the debtor had committed a number of dishonest or illegal acts, but importantly, "[t]he consent of a majority of the creditors was still required for discharge in most cases." *See* James J. White, *Bankruptcy and Creditors' Rights: Cases and Materials* 32 (1985).

The Congressional intent to limit the involvement of the court in granting the discharge, and to eliminate creditor control is pertinent here because the effect of the Ninth Circuit's decision is just the opposite. The decision interjects the court post-bankruptcy in determining the ultimate efficacy of the discharge by determining whether there is a good faith basis for a creditors' disregarding the discharge. It also reinstates a form of creditor "consent." Under the Ninth Circuit's decision, the effectiveness of the discharge rises and falls on a judicial determination of the subjective state of mind of the creditor, a determination often made years after the discharge is granted. Congress envisioned the opposite role for the courts.

Also pertinent in this case, the legislative history to the Act of 1898 reflects Congress's intent to create a meaningful "fresh start," intended to benefit both debtors and the larger economic community.[13] Thus, House Report of 1897, H.R. Rep. No. 65, 55th Cong., 2d Sess. 30-32 (1897), in addressing the question of "who is a debtor" noted the public benefit from the discharge:

> [T]his vast number [of debtors] constitutes an army of men crippled financially—most of them active, aggressive, honest men who have met with misfortune in the struggle

[13] "The discharge was an integral part of the 1898 Bankruptcy Act, and both Congress and the judiciary have consistently read the Act as including the 'fresh start' as one of its primary goals." James J. White, *Bankruptcy and Creditors' Rights: Cases and Materials* 29 (1985) citing R. Lewis Townsend, *Fresh Cash-Another Element of Bankrupt's Fresh Start?* 31 U. Miami L. Rev. 275, 281 (1977).

> of life, and who if relieved from the burden of debt, would reenter the struggle with fresh hope and vigor and become active and useful members of society. . . .
>
> [T]he passage of a bankrupt law . . . will lift these terrible and hopeless burdens, and restore to the business and commercial circles of the country the active and aggressive elements that have met with misfortune and are now practically disabled for the battle of life. . . .
>
> When an honest man is hopelessly down financially, nothing is gained for the public by keeping him down, but, on the contrary, the public good will be promoted by having his assets distributed ratably as far as they will go among his creditors and letting him start anew.

In sum, the 1898 Act reflected Congress's view that the bankruptcy discharge is a foundational concept underlying bankruptcy law, and that it served the public interest as well as interests of the individual debtor. "[T]he 1898 law recognized formally for the first time the overriding *public* interest in granting a discharge to 'honest but unfortunate' debtors." Tabb, *Discharge, supra*, at 364 (emphasis in original). "The theory is that . . . the debtor then is able to resume his or her place as a productive member of society." Tabb, *supra*, at 364-65.[14]

The 1898 Act's discharge provisions were before this Court at least three times between 1904 and 1934. During this period this Court endorsed the twin notions of a fresh start as being a benefit both to the debtor and the public, as well as the need for injunctive protection. *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904);[15] *Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554-55 (1915).[16]

In 1934, this Court confirmed the ability of a bankruptcy court to enjoin creditor action in derogation of the discharge, thus presaging the enactment of § 524(a)(2). *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). This injunctive power was tied directly to the notion of the fresh start and the public interest as well. *Id*. Indeed, the discharge was seen as a "fundamental private necessity." *Id*. at 245. But there was also a public benefit: "This purpose of the Act has been again and

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[14] Professor Tabb cites F. Noel: "The history of these laws is evidence of man's humanity to his fellow man." F. Noel, *A History of the Bankruptcy Law* 200 (1919).

[15] The Court held that the discharge did not apply, however, to a claim for alimony as it viewed such a claim as not being a "provable debt." This issue is obviously not before the Court.

[16] "It is the purpose of the bankrupt act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes."

again emphasized by the courts as being of public as well as private interest. . . ." *Id*. at 244.

B. Congress amended the 1898 Act in 1970 to further strengthen the discharge protection by including an injunction against collection activities on discharged debts.

In 1970, Congress codified *Local Loan* by making the order of discharge an injunction, declaring that "an order of discharge shall enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action . . . to collect such debts. . . ." Pub. L. No. 91-467, § 3, 84 Stat. 990, 991 (1970).

The 1970 amendments also rejected the notion that a discharge should merely be an affirmative defense by adding § 14f to the Bankruptcy Act, declaring that state court judgments are "null and void" to the extent they determined the personal liability attaching to a discharged debt. The rule until 1970 was that the bankrupt had the burden of pleading the certificate of discharge as an affirmative defense. Tabb, *supra*, at 360. If the debtor failed to plead the discharge, a final judgment could be entered despite the discharge, which would be given res judicata effect. Tabb, *id.* (citing Vern Countryman, *New Dischargeability Law*, 45 Am. Bankr. L.J., 1-2 (1971), in turn citing *Dimock v. Revere Cooper Co.*, 117 U.S. 559 (1886)).[17]

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[17] In *Local Loan* the Supreme Court held that a bankruptcy court had the jurisdiction to enjoin a creditor from suing a debtor

The legislative history made it clear that the purpose was to prevent creditors from suing debtors on discharged claims in the hope that they might not appear and thus could obtain a default judgment against the debtor.

> [T]he major purpose of the proposed legislation is to effectuate, more fully, the discharge in bankruptcy by rendering it less subject to abuse by harassing creditors. Under present law creditors are permitted to bring suit in State courts after a discharge in bankruptcy has been granted and many do so in the hope the debtor will not appear in that action, relying to his detriment on the discharge. . . . As a result, a default judgment is taken against him. All this results because the discharge is an affirmative defense which, if not pleaded, is waived.[18]

on a discharged claim, but the injunction required action in the individual case. *See* 293 U.S. at 238.

[18] H.R. Rep. No. 91-1502 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4156. *See also* 116 Cong. Rec. 34,818 (Statement of Rep. Wiggins) (as quoted in *Lone Star Security Video, Inc. v. Gurrola* (*In re Gurrola*), 328 B.R. 158, 168 n.9 (B.A.P. 9th Cir. 2005), noting that by making the discharge an affirmative defense "the concept of a discharge in bankruptcy by which the Bankruptcy Act attempts to assure the honest but unfortunate person a fresh start is defeated."

C. The 1978 Code added §§ 524(a)(1) and (a)(2) to prevent creditor conduct in derogation of the discharge; the Ninth Circuit's decision is contrary to the Congressional goals and purposes.

In the 1978 Code Congress enlarged the discharge injunction provision in new § 524(a)(2), as well as providing for other discharge protections. The Ninth Circuit's decision is contrary to the goals and purpose of §§ 524(a)(1) and (a)(2).

The Code contains a broad discharge provision,[19] and carries forward the same notion of the central importance of the discharge as found in the Act of 1898 and its amendments. The Code provides for the same three critical protections, each of which is pertinent here. It made the discharge non-discretionary and thus limited the role of the court in entering the discharge order; it provided for a stronger statutory injunction against suing on discharged claims; and it provided that acts taken in violation of the discharge are void. The goal was to protect against the very conduct that occurred in this case, namely, creditors suing debtors despite the discharge of the claim.

First, the 1978 Code continues to eliminate most judicial involvement in the decision on whether to enter an order of discharge. In the absence of a statutory exception to discharge (not relevant here) § 727 of the

[19] The discharge is broad. It "discharges the debtor from all debts that arose before the date of the [bankruptcy petition]." 11 U.S.C. § 727(b) (2018).

Code provides that a bankruptcy court "shall grant the debtor a discharge." The Bankruptcy Rules provide that a discharge is to be entered as a matter of course after the time for filing objections has lapsed. *See* Fed. R. Bankr. P. 4004(c)(1).

This effort to remove the bankruptcy court from threshold determinations concerning the discharge is pertinent here, because the effect of the Ninth Circuit's decision is to involve the bankruptcy courts in determinations of a creditor's knowledge of the discharge; the Ninth Circuit has effectively interjected a new judicial role, despite Congress's long-standing efforts to do precisely the opposite.

Second, debtors are protected from creditor interference with their discharge by § 524(a)(2), which states that discharge "operates as an injunction against the commencement or continuation of an action . . . to collect, recover or offset any such debt as a personal liability of the debtor." Section 524(a) "retained and elaborated" on the provisions of § 14f of the Bankruptcy Act, and the legislative history made plain that Congress wanted precisely to preclude creditors suing debtors on discharged debts:

> Subsection (a) specifies that a discharge in a bankruptcy case voids any judgment to the extent that it is a determination of the personal liability of the debtor with respect to a prepetition debt. . . . *The injunction* is to give complete effect to the discharge and *to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt*

> *collection efforts*. . . . [It] is intended to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it.[20]

Finally, § 524(a)(1) sought to prohibit creditors from suing on discharged claims by providing that a judgment obtained on a discharged debt is "void." As noted above, Congress provided that the discharge is not merely an "affirmative defense" in a collection suit, but is an absolute, non-waivable defense, and that any judgment obtained in violation of the discharge is of no effect.[21] *See In re Gurrola*, 328 B.R. at 170.

Thus, "the enactment of § 524(a) and its predecessor reflect a clearly expressed and identified Congressional intent that a debtor be able to rely on the bankruptcy discharge without the burden of establishing her rights under the discharge against a meritless claim that is excepted from discharge and without being subjected to an adverse judgement by failure to defend." *In re Meadows*, 428 B.R. 894 (Bankr. N.D. Ga. 2010) (citing the legislative history of § 524, *supra*).

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[20] H.R. Rep. No. 95-595 at 365-66 (1977) *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6321-22 (emphasis added). The Senate Report is the same. S. Rep. No. 95-989 at 80 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5866.

[21] *See In re Hamilton*, 540 F.3d 367, 372 (6th Cir. 2008). "This provision was designed 'to effectuate the discharge and make it unnecessary to assert it as an affirmative defense in a subsequent state court action.' " (citation omitted). *But cf.*, *Strata Res. v. State*, 264 S.W.3d 832, 843 (Tex. App. 2008).

D. Congress did not intend for creditors to be able to disregard the discharge injunction based on a subjective standard of good faith or ignorance of the law.

There is nothing in the text or history of the Code to suggest that Congress intended to permit creditors to evade the discharge injunction by showing merely a subjective, good faith belief that they were in compliance. The standard is objective. And Congress certainly did not intend to permit a creditor to rely on the subjective "mistake of law" defense. The Ninth Circuit's decision moves in exactly the opposite direction by sanctioning a highly subjective declaration of good faith, even if unreasonable, as a defense.

This Court has held that a subjective good faith intent is not a defense to a violation of a civil injunction. Thus, in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 599 (1949) the Court stated as follows:

> The absence of willfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents (citations omitted).

Likewise, the use of a subjective standard in the context of the bankruptcy injunction is even more inappropriate. Congress specifically intended for the discharge provisions "*to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts*."[22] Unlike civil injunctions, in which the court crafts a new injunction order from whole cloth, such is not the case in a bankruptcy matter. *See generally*, *In re Rose, supra*, at 183 n.12. It has been almost 50 years since Congress first introduced the injunction in § 14f of the prior Bankruptcy Act. Its essential mandate has not varied. The notion that a creditor cannot perceive the scope or application of the injunction is specious.

Even more so, the application of *Taggart* to institutional and corporate creditors is highly problematic, and one court has noted that none of the *Taggart* cases even address the issue of institutional creditors: "It is one thing for individuals to testify as to their subjective beliefs, but quite another for corporate representatives to testify as to the subjective belief of a corporation." *In re Rose*, 565 B.R. 178, 183 n.11 (Bankr. D. Nev. 2017).

This subjective standard will immerse the courts in precisely the fashion that both the Bankruptcy Act and the Code expressly sought to avoid. Bankruptcy courts will be forced to "engage in novel and unfettered inquiries into a 'creditor's state of mind.'" *Midland*,

[22] H.R. Rep. No. 95-595 at 365-66 (1977), *supra* (emphasis added).

137 S.Ct. at 1419 n.5 (Sotomayor, J. dissenting). Similarly, in *In re Rose*, 565 B.R. 178, 183 n.11 (Bankr. D. Nev. 2017) the bankruptcy court expressed its concern that this highly subjective standard "opens the door to the assertion of too many 'Sargent Schultz' defenses ('I know nothing! Nothing!'), at the expense of the peace of mind that the discharge is supposed to provide to the individual debtors" (citation omitted).

A claim that one lacked an understanding of the law is also no defense to a violation of the discharge. This Court recently had occasion to consider whether a defense based on ignorance of the law, or mistake of law, should be permitted in somewhat similar circumstances. *Jerman v. Carlisle, McNellie, Rini, Kramer & Urlich, LPA*, 130 S.Ct. 1605 (2010). In *Jerman*, this Court held that in determining whether mistake of law is a defense the Court should look to the "statute's context and history." *Id.* at 1607.

Jerman concerned the Fair Debt Collection Practices Act. Section 813(c) of the Act, 15 U.S.C. § 1692k(c) provides that a debt collector is not liable in action brought under the Act if she can show "violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." *Id*. at 1607. The question presented was "whether the bona fide error" defense in § 1692k(c) applies to a violation resulting from a debt collector's mistaken interpretation of the legal requirements of the FDCPA. *Id*. at 1607.

The Court held that ignorance of the law was not a defense. "We have long recognized the 'common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.'" *Id*. at 1611, citing *Cheek v. United States*, 498 U.S. 192 (1992).

Further, the Court in *Jerman* held, "[o]ur law is therefore no stranger to the possibility that an act may be 'intentional' for purposes of civil liability, even if the actor lacked actual knowledge that her conduct violated the law" (citing *Kolstad v. American Dental Assn.*, 527 U.S. 526 (1999). *Id*. at 1612.

And, "[l]ikely for this reason, when Congress has intended to provide a mistake-of-law defense to civil liability, it has often done so more explicitly than here." *Id.* at 1612. Thus, this Court held that it was a "fair inference that Congress chose to permit injured consumers to recover actual damages . . . for 'intentional conduct,' including violations resulting from mistaken interpretation of the FDCPA. . . ." *Id*. at 1612.[23]

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[23] The bankruptcy court below referred to the test for contempt under § 105 as being a "willful" violation of the injunction. *In re Taggart*, 522 B.R. 627, 631 (Bankr. D. Or. 2014). But the same court stated that willful is defined in *Hardy* as meaning nothing more than an intent to do the acts which violate the injunction. *Id*. at 632. Your amici contend that the Code does not require a showing of "willfulness' nor is such to be implied. "It is sufficient that the creditor knows of the bankruptcy and engages in deliberate conduct that, it so happens, is a violation of the stay." In *IRS v. Murphy*, 892 F.3d 29, 37 (1st Cir. 2018) noting that the term "willfully" is a "chameleon." *Id*. at 35. The First Circuit further noted that in "common usage" the term "willful" was considered

The same rationale applies here. Indeed, this case is even stronger, as there is no statutory defense of "bona fide error." The context and history of the Code preclude any reliance on the notion that Congress intended for the creditor's unreasonable lack of knowledge that the discharge applied to its claim to undo its carefully crafted discharge provisions.

II. The Ninth Circuit's use of a subjective defense of good will will permit creditors to easily disregard the discharge injunction.

The Ninth Circuit's decision that a good faith, subjective belief can excuse disregarding the bankruptcy injunction will encourage exactly the kind of abusive creditor conduct that Congress has sought to eliminate. If a debtor objects to the filing of a claim on a discharged debt, a creditor can readily plead lack of knowledge that the discharge applied to its claim. Thus, instead of merit-based resolutions, the system will allow under-represented and *pro se* debtors to be intimidated into surrendering their opportunity for a fresh start.

Numerous factors underlie the corrosive impact the Ninth Circuit's decision will have in making abusive conduct less risky. First, Congress intended to "make it unnecessary to assert [discharge] as an affirmative defense in a subsequent state court action." *See In re Hamilton*, 540 F.3d 367, 372 (6th Cir. 2008). "The

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synonymous with such words as "voluntary," "deliberate" and "intentional." *Id*.

purpose of the provision [§ 524] is to make it absolutely unnecessary for the debtor to do anything at all in the collection action." *Id*. at 373. Despite this mandate some state statutory enactments still identify discharge as an affirmative defense and some courts seem to make statements that vary from the federal law. *See*, *e.g., Strata Res. v. State*, 264 S.W.3d 832, 843 (Tex. App. 2008); *see also* Tex. R. Civ. P. 94 ("In a pleading to a proceeding a party shall set forth affirmatively . . . discharge in bankruptcy. . . .").[24]

Congress recognized that individual debtors are unlikely to appear and defend against collection suits, regardless of a valid defense. Consumer debtors often permit the entry of default judgments, regardless of the merits of a claim; institutional debt collectors take advantage of this. "[C]onsumers do fail to defend themselves in court—in fact, according to the FTC, over 90% fail to appear at all. . . . The result is that debt buyers have won 'billions of dollars in default judgment' by simply filing suit and betting that consumers will lack the resources to respond." *Midland Funding, LLC v.*

[24] Some state procedural rules may have followed Fed. R. Civ. P. 8, which until 2010, provided that the bankruptcy discharge was an affirmative defense. However, the Committee Note to the 2010 amendments now clarifies this: "Subdivision (c)(1). 'Discharge in bankruptcy' is deleted from the list of affirmative defenses. Under 11 U.S.C. § 524(a)(1) and (2) a discharge voids a judgment to the extent that it determines a personal liability of the debtor with respect to a discharged debt. The discharge also operates as an injunction against commencement or continuation of an action to collect, recover, or offset a discharged debt. For these reasons, it is confusing to describe the discharge as an affirmative defense."

Johnson, 137 S.Ct. 1407, 1417 (Sotomayor, J., dissenting).[25]

Moreover, the burden of proof is a substantial barrier for debtors who seek to enforce the discharge injunction in bankruptcy court. The Ninth Circuit held that "the moving party [the debtor] has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court." *In re Taggart*, 888 F.3d at 443. *See also In re Dyer*, 322 F.3d 1178, 1190 (9th Cir. 2003). Further elaborating, the court stated that "to justify sanctions the movant [the debtor] must prove that the creditor (1) *knew the discharge injunction was applicable* and (2) intended the actions which violated the injunction." *Id*. (emphases added).

Thus, the debtor's burden includes specific showings of "knowledge" of the injunction's applicability, a highly subjective state of mind that must be shown by clear and convincing evidence. Under the clear and convincing standard, the debtor must "place in the ultimate fact finder an abiding conviction that the truth of its factual contentions are 'highly probable.' Factual contentions are highly probable if the evidence offered in support of them 'instantly tilt[s] the evidentiary scales in the affirmative when weighed against the

[25] This observation is supported by the empirical literature. *See generally* Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 Loy. Consumer L.Rev. 179 (2014).

"evidence [the non-moving party] offered in opposition.'" *Emmert v. Taggart* (*In re Taggart*), 548 B.R. 275, 288 n.11 (B.A.P. 9th Cir. 2016) (citation omitted).

Assuming the debtor somehow shows the requisite intent and knowledge, the burden then shifts to the creditor, who can prevail merely by showing "good faith."[26] One may fairly question how the typical individual debtor can realistically rebut an institutional creditor's subjective claim of good faith. Bad faith cannot be inferred from knowledge of the bankruptcy alone. *In re Taggart*, 888 F.3d at 443. An unreasonable belief that a creditor was not barred from suing on a discharged claim will often be easily created, and it is difficult to imagine how a debtor could satisfy its burden in refuting good faith, absent an unlikely "confession" by the creditor.

Finally, burden aside, the cost and time to litigate the creditor's state of mind will often be beyond what an individual debtor can sustain. The subjective standard of "good faith" would require the debtor to engage in costly discovery, some of which is likely to be resisted. Individual debtors frequently lack the resources to pay legal counsel to defend against discharge litigation, as Congress has recognized. Prior to enactment of the 1978 Code, the House Judiciary

[26] This is precisely what occurred below. The bankruptcy court concluded that the respondents "knowingly violated the discharge injunction." *In re Taggart*, 888 F.3d at 444. The bankruptcy court found that a good faith belief that the discharge was inapplicable was irrelevant. *Id*. The BAP, however, held that a good faith belief was determinative. 548 B.R. at 290.

Committee noted that "[t]he threat of litigation over this [discharge] exception and its attendant costs are often enough to induce the debtor to settle for a reduced sum, in order to avoid the costs of litigation" even with respect to "marginal cases." H.R. Rep. No. 95-595 (1977).[27] *See also* Andrew F. Emerson, *So You Want to Buy a Discharge? Revisiting the Sticky Wicket of Settling Denial of Discharge Proceedings in the Chapter 7 Bankruptcy*, 92 Am. Bank. L.J. 111, 118-23 (2018).

Debtors are unlikely to be able to rely on their Chapter 7 counsel to represent them in discharge litigation. Lawyers have no duty to do so. Legal counsel for Chapter 7 debtors frequently "unbundle" their legal services and decline to undertake representation of the debtor in an adversary proceeding challenging the discharge.[28] "Unbundling" allows an attorney to limit the scope of his or her representation by excluding expensive tasks like adversary proceedings from their general services. Chapter 7 debtor counsel have no obligation to represent the debtor post-discharge if a civil suit is filed in state court to collect on a discharged

[27] *See also* William F. Stone, Jr. & Bryan A. Stark, *The Treatment of Attorneys' Fee Retainers in Chapter 7 Bankruptcy and the Problem of Denying Compensation to Debtors' Attorneys for Post-Petition Legal Services They Are Obligated to Render*, 82 Am. Bankr. L.J. 551, 555 n.25 (2008).

[28] For example, Local Rule 2090-5(B) of the Bankruptcy Court for the Northern District of Illinois expressly excludes representation in adversary proceedings from the duties of an attorney arising from an appearance on behalf of a debtor.

claim and debtors who appear *pro se* have less favorable outcomes in judicial proceedings.[29]

Conversely, intuitional creditors are typically well-represented by counsel. The plaintiff in such suits is frequently not the original creditor, but one of the "bottom fishers" who buy consumer debt for pennies on the dollar, and often file suits despite facial defects.[30] These institutional creditors are well-funded, and their costs are diminished by the likelihood that consumers will lack the resources to defend the discharge. *See id.* ("The clearest trend, repeatedly highlighted in the literature, is that defendants often do not respond to collection suits.") Holland, *Junk Justice*, *supra*, at 227.

These concerns over creditor disregard of the injunction are not hypothetical. In the relatively short time since *Taggart* was decided there have been numerous decisions which illustrate the ease by which the injunction is ignored. Some of these cases are discussed in the amicus brief of the National Consumer Bankruptcy Rights Center filed in these proceedings (NACBA Br. p. 7 *et seq.*) "In each of the cases cited

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[29] *See, e.g.*, Rafael I. Pardo, *An Empirical Examination of Access to Chapter 7 Relief by Pro Se Debtors*, 26 Emory Bankr. Dev. J. 5 (2009); Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 Wm. & Mary L. Rev. 1933, 1957 (2011) ("The percentage of pro se cases rose statistically significantly, especially among lower-income debtors, while the percentage of these cases ending with a discharge of debt declined.").

[30] *See generally* Holland, *Junk Justice, supra; Midland Funding*, 137 S.Ct. 1407 (2017).

above, including *Taggart*, the debtor proved that the debtor filed bankruptcy, the creditor's debt was listed, the creditor received notice of the discharge, the creditor did not object to the discharge, and that the creditor continued to personally collect against the debtor or debtor's property on a debt it knew was discharged.[31] In each of the cases the debtor's counsel informed the creditor or its counsel that the creditor's actions were violating the discharge injunction. In each case, the creditor continued its collection action." *Id*. at 14. Indeed, what these four cases demonstrate is that even a debtor's notification to the creditor in writing explaining that the debt is discharged is insufficient to show the requisite subjective intent. *Id*. at 14.

III. Empirical studies and academic scholarship demonstrate that the bankruptcy discharge has been effective in achieving the Congressional goals and policies that underlie the discharge provisions.

A substantial body of scholarship and empirical evidence demonstrates that the Congressional goals inherent in the discharge provisions have been effective. The discharge has proven to be of vital importance to both the individual debtor and to the larger

[31] *Parker v. Nelson* (*In re Nelson*), No. 15-1416, 2016 WL 7321196 (B.A.P. 9th Cir. Dec. 15, 2016); *Rogerson v. Shaw* (*In re Shaw*), No. 15-1406, 2017 WL 2791663 (B.A.P. 9th Cir. June 27, 2017); *Morning Star Company v. Benech* (*In re Benech*), 17-CV-05100-LHK (N.D. Cal. July 25, 2018) (NACBA App. 1a); *Bruce v. Fazilat* (*In re Bruce*), Adv. No. 8-15 ap-01028, 2018 WL 3424581 (Bankr. C.D. Cal. July 12, 2018).

economy.[32] The effect of the Ninth Circuit's decision, however, would greatly diminish the effectiveness of the Congressional discharge scheme.

The discharge provisions are properly targeted towards those who need the protection. Empirical analysis has demonstrated those who file for bankruptcy relief and seek the discharge are in desperate need of relief, not "can pay" debtors and typically endure serious stigma from the filing. The typical individual debtor turns to bankruptcy due to a serious economic plight, rather than because of over-spending, or other non-productive economic behavior. "[W]hen bankrupt debtors as a group are compared to the general population, their situations are grim." Teresa A. Sullivan, et al., *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* 77 (1999). The authors found that debtors have "staggering debts in relation to their income" and are a "segment of America in financial collapse." *Id*.[33]

Second, the decision to file for bankruptcy is usually the result of oppressive debt obligations, including

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[32] While some of the articles are twenty years old, their influence continues to the present day, and their underlying insights remain valid. *See generally* Michael D. Sousa, *The Persistence of Bankruptcy Stigma*, 26 Am. Bankr. Inst. L. Rev. 217 (2018) (hereafter "Sousa") (collecting prominent research articles and substantial databases on discharge issues).

[33] "The economic profile of debtors [in their study] demonstrated that the latter group was in far worse financial trouble than their earlier counterparts as measured by, among other variables, debt-to-income ratios and the amount of average unsecured debt." Sousa, *supra* at 228.

catastrophic medical problems such as cancer, automobile and industrial accidents, and age-related issues.[34] When asked why they filed for bankruptcy, 67.5 percent of debtors reported job loss, 19.3 percent cited a medical event, and 22.1 percent listed family concerns (i.e., divorce for example) as contributing factors. Teresa A. Sullivan, et al., *The Fragile Middle Class: Americans in Debt*, 16 fig. 1.2 (2000). These Americans file for bankruptcy not because it is "an easy way out," but because they have exhausted their other options. Teresa A. Sullivan, et al., *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 Wis. L. Rev. 1091, 1138 (1983). In other words, "[f]ew people file bankruptcy without crushing debts." Sousa, *supra*, at 226.

The filing for bankruptcy is traumatic and causes feelings of stigma and shame.[35] According to empirical data collected by Professor Michael D. Sousa, most of the debtors he interviewed "experienced deep feelings of shame, embarrassment and instances of stigmatization." Sousa, *supra*, at 230. Indeed, "bankruptcy stigma appears to have increased over the past four

[34] Maurie Backman, *This Is the No. 1 Reason Americans File for Bankruptcy*, The Motley Fool (May 1, 2017) https://www.fool.com/retirement/2017/05/01/this-is-the-no-1-reason-americans-file-for-bankrup.aspx.

[35] "There is robust literature in the social sciences regarding the association between socioeconomic disadvantage and mental health, including suicide. . . . [T]he more debt an individual possessed the more likely that he or she suffered from mental disorder, neurosis, psychosis, alcohol dependency or drug dependency." Sousa, *supra* at 232 (citations omitted).

decades. . . .” *Id*. at 235. “[S]tigma has increased and the rising numbers of filings are actually the net result of two opposing trends—economic forces may have pushed more families to the brink of bankruptcy, while increasing stigma may have prevented even more distressed families from filing.” *Id*. at 239 (citing Teresa L. Sullivan, et al., *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 Stan. L. Rev. 213, 228-33 (2006)).

Discharge is vital in a third respect: it has shown a demonstrable effect in restoring debtors to a productive role in the larger economy. Indeed, “the average person who files for bankruptcy to relieve financial stress catches up with their peers.” Jay L. Zagorski & Lois R. Lupica, *A Study of Consumers’ Post-Discharge Finances: Struggle, Stasis, or Fresh-Start?* 16 Am. Bankr. Inst. L. Rev. 283, 289 (2008).[36] “None of the data indicate that over time the size of the financial gap between bankruptcy filers and non-filers either gets wider or stays the same; for the most part, the size of the financial gap between these two groups narrows over time.” *Id.* at 307.

Fourth, without bankruptcy discharge, only a small fraction of debtors have any hope of repaying their debt outside of bankruptcy. Even those debtors who voluntarily attempted repayment in Chapter 13

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[36] *See also* Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy’s Fresh Start*, 92 Cornell L. Rev. 67, 87 (2006) (“The majority, 65% of families, reported that their financial situations had improved since they filed bankruptcy.”).

often failed: at most, only about a third were able to complete their repayment plans, and a significant portion of those debtors were making only minimal repayments. *See* Teresa A. Sullivan, et al., *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981–1991*, 68 Am. Bankr. L.J. 121, 123 (1994).

Discharge benefits both debtors and the larger macro economy. "The theory is that society as a whole benefits when an overburdened debtor is freed from the oppressive weight of accumulated debt. The debtor then is able to resume his or her place as a productive member of society." Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325, 364-65 (1991). "Bankruptcy law . . . serves significant macroeconomic goals[;] . . . the Chapter 7 debt discharge prevents the development of an insolvent underclass. . . ." Amber J. Moren, Note, *Debtor's Dilemma: The Economic Case for Ride-Through in the Bankruptcy Code*, 122 Yale L.J. 1594, 1618 (2013).

Ultimately, empirical data show that "bankruptcy laws are generally serving the people they were designed to serve: people in serious, even hopeless financial trouble, who need either a fresh-start discharge from their debts or at least some [breathing spell]." Sullivan, *As We Forgive Our Debtors*, *supra*, at 77. This Court has consistently emphasized that the bankruptcy discharge is of profound public and private importance. In 1915 this Court correctly perceived the need to have a legal system that restores debtors to productive participation in the economy. *See Williams v. United States*, 236 U.S. 549, 554-55. In 1918, this Court emphasized the "great public interest" in protecting the discharge. *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918).

The Ninth Circuit's decision plainly would impair the financial and social benefits that Congress intended for the discharge to achieve.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court reverse the decision of the Ninth Circuit.

Dated: February 2019

Respectfully submitted,

David R. Kuney
Counsel of Record
9200 Cambridge Manor Court
Potomac, MD. 20854
301-299-9544
davidkuney@dkuney.com

Attorney for Amici Curiae

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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BRADLEY WESTON TAGGART,	)	
Petitioner,	)	
v.	)	No. 18-489
SHELLEY A. LORENZEN,	)	
EXECUTOR OF THE ESTATE OF STUART	)	
BROWN, ET AL.,	)	
Respondents.	)	

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Washington, D.C.

Wednesday, April 24, 2019

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

DANIEL L. GEYSER, Dallas, Texas; on behalf of the Petitioner.

SOPAN JOSHI, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, in support of neither party.

NICOLE A. SAHARSKY, Washington, D.C.; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 18-489, Taggart versus Lorenzen.

Mr. Geyser.

ORAL ARGUMENT OF DANIEL L. GEYSER

ON BEHALF OF THE PETITIONER

MR. GEYSER: Thank you, Mr. Chief Justice, and may it please the Court:

According to the Ninth Circuit below, a creditor's subjective good faith belief categorically precludes any liability for discharge violations under the code. All sides to this case now agree that the Ninth Circuit was wrong.

There is no per se rule that courts can never provide relief when a creditor violates the discharge in good faith. But Respondents and the government now propose adopting a different kind of per se rule.

This categorical rule would adopt a profoundly atextual qualified-immunity-like defense for the code, declaring that courts can never provide relief so long as a creditor can identify any fair, reasonable ground for violating the discharge.

This novel proposal has no foothold in this Court's traditional principles for enforcing injunctions or the cords -- the code's broad equitable authority under Section 105.

There is no per se rule that excuses subjective or objective mistakes under the code. Section 105 provides broad authority to enforce and restore the statutory discharge, and the code bars all efforts to collect discharged debts, not only unreasonable ones.

In taking the opposite position, Respondents and the government ignore the broad authority under Section 105 in the code's overall scheme. They overstate the cost to creditors, and they understate the cost to debtors. And they ignore the foundational importance of the fresh start.

A discharge violation imposes real costs on other parties, and there is no basis for allocating the damage caused by the wrongdoer's violation to the protected class.

JUSTICE ALITO: But in this case,

isn't it the case -- isn't it true that the state court and the bankruptcy court held that Taggart had returned to the fray --

MR. GEYSER: They --

JUSTICE ALITO: -- and that would -- therefore there would not have been a -- a violation of the discharge?

MR. GEYSER: If those courts were correct, but they were wrong. Both the state court was reversed the state appellate court and the bankruptcy court was reversed by the federal district court.

And I don't think it's enough the fact that they had some judicial decisionmaker say that conduct was permitted. The question is did it actually violate the code? And --

JUSTICE ALITO: But isn't it -- what is -- well, what is the justification for holding somebody in contempt for doing something that two state courts have held was not a violation?

MR. GEYSER: Well, first, Your Honor --

JUSTICE ALITO: Even -- even if those courts turned out to be wrong.

MR. GEYSER: Well, even if they -- they turn out to be wrong, but I think the -- the justification is first, that the fact that someone says that's something's permissible doesn't mean that it doesn't violate the code and that it doesn't impose real costs on the protected class.

The -- Section 105 doesn't have any exception for a good faith error or for reasonable error, and the fact that a court might agree, even -- perhaps unreasonably, that that that particular act was permitted doesn't make it so. And if Congress wanted to create that sort of good faith or reasonableness defense, it presumably would have done so. And we know that because they did something similar in Section 362(k).

In 362(k), Congress looked at automatic stay violations, they're cut from the same cloth as the discharge, and they said that we're creating a bright-line rule where any violation is automatically subject to mandatory remedies for the full costs of the violation, including attorneys' fees.

So the -- there's no reason to think

that Congress --

JUSTICE SOTOMAYOR: There's a sort of reverse problem. I understand your argument that the other side is permitting an end run around a district court's discretion, if somebody continues in the fray, borrowing a pun. But it might have a good ground of doubt or a reasonable basis, but it really wasn't their motivation. And the district court held that.

So that's one extreme. Yours is an extreme too, because you want to impose strict liability on a code provision that doesn't -- where an order is not abundantly clear, because it tells you some debts but others are not discharged, and, secondly, in a situation where the code doesn't require a debtor to go back to the bankruptcy court to get clarification on all actions, only on some. And this wasn't one of them.

So isn't there something wrong with your formulation of strict liability too?

MR. GEYSER: Well, I -- I -- I hope not, Justice Sotomayor.

JUSTICE SOTOMAYOR: But assuming --

MR. GEYSER: I can --

JUSTICE SOTOMAYOR: -- it is --

MR. GEYSER: -- try to --

JUSTICE SOTOMAYOR: -- assuming I think that the policy grounds are not as compelling as you think.

MR. GEYSER: Sure. Well, first --

JUSTICE SOTOMAYOR: Then -- then how -- how do I square the belief that this requires more discretion than either of you are --

MR. GEYSER: Well --

JUSTICE SOTOMAYOR: -- are positing or -- or want?

MR. GEYSER: Well, let -- let me make our position very clear, because our position actually embraces the Court's discretion under Section 105. Our position is that if the discharge is violated, then under Section 105, a court may impose a remedial order to remedy the violation. It's in the court's discretion.

Now, the thumb on the scale will be in favor of full remedial relief precisely because of the damage to the discharge and the need to restore the benefits of the discharge. That's how you carry out the provisions of the code. It's a necessary and appropriate order.

But it is absolutely in the court's discretion. The court can take into account the fact that the creditor had an excellent basis for thinking that this was true, that the creditor sought a determination under Rule 4007, which, you're right, isn't mandatory, but it provides a safe harbor for those creditors who are very worried about a genuinely disputed --

JUSTICE SOTOMAYOR: The problem with that --

MR. GEYSER: -- provision of the code.

JUSTICE SOTOMAYOR: -- is you're -- you're -- you're putting into the code something that's not required.

MR. GEYSER: Oh, but --

JUSTICE SOTOMAYOR: That you're basically telling debtors, if you think you're not covered, you can't do what the code permits you to do; you have to go for that safe harbor to be safe.

MR. GEYSER: Oh, absolutely not, Your Honor. What -- what we're saying is that if a creditor is concerned, a creditor can go forward and collect a debt right away. And, by the way, the vast majority of debts under the code are absolutely clear.

They either clearly fall within the discharge or they clearly fall within one of the exceptions to the discharge. It's really a small category of cases where there's genuine confusion and good arguments on both sides.

JUSTICE GORSUCH: Okay, but in those cases -- I'm -- I'm -- I'm still struggling with this for a slightly different reason -- not only may a -- a creditor go to a state court to seek clarification in most issues. 523, I know, carves out a couple where you got to go to the bankruptcy court. But Congress expressly gave concurrent jurisdiction to the states to do this.

And -- so it's not like it's any different of a safe harbor, statutorily, as far as Congress is concerned. They're equally good.

MR. GEYSER: Well --

JUSTICE GORSUCH: So how do we account for that?

MR. GEYSER: Well, I -- I think this is how you account for that, Justice Gorsuch: If a -- if a creditor goes to, say, court and seeks a pure declaratory judgment, they're saying all I want to know is does this debt fall within the discharge, then that would put them on the same footing as Rule 4007.

But that's not what most creditors do, and it's not what the Respondents did here. They affirmatively sought to collect the discharged debt.

JUSTICE GORSUCH: Right. So that -- the -- the -- so if I understand your point, the error isn't that they failed to go to the bankruptcy court. The error is that they failed to seek a declaratory judgment, rather than to collect on the debt.

MR. GEYSER: Well, no, the -- the error is that they -- they violated the discharge by affirmatively seeking to collect a discharged debt.

JUSTICE GORSUCH: Right. They should have sought a declaratory judgment from the state court.

MR. GEYSER: If -- if they had done

that as -- as opposed to trying to actually collect, then there'd be -- be both legal and practical differences. The legal difference is they wouldn't be taking an act that violates the discharge injunction. They wouldn't be trying to collect a debt. They'd be trying to seek a determination about what their rights are. The --

CHIEF JUSTICE ROBERTS: Can't you do that at the same time? You go into the court and say here's the debt that I have, I want to collect it, but first I want to make sure that I -- I can do it. So I'd like a declaration of whether it's dischargeable or not, and if it is, or if it's -- if it's not, then I'd like to go ahead with my suit.

It seems to me that the court would like that to be done that way. It's certainly more efficient.

MR. GEYSER: Well, I -- I don't think it is more efficient, and half of that would be problematic and half of it wouldn't. The declaratory judgment part wouldn't. The problem is that the second you file an affirmative action in state court, you're imposing a entirely different brand of costs on the debtor. The debtor has to defend the entire action.

They can't just show up and say I want to litigate the discharge. They have to defend every element of the creditor's suit.

CHIEF JUSTICE ROBERTS: Well, maybe they do. But I would think most state courts judge -- state court judges in that situation would realize, well, we've got to clear up the dischargeability question first and do that.

MR. GEYSER: Well, that -- that's not what happened here. And it's, I think, not what will happen in a lot of cases.

The -- the ultimate point is that if a creditor is really concerned, then Congress has a clear scheme set out. You can go to Rule 4007 and you can seek clarification and guidance.

If you don't want to seek that guidance, you don't have to. You can go to state court. But at that point you're imposing extra costs on the debtor. Four -- rule 4 --

JUSTICE KAVANAUGH: To back up a minute, the statute says that the order operates as an injunction, and the traditional rules of contempt for injunctions suggests that a reasonable, good faith belief that you weren't violating the order is sufficient.

So why shouldn't that just follow squarely from the text referring to operates like an injunction, the traditional rules of injunctions, therefore, your position of strict liability or something close to it doesn't work?

MR. GEYSER: Well -- well, no. I think that the traditional rules in injunction -- for injunctions fall squarely on our side.

If you look to the Court's decision in McComb, it said specifically if there is uncertainty in the decree, then the burden falls on the person who is supposed so comply with the decree to make sure that their conduct comports with it.

And if they violate it, then they -- it's -- that's -- that falls on their shoulders. They act at their own risk. And if they're confused about any uncertainty, then they can go and seek clarification from the Court. That's the way it normally works.

There is --

JUSTICE KAGAN: I -- I found McComb a very confusing case, I have to admit, because sometimes it speaks in your language and sometimes it speaks in Ms. Saharsky's language and what are we to make of that?

And I think I'll add on to this. I mean, I guess I was totally stunned that this wasn't clear what standard does apply for civil contempts and that people are citing these 100-year-old cases that are opaque.

MR. GEYSER: Well, we -- I was a little stunned, too, Your Honor, but I think that what is clear in the bankruptcy context, the overwhelming rule from the majority of jurisdictions is the one that we've set out in our brief.

It's that if you are aware of the discharge and you violate it, then you are -- you are subject to remedial order under Section 105.

And if you're concerned about creating a new rule and wading into this morass, the easiest way to resolve it is to look to Section 105, which provides independent statutory authority to create any order -- and that's -- that's broad language -- that's necessary or appropriate for carrying out the code.

Now, the code prohibits collection attempts. It doesn't just prohibit the actual collection of debts. It's the attempt to collect it. And the reason the code does that is it wants to make sure that debtors aren't put to the cost of defending suits that violate the discharge.

The only way to restore the benefits under that decree, the benefits that Congress specifically provided debtors to ensure the fresh start is meaningful is to pay back the -- the debtor, who did absolutely nothing wrong, who also had a good faith reason to think and an objectively strong reason to think the discharge did apply.

JUSTICE KAVANAUGH: To go back to the traditional rule, which you dispute, I understand that, but the fair ground of doubt principle, a lot of lower courts have applied that.

And then you think about, well, what's the purpose here? Well, the purpose is contempt, it's a severe sanction. So before someone's found to be liable for such sanctions, you would want some clear intent, and if they had a reasonable, good faith belief that they weren't violating it, that's not usually something that we'd say, tough, and still impose the sanctions.

Do you agree with that or how do you deal with the overall purpose of the rule, the fair ground of doubt rule?

MR. GEYSER: Well, I -- I think in a couple different ways. The first is the fair ground of doubt rule appears in this -- the Molitor decision from the -- from the 1800s. And my friends respectfully misread it.

JUSTICE KAVANAUGH: But it's been applied by a lot of lower courts up to the present, correct?

MR. GEYSER: But -- but they've applied it in a way that actually is consistent with our reading.

Take the TiVo decision from the Federal Circuit, the en banc Federal Circuit looked at the principles both in McComb and in Molitor and they said that they specifically rejected the proposition that there is a good faith objectively reasonable defense to the actual violation of the injunction.

The way -- where they incorporate the fair ground of doubt rule is they say does the injunction actually apply? So it's not a rule that says you can violate an injunction and then you're excused because you had good faith. It's saying we will construe the injunction not to reach your conduct.

So that the --

JUSTICE KAVANAUGH: Are those really two different things?

MR. GEYSER: Well, I -- I think they are two different things, because look at how it would play out here. Here you have a statutory injunction in the Bankruptcy Code, and it -- I don't think Court's in a position to say that the code means different things in different cases.

In fact, any ambiguity in the code is construed against an exception to the discharge. The exceptions are supposed to be true exceptions.

So any creditor who looks and sees

that a debt is sort of marginal, then at that point they're -- they're well on notice that their conduct could be subject to remedial order if they go ahead anyway.

And the way that Congress accommodated those concerns is it created their Rule 4007.

So it's perfectly fine for the creditor to go and invoke that rule, get the guidance if they want it. They don't have to. Just as there is a Declaratory Judgment Act and not everyone goes and invokes it before they breach a contract or violate a statute.

It's entirely optional but it's the way to make sure that if someone does, in fact, go forward and they are not sure what the code means, then they're assuming the risk that they might be wrong.

JUSTICE KAVANAUGH: You make it sound easy but there are a lot of states on an amicus brief, a real cross-section of states who say your rule would really hamper them in real world collection efforts.

How do you respond to that?

MR. GEYSER: Well --

JUSTICE KAVANAUGH: Are they just

wrong about that?

MR. GEYSER: I -- I think -- I think they're wrong and I think the concerns are overstated.

First, they -- they don't account for the fact that the rule, again, that we're not proposing something new. It's actually the government and Respondents that are proposing something new. This has been the majority rule in the overwhelming number of jurisdictions nationwide. We haven't seen any concrete showing that this has a material effect on the states.

The other problem with their submission is they're talking about all of the debts everywhere and all bankruptcies. And, again, the code is very precise. And when Congress said this operates as an injunction, they knew that the -- it would operate as an injunction for the provisions they set out in Section 523 and 524.

So Congress thought this was sufficiently precise. And it does, in fact, provide clear guidance for the vast majority of debts. We're talking about the very small subset where there's a genuine dispute.

And where there is a genuine dispute, the states haven't said why they can't access Rule 4007. They've suggested that in some cases it might be too expensive, but the only way that a $350 filing fee for something that is supposed to be streamlined and efficient and economical is actually too expensive is if they have no intent of litigating the issue anyway.

And if that's the case, then any time they try to collect even under their own rule, a debtor could say this has been discharged and the state will back down.

If they're actually willing to litigate an affirmative seat to collect that debt, they also should be willing to litigate under Rule 4007 and reduce the costs imposed on the debtor and imposed on other parties.

And so I -- I think if you look at the -- the -- the concerns that Congress had with the discharge, they understood that debtors exit bankruptcy often still in a fragile economic state. They have their finances a little bit back in order but it's the rare debtor that can go and hire an attorney to resist the discharge, unless they know that the attorney can be compensated at the end of the day if they prove right.

JUSTICE KAGAN: Mr. -- Mr. Geyser, the strength of your rule, I would say, is in the realm of compensatory damages, but here there were punitive damages as -- as well, and what justification would there be for that?

MR. GEYSER: Well, the -- the -- to be clear, the punitive damages here, it was a $2,000 award. It's really not the -- the bulk of this -- this debate. And it was imposed for a very specific reason.

After the -- the state court award of, you know, $45,000 or $50,000 of attorneys' fees was reversed, the Respondents didn't vacate it. They kept it on the books. And it took a specific -- a specific order from the court to go and vacate that.

And because the Court had to go through that effort, he imposed a small $2,000 punitive damages, which he said was designed to coerce future compliance with the -- with the discharge.

So, again, that's -- that's -- it's a

very minor issue. It's not the bulk of -- of what this dispute is really about.

I -- I do think when -- when you look at the -- the competing arguments on each side, if the -- we have the two independent grounds. First, that because this operates as an injunction, then under McComb we do think that is the best reading of the court's traditional contempt authority, but also the statutory powers under 105.

And while my friends do point out that there are certain exceptions to the discharge that are mandatory, you have to go back to a court in order to prevent those debts from being discharged.

There's absolutely nothing that says that 4007 can't be used to provide guidance in cases where --

JUSTICE BREYER: It's something they -- they have to buy a lawyer, and it's complicated, 4007.

What -- what I want to know is the Court wrote, I guess in a case called California Artificial Stone, this is contempt. And it says contempt is a severe remedy and it should not be resorted to where there is a fair ground of doubt.

Well, I understand that. That's what the other side is I think making a point. So if he has a fair ground of doubt, isn't that good enough? I mean, I know they went further in the Ninth Circuit.

But, I mean, the government, I think, is saying, yes, fair ground of doubt, fair ground of doubt, you don't have to pay contempt. Well, it seems to be what the courts hold -- held.

MR. GEYSER: Well, it -- it's not, Justice Breyer. And -- and if you look at the Molitor decision, that is the foundation --

JUSTICE BREYER: That was before, wasn't it?

MR. GEYSER: No, it's -- it's the same case.

JUSTICE BREYER: Oh.

MR. GEYSER: And if -- the -- the government teases two propositions out of that case. First, they say if judges disagree, then there can't be a finding of contempt. Now, they're wrong on that.

JUSTICE BREYER: Well, but that would have to be more general. I mean, the -- here what they say is "fair ground of doubt."

MR. GEYSER: They -- they do. But what -- what the Court specifically said was not that, if there's fair ground of doubt, contempt's off the table. What they said is that if you're -- that was an infringement suit, so you had an original product that was judged to infringe and was bound by the injunction, and then infringer modified the product. And so then the new dispute is does this modified product fit within that original junction?

And what the Court said is the -- the patentee has two options: They can seek contempt under the injunction or they can file a new lawsuit. And the Court said both of those options were available to the patentee, but they advised that it would be most appropriate to file a new suit if there's a fair ground of doubt.

That is not a categorical threshold per se rule at all. It actually kept both options open to the patentee. And, again, that involves something very different than what we have here. That involves a judge-made injunction. When a judge crafts the substantive rules on an ad hoc basis to govern specific disputes, it takes it, that process, out of the democratic process. There is greater concern for confusion and arbitrariness.

This is a statutory injunction. Congress passed the language for Section 523 for the exceptions and 524 for the discharge. So --

JUSTICE BREYER: Well, why not -- why not say -- well, what do you think, it says the statute, that the court can grant, "take any action or make any determination necessary or appropriate to enforce or implement the court orders or rules."

So why doesn't it -- but that bankruptcy judge have the power to say, well, we think in your case it does, in fact, require considerable damages, as you were on the brink there, and some other case say no, it's just compensatory damages, and some other case say half that. In other words, up to the bankruptcy judge.

What do you think of that?

MR. GEYSER: Well, the -- it's -- again, our position is that the court does have that discretion. We think there should be a heavy thumb on the scale in favor of full remedial relief because that is really what's necessary to carry out the discharge. Any time you buy less than full remedial relief, you're not really enforcing the benefits that the debtor was entitled to under the discharge.

It's Respondents and the government that are saying at the threshold, if they can conjure up any fair ground of doubt -- and I'm not even --

JUSTICE BREYER: It's not conjure up. They think, look, I'd say if the person wasn't in good faith, say that. Indeed, he had a fair ground of doubt. You know. Maybe there's something special that means he should pay anyway. I wouldn't want to eliminate that, but what?

MR. GEYSER: Well, the -- their contention, though, is that the court would not have discretion. Section 105 is a broad equitable remedy, and it -- it confers broad discretion on the bankruptcy court to carry out the code.

I think it's unusual to take that flexible remedy and to cut it off as -- in a categorical way any time a party has some reasonable basis for violating the code, even though there was an even more reasonable basis to know that their action would violate the discharge.

If I could reserve the balance of my time?

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Joshi.

ORAL ARGUMENT OF SOPAN JOSHI

FOR THE UNITED STATES, AS AMICUS CURIAE,

IN SUPPORT OF NEITHER PARTY

MR. JOSHI: Mr. Chief Justice, and may it please the Court:

I should first say the ground has somewhat shifted in this case beneath us since the time we filed our brief. Now it appears Petitioner is really not talking about civil contempt, even though that is the question presented on which this Court granted cert.

For civil contempt, we think that the text of 524 is what controls. The text of 524 says that a discharge order operates as an injunction, and not to borrow Justice Frankfurter's sort of horticultural analogy, but that brings all the old soil with it, the word "injunction."

And so the government's position is that the ordinary rules that govern injunctions, injunctive relief, and the discipline for violating injunctive orders in the ordinary civil context apply in the bankruptcy context.

Now, the Ninth Circuit below had a bankruptcy-specific rule in which good faith belief, even if unreasonable, could immunize from civil contempt. It appears nobody agrees with that rule anymore, and so I don't need to spend much time on it. But Petitioner's rule also appears to be a bankruptcy-specific rule.

And that's our point of disagreement with Petitioner and that's --

CHIEF JUSTICE ROBERTS: Well, it takes into account the -- the deep policy in the

Bankruptcy Code to grant relief to the honest debtor. And I just don't see why it's so hard for -- I appreciate that you're representing the largest creditor in the country, but I don't see why it is so hard for a creditor, if he has any doubt, to go in the safe harbor and get a -- get a clean ticket, a clean bill of health, instead of just, you know, going after the newly released debtor who's getting a -- a fresh start, is supposed to get a fresh start, and all of a sudden there are the same people who were, you know, hounding him before.

Why is it so hard? If -- if you have -- I -- I think if you have a safe harbor, a pretty strict -- it doesn't have to be strict liability, but a pretty rigorous standard before you can get out of contempt seems to me to make a lot of sense.

MR. JOSHI: So a number of responses to that. First of all, I think giving the debtor a fresh start is certainly one of the goals of the Bankruptcy Code, but another goal that's incorporated into the code and rules is to balance creditor and debtor rights. Congress made a judgment certain debts would the not be discharged and that the creditors retain rights to it.

So to say the debtor deserves a fresh start somewhat begs the question: A fresh start from what? The debtor does not get a fresh start from a debt that has not been discharged.

And so really what you --

CHIEF JUSTICE ROBERTS: Right, but the whole point is here is, you know, who -- who bears the risk of -- of the fact that you -- there's some doubt about whether a debt is discharged or not?

MR. JOSHI: Right.

CHIEF JUSTICE ROBERTS: The person who is supposed to get the fresh start or the person who can just quickly jump into the bankruptcy court and say is this dischargeable or not, and -- and to not have to worry about it?

MR. JOSHI: So we disagree that it's that quick of a jump. Under Rule 4007 or 7001, you have to file an adversary complaint and it involves all the traditional rules under -- under -- under the bankruptcy rules of witnesses, evidence, et cetera.

So I don't think it's that quick, but -- but more important, in terms of who bears a risk and the cost, that sounds a lot like sort of compensatory damages, but for better or worse, in this country we follow the American rule.

And really as this case exemplifies, what Petitioner really wants are attorneys' fees, but that is not traditionally, under the American rule, a form of make-whole remedial relief. It just isn't. Even though in the real world we all understand that you have to pay your attorney, which is a good thing, but -- and that that's likely to be the -- the bulk of the cost for the debtor who has just emerged from bankruptcy, the fact is it is not a form of make-whole relief.

And so, again, the -- we made this point in our brief and -- and I think Petitioner picks up on it a little bit in -- in the reply and today, which is we agree that under Section 105, a bankruptcy court has the authority to -- to give remedial relief that' short of civil contempt.

JUSTICE GORSUCH: One of the difficulties, I think, for your side of the case is the decision in McComb, which is rather a hard-line view of civil contempt.

It seems to me that one possible answer -- and I just want your thoughts on this -- is that McComb dealt with a situation where you had a rather contumacious party that had already disobeyed several orders. Would you agree the standard there may be a little different than in the first instance?

MR. JOSHI: I -- I think that's exactly right. As this Court said in Chambers against Nasco, for example, contumacious, vexatious conduct can always be the basis for attorneys' fees and -- and perhaps even a -- a contempt citation as well.

And we believe the bankruptcy courts would retain that kind of power, but that wouldn't --

JUSTICE GORSUCH: So to the extent that they were worried about who bears the burden of risk, it may shift over time based on behavior?

MR. JOSHI: That is certainly true.

It wouldn't be civil contempt, though, for violating the discharge injunction. It might be contempt or other --

JUSTICE GORSUCH: Prior.

MR. JOSHI: -- kinds of sanctions for other related sorts of litigation misconduct or -- or, you know, contumacious or vexatious conduct.

I would also hasten to add that we embrace McComb. We think McComb and Stone Paving are perfectly consistent with each other.

Stone Paving says you -- civil contempt is a severe remedy and it shouldn't be imposed where there's a fair ground of doubt about whether the injunction actually prohibits the -- the challenged conduct. Now, we can quibble over the words, but I think the key point of Stone Paving is it's an objective test, purely objective.

McComb reinforces that by saying that subjective intent of the putative contemnor also doesn't matter when imposing civil contempt. Those two rules harmonize perfectly and that is essentially the rule that the government sets forth today.

JUSTICE KAGAN: Could -- could you explain to me, Mr. Joshi, what the difference is between your rule and the Respondents' rule? And whether it matters?

MR. JOSHI: Right. So -- so this is one of those grounds that shifted a little from when we wrote our brief. We think the Ninth Circuit's rule clearly is -- is incorrect.

Respondents' rule and our rule may in the vast majority of cases yield the -- the same results, but I think we want to stand behind a purely objective test. If objectively the creditor's position is -- is reasonable, and there is -- you know, there -- there's a basis in law for it, then we would say that's enough.

It doesn't matter what the subjective intent is, even the reasonable, subjective, good faith belief is. It's am simply irrelevant to the analysis.

JUSTICE GORSUCH: Well, is it irrelevant -- I'm -- is it irrelevant? I mean, can subjective, good faith be some evidence of objective, good behavior and can subjective bad faith be some evidence of objective bad behavior?

MR. JOSHI: Yes, and I was about to get to that --

JUSTICE GORSUCH: Okay. All right.

MR. JOSHI: -- to the exception.

JUSTICE GORSUCH: That's all I wanted to hear you say --

MR. JOSHI: Thank you for raising it.

JUSTICE GORSUCH: -- then Justice Breyer.

Oh, good. Well, two birds, one stone.

MR. JOSHI: Right. And what I was going to say is that the factors a finder of fact might have to find to find subjective, good faith belief that's reasonable, for example, here's the case law I looked at, here are the treatises I read. Here's what -- you know, what traditional practices in bankruptcy that lead to subjective, good faith, those are probably the same factors, or they overlap substantially, with the factors that would be considered in an objective analysis under --

JUSTICE KAGAN: So could I understand that a little bit better? Because the -- your statement in your brief confused me a little bit.

But you're saying that the facts that lead to subjective good faith would also be indicators of objective reasonableness.

You're not saying, as I understand it, although you do say in your brief, you say in your brief that the belief itself is relevant to objective reasonableness?

MR. JOSHI: So the belief might have probative evidentiary value, to the extent it is highly correlated with those facts, which will overlap in the objective analysis, so that may --

CHIEF JUSTICE ROBERTS: As long as it's easy to apply.

(Laughter.)

MR. JOSHI: So, look, I'm -- I'm not going to stand in your way if you want to close the door that I have left open for the -- for the evidentiary value of subjective, good faith belief. We think the test should be objective.

And that's because that is the test in the ordinary civil context. And because under the Bankruptcy Code, Congress gave no indication that it wanted to deviate from the traditional rules governing injunctions, injunctive relief and civil contempt to enforce its injunctive orders in the bankruptcy context or at least this bankruptcy context from the ordinary civil context, we think the same rules should apply.

JUSTICE KAVANAUGH: So just to be clear on this, "reasonable, good faith belief" is the articulation Respondent has. How would you alter that, just say "reasonable belief"?

MR. JOSHI: "Reasonable belief" might work or simply adopt the text in California Artificial Stone Paving and say where as an objective matter there's a fair ground of doubt about whether the injunction prohibits the challenged conduct, then civil contempt is unavailable.

Otherwise --

JUSTICE KAVANAUGH: How is fair ground of doubt different than a reasonable belief that the discharge order did not apply to the conduct?

MR. JOSHI: They may well land in the same place. I think our objection, if you will, is to the word "belief."

We just think the subjective beliefs --

JUSTICE KAVANAUGH: Okay.

MR. JOSHI: -- are not something the courts need to or really ought to be probing.

JUSTICE KAVANAUGH: So it is reasonable to conclude that the discharge order did not apply to the conduct?

MR. JOSHI: I think we wouldn't have a problem with that, with that formulation.

Meanwhile, Petitioner's rule, again, in -- in one of the ground shifting, if I --

JUSTICE KAVANAUGH: And why not affirm under your position, rather than vacate?

MR. JOSHI: So we think there are -- this Court's ordinary practice when announcing a new rule is to remand, especially because none of the lower courts have applied the rule we set forth here today.

But there remains some -- you, of course, have jurisdiction to reach it, but we believe there remains some legal and factual issues to decide. So if you decide that -- first of all, no court -- the Ninth Circuit didn't rule on whether they had actually violated the discharge injunction. And you would need to decide that in the first instance.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Saharsky.

ORAL ARGUMENT OF NICOLA A. SAHARSKY

ON BEHALF OF THE RESPONDENT

MS. SAHARSKY: Mr. Chief Justice and may it please the Court:

We acted reasonably and in good faith. Notwithstanding that, we were held in contempt of court, which included attorneys' fees and punitive damages. And that's just wrong in light of the decades of this Court's established precedent on what's required to hold someone in contempt of court.

And I think --

JUSTICE GINSBURG: Do -- do --

MS. SAHARSKY: -- where I'd like --

JUSTICE GINSBURG: Do you think the Ninth Circuit's test needs to be modified?

MS. SAHARSKY: I think the Court should say unreasonable good faith -- or, I'm sorry, reasonable good faith belief, and that's not exactly what the Ninth Circuit said, so we think the Court should go ahead and clarify that, yes.

JUSTICE GORSUCH: I'm a little curious why you haven't adopted the government's standard? I have sat down trying to figure out the Venn diagram of when they don't overlap.

And the one -- the one scenario that comes to my mind is what if some creditor had a not well-founded, subjective belief, but he was objectively reasonable, objectively reasonable but bad faith, he didn't do any work, didn't do any due diligence, he just filed, it turned out he was right, objectively reasonable. That happens.

(Laughter.)

JUSTICE GORSUCH: I would have thought you'd want to protect that creditor. But your test wouldn't, and the government's would. And so your test in that respect, at least, is under-inclusive compared to the government's. And that surprised me, coming from creditor's counsel.

So help me out with that.

MS. SAHARSKY: Sure. We don't think that there's much daylight at all between our test and the government, particularly in this case, where good faith is undisputed, but I see your question.

And frankly we got the consideration of good faith and bad faith from this Court's decisions, because I think there's -- we've talked a lot with about the California Artificial Paving case, but there are other cases where this Court has considered what's appropriate for contempt, the rules that apply to contempt.

And in California Paving the Court talked about fair ground of doubt, but an additional case --

JUSTICE GORSUCH: All right. I will -- I will spot you that our cases may not be entirely clear on this point.

(Laughter.)

JUSTICE GORSUCH: But I guess I'm wondering, assuming we were writing on a blank slate, would you disagree with the government's test, and, if so, why?

MS. SAHARSKY: An objective standard

would be fine by us. We just read the government's case as especially because contempt is -- or, I'm sorry, the court's cases especially because contempt is an equitable remedy to allow for consideration of good faith and bad faith.

And certainly there were some questions about if someone were acting purely in bad faith, is that the kind of thing that could be sanctioned.

JUSTICE KAVANAUGH: Could you --

MS. SAHARSKY: We think the Court has left that open. But if you wanted to use a purely objective test, that would be fine with us.

JUSTICE KAVANAUGH: I think you were going to identify a few of the other cases.

MS. SAHARSKY: Yes, I actually wanted to point the Court, I think, to four cases that we think are particularly relevant. The first is California Artificial Paving, which has been addressed in great detail.

The second is the International Longshoremen's case that we talked about, which we think is very important because it talks about what it means to be held in contempt and the prerequisites for contempt.

And the Court said, "Contempt is for a violation of a court order by" -- someone -- "by one who fully understands its meaning, but chooses to ignore its mandate. Contempt is when" -- you -- "when the person knows what they are supposed to do, and they refuse to do it."

And that's just not a case when there is an objective -- a reasonable, good faith belief. And then the other two cases that I wanted to mention, which we featured in the briefs, are the Watts case and the Maness case.

And both were situations in which the Court held that because of a good faith, reasonable belief, the person could not be held in contempt.

The Maness case was about an attorney who counseled his client to invoke the Fifth Amendment with respect to a subpoena. And the Court talked about both good faith, we quote the language in our brief, and it talked about reasonableness.

The Watts case, I think, is even more

interesting because it was a bankruptcy case. And it had to do with there being a state bankruptcy or -- or a state order about the possession of property. And the lawyer in that case relied on the state court order, and then the federal court held him in contempt.

And this Court said he relied on the state court order, he had a good faith reasonable belief, he can't be held in contempt. And, frankly, that's the -- pretty much the same thing as this case.

JUSTICE KAGAN: Ms. Saharsky, in the universe of cases that we're talking about, we know that the discharge injunction has been violated. We know that the debtor has suffered harm as a result.

Now -- now -- now let's give you that there was entirely good faith on the part of the creditor, but we still have a question of: Who should bear the burden of the harm?

And from the debtor's perspective, it's like this injunction has been violated. I didn't do anything wrong. As between the victim of the violation and the person who, with all the good faith in the world, perpetrated the violation, why shouldn't we look to the person who perpetrated the violation?

MS. SAHARSKY: I think that's a terrific question. It really gets to a point that we haven't explored much today, which is the difference between remedying the violation of a discharge order and the additional and separate sanction of holding someone in contempt.

We agree that if someone violates the discharge order, that they have to comply going forward. And if they, say, obtain property under the discharge order, they would return the property.

It's the -- it's just the regular kind of make whole relief that applies in these circumstances.

But what Petitioner is asking for here is to hold us in contempt, which is a serious sanction, and to get attorneys' fees. And I think as the representative from the government made clear, attorneys' fees are not normally considered compensation.

In fact, this Court has been crystal

clear, because it's gotten opportunities, where people have come to it and said: Look, as an equitable matter, give us some attorneys' fees. That was the Alyeska case cited in the briefs, also the Baker Botts case.

CHIEF JUSTICE ROBERTS: Well, you could be --

MS. SAHARSKY: And the Court said --

CHIEF JUSTICE ROBERTS: -- you could be sanctioned under contempt through monetary sanction, right?

MS. SAHARSKY: If a person meets the standard from -- for contempt, they could face monetary sanctions, including --

CHIEF JUSTICE ROBERTS: Well, it seems to me --

MS. SAHARSKY: -- attorneys' fees.

CHIEF JUSTICE ROBERTS: -- why can't a court say, well, okay, I'm going to fine you because of your contemptuous behavior and, you know, how much should it be? The amount of the attorneys' fees seems to be a pretty reasonable number.

It doesn't mean that he's violating the American rule. It means that he's looking for some basis to judge how much the fine should be.

MS. SAHARSKY: I agree with that. I think it's just the difference between remedying an order violation and holding us in contempt.

And holding us in contempt requires a particular finding that we knew what we were supposed to do and we didn't do it.

And in this case, particularly we went to a state court and got an order in our favor, we -- we did not meet that standard. So we completely agree that we have to comply that -- with the -- with the discharge order going forward.

What we're saying is that the prerequisite that this Court has said out in cases like International Longshoreman, California Artificial Paving, and the others that I mentioned, just hasn't been met.

CHIEF JUSTICE ROBERTS: Well, one thing --

MS. SAHARSKY: And so --

CHIEF JUSTICE ROBERTS: -- you didn't do, which you could easily have done, is -- is get -- get a -- a ruling in the -- from the bankruptcy court whether the debt was discharged or not. I mean, why didn't you do that?

MS. SAHARSKY: Well, state --

CHIEF JUSTICE ROBERTS: Because -- and you guessed wrong on whether it was. So why didn't you go ahead and just get an order in advance?

MS. SAHARSKY: So we -- we were in state court, as -- as the court knows from the briefs. There was already a business dispute. And the question that arose, which was the one about the -- the effect of the discharge order was whether we could get an award of attorneys' fees based on our contract.

We're already in state court. Everyone agrees that the state court has concurrent jurisdiction to decide that issue. We had a limited time to bring the attorney's fees issue --

CHIEF JUSTICE ROBERTS: To decide which issue?

MS. SAHARSKY: To decide whether that is a discharged debt under the bankruptcy. So

I don't know why it would make any sense to have to go to the federal court when we're already in state court, and when it has concurrent jurisdiction to decide the issue, and it decided it in our favor.

And I just -- I just want to make sure that the Court understands --

CHIEF JUSTICE ROBERTS: Well, the sense is it's a safe harbor.

MS. SAHARSKY: Well, but the -- a -- a couple of -- I think there are a couple of answers to that:

First of all, I think there is the answer in terms of what Congress intended and then I think there is a policy answer.

So in terms of what Congress intended, as we have discussed, Congress did not require advance determinations. It -- it anticipated that these questions would be litigated in collection actions.

But then, second, Congress provided for concurrent jurisdiction and it specifically recognized that sometimes there are questions about dischargeability of debts that depend on state law.

And this is a point that the state's amicus brief, I think, makes very well about how there can be state law questions about community property and other things that actually some of these exceptions to discharge aren't clear.

But just moving beyond that, because I think you're asking about the policy rationale behind this, I think we need to think about, if Congress were making a decision about this, what interest it would consider because it's always when it's putting together bankruptcy provisions trying to -- trying to balance the various interests.

First of all, we start with the interest of debtors. Now, I think it's undisputed that if there were a 4007 proceeding the debtors would have to pay their -- their own attorneys' fees.

Petitioner has not disputed that. So the debtor is not any better off. In fact, debtors have to pay their own attorneys' fees in all of Chapter 7 proceedings, unless the attorney was appointed by the trustee. That's the Court's decision from about 15 years ago in

Lamie versus U.S. Trustee.

So if we're just looking at helping the debtor, going to a 4007 proceeding does not make the debtor better off in terms of attorneys' fees because he has to pay those attorneys' fees.

So then we look at the interests of the creditors. Does it help or hurt the creditors? Well, the states and the federal government are coming in and telling you that that's going to seriously chill creditors to have to go through that procedure, and not -- to chill them from collecting on debts that they legitimately --

CHIEF JUSTICE ROBERTS: Well, it's not so much --

MS. SAHARSKY: -- can collect.

CHIEF JUSTICE ROBERTS: -- it's not so much the procedure. It's -- it's the standard. The -- the standard that the Petitioners are asking for certainly benefits debtors, whether it's consistent with the general policy of the fresh start or not is another story, but it's -- and the existence of the safe harbor, I would say, would -- makes the rigorous standard more acceptable.

MS. SAHARSKY: Right. And putting aside the arguments that we've already discussed about why Congress didn't want that and why we should do what Congress wants, because this is a statutory interpretation case just getting back --

CHIEF JUSTICE ROBERTS: Well, I think --

MS. SAHARSKY: -- to the policy --

CHIEF JUSTICE ROBERTS: -- we should do what Congress wants.

MS. SAHARSKY: We're --

CHIEF JUSTICE ROBERTS: It's just a question of what they want.

MS. SAHARSKY: Right. Right. Right. And I -- I just want to -- to get back to -- to the -- the first part of your question, which is to say that this would help debtors.

I just want the Court to really think about how is this helping debtors to have this 4007 proceeding? It would provide an answer about the dischargeability of the debt but it would not make the debtor any better off because he is paying his own attorneys' fees.

And then if you look at the harms to creditors, those harms are significant in terms of the chilling of creditors and the states have discussed that in their amicus brief. And the federal government is here to tell you that.

And then I think you should also consider --

CHIEF JUSTICE ROBERTS: Well, yes, it does --

MS. SAHARSKY: -- the interests of the courts who are going to be burdened by these procedures in a way that Congress didn't intend.

CHIEF JUSTICE ROBERTS: Yeah, it -- it does have some chilling effect on creditors, and it doesn't surprise me that creditors don't like that.

But that chilling effect makes them -- since allowing the creditors to proceed on debts that may or may not be dischargeable, it seems to me perfectly reasonable to have them bear the risk, make -- have them make a careful choice.

MS. SAHARSKY: I understand that. And

I think that the difference in terms of bearing the risk is the difference between compensation and the additional sanction of -- of contempt.

We agree that they bear the risk and that if they guess wrong they have to comply with the discharge order and there has to be make-whole relief in terms of compliance going forward and in terms of giving back any property or money that was gotten from the debtor.

But what Petitioner is asking for here is contempt. The question presented is about contempt. We were under an order of contempt. And that's a serious personal stigmatizing sanction. This Court has said that in multiple cases, the seriousness of contempt. That's not one case.

JUSTICE KAGAN: If --

MS. SAHARSKY: It's many cases.

JUSTICE KAGAN: As -- as I understand it, and tell me if I'm wrong, but in the automatic stay context, under, what is it, 362(k) or something?

MS. SAHARSKY: Correct.

JUSTICE KAGAN: There when -- if -- if

there is a violation of the automatic stay, and there was, you know, an -- sort of an intentional act that resulted in that violation, the violator would be on the hook for any damages that resulted, irrespective of the reasonableness of his -- of -- of his beliefs.

Do you understand that to work that way? And, if you do, why shouldn't we have the exact same rule in the two contexts?

In other words, why shouldn't we say if you violate the automatic stay, if you violate the discharge injunction, you should be treated exactly the same way, under the same standard, with respect to the costs that you impose?

MS. SAHARSKY: Right. I think there are really two reasons: There is different, different textual bases in terms of how Congress addressed this and then there are different policies underlying it.

So in terms of the different textual bases, in our situation we're talking about the Court's necessary and appropriate authority to enforce something that operates as an injunction, and that pulls in the contempt principles that we've talked about.

The fact that Congress was so specific when it wanted to allow this payment of attorneys' fees in the three -- in the -- in the context of Section 362(k), we actually show -- we think shows that it's different from this case because Congress used different language.

It wanted to make sure that there would be payment of these fees so it put that language in there.

And then, second, we think that there is a significant policy reason to distinguish between the two. The automatic stay is entered at the beginning of the case. It's automatic. It's temporary. It benefits all of the parties.

And so we think that reasonably it could be the case that Congress would decide that that would be -- that there would be a more hard and fast rule in that context than in this context.

But I think this case really illustrates why in the context of a discharge order questions will arise and that contempt is just not appropriate if someone has a reasonable belief or good faith reasonable belief that the discharge order doesn't apply to them.

In particular, in this case, just to make sure that it's clear, all we did was go to a state court where we were already in proceedings and be forthright with that state court about the fact that there had been a bankruptcy discharge and that we had a contractual right to attorneys' fees and that we weren't sure whether we could get the attorneys' fees under that contract.

And we asked the court to decide that issue. And Petitioner agreed that the court had jurisdiction under concurrent jurisdiction to decide that issue.

And so it just seems to me that it can't be the case that you can hold someone in contempt of court, which is this very serious thing, for asking a court whether the discharge order applies to it, it's contempt of court for violating the discharge order just for asking the court to resolve that open legal question.

That just can't be contempt and we

think that that really shows the need for the kind of rule that we in the government have been discussing.

JUSTICE KAVANAUGH: Just to follow up on Justice Gorsuch's question from earlier, it sounded like you don't object to an objective standard, but you had rolled in good faith based on some of our cases; is that accurate?

MS. SAHARSKY: Yes. And I think, you know, it's -- it's helpful just to think about the position that courts are in in the normal civil contempt context, and what they do when they're faced with a request for contempt.

So someone files a motion for contempt, and what the court typically does and what this Court has done in the cases we cited, or in the case -- the cases that came to this Court, that courts also did, was enter an order to show cause. Okay?

And the order to show cause says come to the court and give me your reasons. Explain to me what you did.

And then the party comes in and says, well, we can't -- we can't actually follow the order, or we didn't think the order applied to us. And the court listens to the reasons from the person and basically decides whether they are good reasons or not.

And so when we're talking about a good faith objective belief or just an objectively reasonable belief, it's just the court listening to the reasons and it's deciding that they are good enough that you shouldn't impose the various very serious sanctions --

JUSTICE SOTOMAYOR: When do you think that a reason could not be objectively -- an objective ground that could be still reasonable?

Meaning, I understand your answer to Justice Gorsuch, which is that somebody doesn't do research and just says I don't want to pay, I'm just going to do this. And it turns out later that a -- a ground could exist.

You're suggesting that your formulation might not get that person off.

So -- but the reverse, what could be a reasonable good faith belief if objectively a ground is not -- if objectively there's no fair ground of doubt?

MS. SAHARSKY: Well, if I'm

understanding the question, you know, I think there's a -- there is a spectrum really of reasonableness. And the case that seems to me like it is per se reasonable is if you go to a court and ask it to resolve the issue in your favor and it says you win, which is what happened in this case.

But imagine also that there's circuit precedent that applies --

JUSTICE SOTOMAYOR: Well, that might --

MS. SAHARSKY: -- to your case, do you also --

JUSTICE SOTOMAYOR: -- get you up to that proceeding, but how about if the court's decision is so flawed that you decide to fight the appeal on it and don't concede that they were wrong?

MS. SAHARSKY: Well, in this case, you know, we're -- we're consistent -- our position is consistent with what the state court and the bankruptcy court did. So it's supportive of us and not a -- a fighting situation, but, you know, to answer your question more generally, contempt is an equitable remedy and it's one where the courts did, you know, what I was suggesting to Justice -- do, what I was suggesting to Justice Kavanaugh, which is really just consider like is your reason a good one or not? You know, tell me your reasons.

And those could be a variety of reasons. It could be reliance on precedent. It could be reliance on something a state or federal administrative agency told you. You know, there -- there are a variety of potential reasons.

But, you know, really the point we're trying to make is that because contempt is such a big deal and such a serious, stigmatizing sanction, that you need to leave the door open. And this is the kind of -- this question about, you know, when is contempt appropriate, that's something that the district courts and now the bankruptcy courts are fairly familiar with deciding.

JUSTICE KAVANAUGH: Because -- because your standard is slightly different or more than slightly than the Ninth Circuit's, why shouldn't we vacate rather than affirm as the Solicitor General suggests?

MS. SAHARSKY: Sure. Well, three -- three answers, really. First of all, the Court certainly has the power to go ahead and set out the correct rule and then apply it. It's done that recently, for example, in the Air and Liquid Systems case.

So then the question is: Is that appropriate in this case? And the answer we think is yes because under any standard like our standard or the government's standards, we think it's pretty clear that reliance on a state court order is one that would be considered reasonable. And there's no dispute at all about good faith in this case.

And that's what the Ninth Circuit said that we did, and the bankruptcy panel, appellate panel. They said that we relied on the state court order. Under California Paving, that's like pretty much per se good faith.

And just the third thing, you know bankruptcy -- bankruptcy proceedings are supposed to be quick and efficient and let people move on with their lives. And this contempt proceeding has been going on since

2011. I think it's fair to say everyone wants to move on with their lives, you know, particularly the spouse of the deceased attorney in this case, who hasn't been able to close her husband's estate even though he passed away in 2013.

And so this does seem like the case where it would make sense for the Court to just go ahead and apply the rule. I understand, of course, that this is a court of review, not first view, but there's not really work left here for the lower courts to do, and so we would greatly appreciate it if you could affirm.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Geyser, three minutes remaining.

REBUTTAL ARGUMENT OF DANIEL L. GEYSER

ON BEHALF OF THE PETITIONER

MR. GEYSER: Thank you, Mr. Chief Justice.

First, for the American rule, Congress did not think that these fees were fees as fees; they were fees as damages. If you look at 362(k), it specifically says that courts can award actual damages, including attorneys' fees, because they understood that this context, the fees constitute the actual harm.

If you look to Rule 4007, this definitely will help debtors. This is an efficient, streamlined, economical proceeding before an expert bankruptcy judge. It imposes far fewer costs on the debtor than litigating in state court before state judges who aren't as familiar with these questions.

My friend suggested that the Respondents in this case relied on a state court order saying they could collect fees. That's not true.

They filed an affirmative fee petition seeking the fees. It was the culmination of the entire litigation in this -- in the trial court where the state court finally made a determination, which was clearly incorrect.

We've outlined in our reply brief why they're clearly incorrect, both legally and factually, in this case. So we'd encourage the court to look at that, although I do think it makes more sense to send it back down to the Ninth Circuit if you adopt an objectively reasonable standard, which I hope you won't because it would obliterate the -- the fresh start.

This is -- an objectively reasonable standard is telling any creditor that if they can come up with a reasonable basis for collecting, they should absolutely go forward and collect. They -- you either will have the debtor acquiescing, they'll throw up their hands because they don't have the funds to resist, or the debtor will end up resisting, and the creditor knows it's a no-cost proposition if they lose.

In terms of balancing debtor and creditor rights, Congress did balance debtor and creditor rights. They did it in the code by creating 19 specific exceptions to the discharge, but when they did impose the discharge for everything else, they meant courts to take it seriously, which is why they created an injunction to protect the discharge.

In terms of chilling, the effect on the creditors, I think we've already explained why this won't chill any creditor who's legitimately trying to collect a claim. The

Rule 4007 proceeding is far more efficient both for debtor and for the creditor, and there's no reason they can't access that safe harbor, if they really do have any doubts about their rights.

A final point is that not all contempt orders are created equal. First, this isn't really even contempt. This is a statutory remedial order under Section 105. Everyone can distinguish pretty readily as a matter of common sense between a contempt order entered for bad faith conduct and one saying that you violated the code, you might have done it innocently, you might have done it in good faith, but we know from McComb, courts have the authority to enforce that. We know from 105, courts have the power to enter any order necessary or appropriate to carry out the provisions of the code.

One way to carry out the discharge is to make sure that when a creditor's conduct violates the discharge, imposes the exact costs that Congress said debtors were entitled to avoid, the only way to carry out the discharge is, in fact, to enforce the code by reimbursing the debtor.

It certainly doesn't make any sense to tag the innocent victim, who also had a reasonable good faith belief that the discharge did apply and was correct with the costs of the creditor's mistake.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:59 a.m., the case was submitted.)