CONSUMER WORKSHOP IV: CASE LAW UPDATE

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I. GENERAL ISSUES/AUTHORITY OF COURT

A. ACTIONS TAKEN AFTER PETITION DATE--VOID OR VOIDABLE?

1. Void

The First, Second, Third, Ninth, Tenth, and Eleventh Circuits hold that acts in violation of the automatic stay are void unless the stay is annulled, and thus said acts should not be given effect in any later proceeding. *See Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969, 976 (1st Cir. 1997); *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 527 (2d Cir. 1994); *Fleet Consumer Discount Co. v. Graves (In re Graves)*, 33 F.3d 242, 248 (3d Cir. 1994); *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992); *Ellis v. Consolidated Diesel Elec. Corp.*, 894 F.2d 371, 372 (10th Cir. 1990); *Albany Partners, Ltd. v. Westbrook (In re Albany Partners, Ltd.)*, 749 F.2d 670, 675 (11th Cir. 1984). The Seventh Circuit, while not having addressed the issue under the Code, has held that actions taken in violation of the automatic stay under the Bankruptcy Act are generally void. *Matthews v. Rosene*, 739 F.2d 249, 251 (7th Cir. 1984).

Recently, the Tenth Circuit B.A.P. held that post-petition tax liens imposed by the IRS were void because they were in violation of the automatic stay. *See Gonzales v. IRS (In re Silver)*, 303 B.R. 849, 863-64 (10th Cir. B.A.P. 2004).

2. Voidable

The Fifth and Federal Circuits hold that acts in violation of the automatic stay are "voidable." *See Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178 (5th Cir. 1989); *Bronson v. United States*, 46 F.3d 1573, 1578 (Fed. Cir. 1995). The basis for such holdings is the power of the bankruptcy courts to annul the automatic stay pursuant to the Code. As a result, if the debtor

fails to assert the automatic stay as a defense to an action taken, said action remains effective even though it was taken in violation of the automatic stay. Similarly, the Sixth Circuit holds that acts taken in violation of the automatic stay are not void, but are "invalid and voidable." *Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 911 (6th Cir. 1993).

B. EMOTIONAL DISTRESS DAMAGES FOR VIOLATION OF THE AUTOMATIC STAY; WHETHER BUSINESS DEBTORS ARE INDIVIDUALS UNDER § 362(h)

1. Do "Actual Damages" Include Damages for Emotional Distress?

Recently, the Ninth Circuit withdrew its previous opinion which held that emotional damages could not be awarded under § 362(h), and instead held that "actual damages," under § 362(h), include damages for emotional distress. *See Dawson v. Washington Mut. Bank (In re Dawson)*, 2004 WL 287663 (9th Cir. Dec. 10, 2004) (discussing withdrawal of previous opinion in *Dawson v. Washington Mut. Bank (In re Dawson)*, 376 F.3d 1174 (9th Cir. 2004)). *See also Fleet Mortgage Group, Inc. v. Kaneb*, 196 F.3d 265 (1st Cir. 1999) (emotional damages qualify as "actual damages" under § 362(h)).

In so holding, the Ninth Circuit declined to follow the Seventh Circuit's decision in *Aiello v. Providian Fin. Corp.*, 239 F.3d 876 (7th Cir. 2001), which held that an individual must suffer a financial loss in order to claim emotional distress damages.

2. Are Business Debtors "Individuals" Under § 362(h)?

Section 362(h) provides that a debtor "shall recover" actual damages, costs, and attorney's fees. However, § 362(h) applies by its terms only to "individuals." That term is not expressly defined in the Bankruptcy Code, and, as a result, a significant split has developed

among the circuit courts over whether the term "individual" as used in §362(h) restricts the section's application to "human" debtors. *See, e.g.*, *Spookyworld, Inc. v. Berlin (In re Spookyworld, Inc.)*, 346 F.3d 1, 7-8 (1st Cir. 2003) (following courts from Second, Eighth, Ninth, and Eleventh Circuits, and rejecting courts from Third and Fourth Circuits, in holding that "corporations cannot sue under section 362(h) to obtain damages for violation of the automatic stay"). *See also Dawson v. Washington Mut. Bank (In re Dawson)*, 2004 WL 287663 (9th Cir. Dec. 10, 2004) (emotional distress "can be suffered by individuals but not corporations); *In re Versar,* 138 B.R. 620 (Bankr. D. Colo. 1992) (holding that § 362(h) applies only to natural persons).

Courts which have applied § 362(h) to corporate debtors have done so in light of the breadth of the automatic stay: "[I]t seems unlikely that Congress meant to give a remedy only to individual debtors against those who willfully violate the automatic stay provisions of the Code as opposed to debtors which are corporations or other like entities. Such a narrow construction of the term would defeat much of the purpose of the [automatic stay], and we construe the word 'individual' to include a corporate debtor." *Budget Serv. Co. v. Better Homes,* 804 F.2d 289, 292 (4th Cir. 1986).

C. BARRING DISCHARGE OF SCHEDULED DEBTS AFTER DISMISSAL UNDER § 349

Under § 349(a), courts may bar the discharge of scheduled debts when dismissing a case with prejudice. If a bankruptcy court finds "cause" to dismiss a case with prejudice, then the dismissal bars discharge of the scheduled debts in future petitions. In re Frieouf v. U.S., 938

F.2d 1099, 1105 (10th Cir. 1991). Section 349(a) allows courts to consider the res judicata effect of a dismissal with prejudice as a "complete adjudication of the issues presented by the pleadings and a bar to further action between the parties." In re Leavitt, 209 B.R. 935, 939 (B.A.P. 9th Cir. 1997) (citation omitted).

Courts may dismiss a case with prejudice and bar discharge when the serial filer's conduct "abuses the bankruptcy system" by filing bankruptcy specifically for the automatic stay but failing to make plan payments. *In re Jones*, 289 B.R. 436, 440 (Bankr. M.D. Ala. 2003) ("By repeatedly filing petitions and making little or no effort to comply with the terms of the Chapter 13 plans she has proposed, Debtor is making a mockery of the bankruptcy system. The automatic stay provisions of § 362 were not intended to be used as a sword by the rapacious."). However, a debtor does not abuse the automatic stay by filing a Chapter 7 petition in response to a potential state court judgment "where the debtor [did not hide his] assets from the court, the debtor [did not] continue[] to live a lavish lifestyle, and whose actions [did not] hinder[] the settlement of outstanding claim." *In re Keobapha*, 279 B.R. 49, 53 (Bankr. D. Conn. 2002) (citations omitted).

Courts also find debtor abuse of the system when the debtor: (1) knowingly fails to add creditors to the creditor matrix; (2) knowingly fails to list pending state court actions between him and a creditor; and (3) fails to review the creditor matrix to ensure correct addresses for creditors. *In re Pettey*, 288 B.R. 14, 19-21 (Bankr. D. Mass. 2003). The debtor's willful failure to obey the court's turnover order also merits a dismissal with prejudice that bars discharge of scheduled debts. *In re Johnson*, 281 B.R. 269, 271 (Bankr. W.D. Ky. 2002).

D. CIRCUITS SPLIT ON "RIDE THROUGHS" OF SECURED DEBT WITHOUT REAFFIRMATION

1. Where Loan Not in Default, Debtor May Retain Collateral by Continuing to Make Current Payments.

The Second, Third, Fourth, Ninth, and Tenth Circuits hold that where a loan is not in default a debtor may retain the collateral by keeping current on the loan. *See Price v. Delaware State Police Fed. Credit Union (In re Price)*, 370 F.3d 362, 364 (3d Cir. 2004); *McClellan Fed. Credit Union v. Parker (In re Parker)*, 139 F.3d 668, 673 (9th Cir. 1998); *Capital Communs. Fed. Credit Union v. Boodrow (In re Boodrow)*, 126 F.3d 43, 53 (2d Cir. 1997); *In re Belanger*, 962 F.2d 345, 347-48 (4th Cir. 1992); *Lowry Fed. Credit Union v. West*, 882 F.2d 1543, 1546 (10th Cir. 1989).

2. Section 521 Gives Only 3 Options for Retaining Collateral: Redemption, Reaffirmation, or Exemption.

The First, Fifth, Seventh, and Eleventh Circuits hold that § 521 gives only three options for retaining collateral: redemption, reaffirmation, or exemption. *See Bank of Boston v. Burr (In re Burr)*, 160 F.3d 843, 847 (1st Cir. 1998); *Johnson v. Sun Fin. Co. (In re Johnson)*, 89 F.3d 249, 252 (5th Cir. 1996); *Taylor v. AGE Fed. Credit Union (In re Taylor)*, 3 F.3d 1512, 1516 (11th Cir. 1993); *In re Edwards*, 901 F.2d 1383, 1387 (7th Cir. 1990).

E. MEANING OF *IN RE PARKER*; CIRCUITS SPLIT ON DISCHARGE OF UNSCHEDULED DEBTS IN NO ASSET CASE

1. Meaning of *In re Parker*.

In *In re Parker*, 313 F.3d 1267, 1268-69 (10th Cir. 2002), the Tenth Circuit held that non-scheduled debts in a no asset case are discharged by operation of law pursuant to §§ 727(b) and

523(a)(3)(A). In so holding, the Tenth Circuit recognized that an exception to such a discharge by operation of law exists if the creditor can establish that the claim was nondischargeable under "one of the exceptions referenced in § 523(a)(3)(B)," i.e., false pretenses, fraud, or willful and malicious injury under § 523(a)(2), (4), or (6). *Id.*

2. <u>Circuits Split on Whether Debtor's Intent Is Relevant to Court's Decision to Reopen No Asset Case</u>.

The Third, Sixth, Ninth, and Tenth Circuits hold that a debtor's intent in failing to schedule a claim is irrelevant to a bankruptcy court's decision to reopen a case in which there are no assets and no bar date. *See In re Parker*, 313 F.3d 1267, 1268-69 (10th Cir. 2002); *Zirnhelt v. Madaj (In re Madaj)*, 149 F.3d 467, 471 (6th Cir. 1998); *Judd v. Wolfe (In re Judd)*, 78 F.3d 110, 115-16 (3d Cir. 1996); *Beezley v. California Land Title Co. (In re Beezley)*, 994 F.2d 1433 (9th Cir. 1993). The result of such a holding is that "equitable considerations do not impact the dischargeability of a debt under § 523(a)(3)(A)." *In re Parker*, 313 F.3d at 1269.

In contrast, the Fifth, Seventh, and Eleventh Circuits reject a mechanical analysis and hold that equitable principles, including the consideration of the debtor's intent, are relevant to determining whether to reopen a case in which there are no assets and no bar date. *See Faden v. Insurance Co. of North Am. (In re Faden)*, 96 F.3d 792, 797 (5th Cir. 1996); *Samuel v. Baitcher (In re Baitcher)*, 781 F.2d 1529, 1534 (11th Cir. 1986); *Stark v. St. Mary's Hosp. (In re Stark)*, 717 F.2d 322, 323-24 (7th Cir. 1983).

F. ACCURACY OF DEBTOR'S NAME ON U.C.C. FILINGS (NICKNAMES)-- *KINDERKNECHT*

Under Kansas' U.C.C. Article 9, a creditor will not have a perfected security interest unless the creditor lists the debtor's full legal name in the financing statement. *In re Kinderknecht*, 308 B.R. 71 (B.A.P. 10th Cir. 2004). *Kinderknecht* reasoned that because a debtor-entity's trade name is insufficient for perfecting a secured interest, then an individual's "nickname" is likewise insufficient to perfect a secured interest. *Id*. at 75. By requiring that an individual submit his full legal name on the financing statement, courts employ a "clear test" to determine the financing statement's validity and "avoid litigation as to the commonality or appropriateness of a debtor's nickname, and as to whether a reasonable searcher would have known or should have known to use the name." *Id.* at 75-76.

G. ATTORNEY MISCONDUCT AND U.S. TRUSTEE'S INCREASED SCRUTINY[1]

J. Christopher Marshall, the U.S. Trustee for Region One, in his report entitled "Civil Enforcement; An Early Report," articulated one of the major objectives of the U.S. Trustee's civil enforcement initiative as follows:

> Protecting consumer debtors, creditors, and others who are victimized by those who mislead or misinform debtors, make false representations in connection with a bankruptcy case, or otherwise abuse the bankruptcy process. Attorneys and bankruptcy petition preparers (non attorneys who prepare bankruptcy documents for a fee) must engage in full disclosure, be free of conflicts of interest, and engage in ethical practices.

[1] The views expressed on this issue are those of the authors and do not necessarily represent, and should not be attributed to, the Executive Office for United States Trustees, the United States Trustee Program, or the Department of Justice.

This civil enforcement initiative position has taken expression during the last year in several decisions, including the following:

In *In re Miller*, 312 B.R. 626 (Bankr. S.D. Ohio 2004), the court considered a motion of the U.S. Trustee for disgorgement of attorney fees paid by a third party redemption lender, 722 Redemption Funding, Inc. This case involved a redemption motion filed by the attorney under which the debtor received third party funding to redeem a vehicle. The court found a conflict of interest and that the fee of $400.00, which was paid by the lender, was excessive in light of the redemption pleading being simply boilerplate. Similar outcome is found in *In re Griffin,* 313 B.R. 757 (Bankr. N.D. Ill. 2004), where the court denied a fee application and ordered return of monies if paid for similar redemption loan motion, noting that under *Lamie v. U.S. Trustee*, 540 U.S. 526, 124 S.Ct. 103, 157 L.Ed.2d 1024 (2004), counsel could not be compensated by the estate and that under *Bethea v. Robert J. Adams & Assocs*. (*In re Bethea*), 352 F.3d 1125 (7th Cir. 2003), cert denied, U.S. 124 S.Ct. 2176, 158 L. Ed. 2d 724 (2004), the obligation to pay the counsel of the debtor was discharged under 11 U.S.C. § 727 (also noting in footnote three that *Bethea* conflicts with the Ninth Circuit opinion of *In re Hines*, 147 F.3d 1185 (9th Cir. 1998)). Contrast this decision with *In re Ray*, 314 B.R. 643 (Bankr. M.D. Tenn. 2004), where the bankruptcy court overruled the U.S. Trustee's motion for disgorgement of fees related to redemption loan motions.

In *In re Wilson*, 2003 U.S. Dist. Lexis 17840 (W.D. Mich. 2003), the district court affirmed the bankruptcy court's order denying the attorney's motion for reconsideration of the disgorgement motion filed by the U.S. Trustee, where the debtor's attorney knowingly filed

statements and schedules and a matrix with incorrect creditor addresses. The bankruptcy court had ordered complete disgorgement of all fees even though the debtor's attorney had not signed the statements and schedules or the mailing matrix.

In *In re Holmes*, 304 B.R. 292 (Bankr. N.D. Miss. 2004), the U.S. Trustee brought an adversary proceeding challenging a certain attorney's practices of tying the preparation of a living will and durable power of attorney to the bankruptcy service provided, and the practice of providing a $5 incentive bonus to his non-attorney staff. The court held that even though there were genuine issues of fact as to whether or not the living will and durable powers of attorney were consented to by the debtors, the practice of giving a bonus to his non-attorney staff for obtaining the living will/durable power attorney agreement constituted an improper "Fee Splitting," requiring disgorgement.

In *In re Shell*, 312 B.R. 431 (Bankr. M.D. Ala. 2004), the Bankruptcy Administrative (equivalent to the U.S. Trustee in Alabama) moved for examination of the transactions between certain debtors and their attorney, under which the debtor's attorney accepted post-dated checks pre-petition and cashed them post-petition. The court, looking to *In re Bethea* and rejecting *Gordon v. Hines* (*In re Hines*), 147 F.3d 1185 (9th Cir. 1998), concluded that the post-dated check system constituted a violation of the discharge provisions of 11 U.S.C. § 523 and a violation of the automatic stay under 11 U.S.C. § 362(a), thereby requiring disgorgement.

In *In re Fickling*, 361 F.3d 172 (2d Cir. 2004), the Second Circuit adopted the Seventh Circuit analysis found in *In re Bethea*, and held that debtor's attorney fees incurred during the chapter 11 period prior to conversion to chapter 7 were discharged under 11 U.S.C. § 727 when

the debtor received a discharge. In so holding, the court specifically rejected an administrative expense exemption argument and a fraud argument made by debtor's counsel.

H. AUTHORITY OF BANKRUPTCY COURT TO ISSUE ATTORNEY DISCIPLINE AND ATTORNEY FEE ISSUES

1. <u>Inherent Power</u>:

Bankruptcy courts have inherent power to sanction conduct abusive to the judicial process. *See In re Courtesy Inns, Ltd.*, 40 F.3d 1084 (10th Cir. 1994). Sanctions may be imposed against debtor's attorney and principal for bad faith filing. *See In re Nursery Land Development, Inc.*, 91 F.3d 1414 (10th Cir. 1996). Bankruptcy courts cannot impose sanctions under § 1927, but may impose sanctions under§ 105(a) for conduct abusive of the judicial process. *See In re Courtesy Inns, Ltd.*, 40 F.3d 1084 (10th Cir. 1994).

2. <u>11 U.S.C. § 110 – Penalty For Persons Who Negligently or Fraudulently Prepare Bankruptcy Petitions</u>

Petition preparer that used various aliases and business names was fined for flagrant pattern of fraudulent, unfair, and deceptive acts. *See In re Fish*, 210 B.R. 603 (Bankr. D. Colo. 1997).

3. <u>11 U.S.C. § 329--Debtor's Transactions with Attorneys</u>

Chapter 13 attorneys do not need to submit a time and task summary if the fee request is $1,000 or less, but must demonstrate in their summaries that the representation of the debtor involved unusual, unique, or troublesome aspects if seeking more than $1,000. *See In re Zwern*,181 B.R. 80 (Bankr. D. Colo. 1995).

Failure to make disclosures required under § 329 was sufficient grounds to deny all fees even if failure was merely through inadvertence. *See In re Smitty's Truck Stop, Inc.*, 210 B.R. 844 (10th Cir. B.A.P. 1997).

4. <u>11 U.S.C. § 362--Automatic Stay</u>

Bankruptcy courts do not have authority to punish violations of the automatic stay by issuing contempt citations. *See In re Hunter*, 190 B.R. 118 (Bankr. D. Colo. 1995). *But see In re Skinner*, 917 F.2d 444 (10th Cir. 1990) (affirming order of bankruptcy court imposing sanctions for violation of § 362(a)).

5. <u>Sanctions</u>

Attorneys may be sanctioned under Rule 9011 for claiming a homestead exemption against fully encumbered property after entering into a stipulation with trustee not to do so, and for seeking to avoid clearly unavoidable liens. *See In re Pullara*, 199 B.R. 417 (Bankr. D. Colo. 1996).

Sanctions of $10,000 were upheld against a corporate debtor's attorney who filed a chapter 11 petition in a one-asset case on the day before foreclosure sale of a business with no employees, no income or business activity, only one creditor, and no reasonable possibility of reorganization. *See In re Nursery Land Dev., Inc.*, 91 F.3d 1414 (10th Cir. 1996).

I. ACCURACY OF STATEMENTS AND SCHEDULES--CRIMINAL AND CIVIL PENALTIES

Under § 727(a)(4)(A), a debtor's knowing and intentional false statements of material fact warrant a denial of discharge. The Fifth Circuit held that debtors who filled out their schedules in haste, made "numerous material false statements," and failed to amend or correct the schedules

"recklessly" disregarded the truth. *In re Mitchell*, 102 Fed. Appx. 860 (5th Cir. 2004). The court found that the debtors' "reckless indifference to the truth [was] sufficient to constitute a false oath," and consequently denied the debtor's discharge. *Id.* at 863. *See also In re Olbur*, 314 B.R. 732 (Bankr. N.D. Ill. 2004) (debtor recklessly disregarded truth because he "not only failed to read the petition and schedules before he signed them, he did not bother to read them even after [creditors] objected to his discharge, took his deposition in the adversary proceeding, and then brought him to trial"). However, a California bankruptcy court refused to dismiss a Chapter 13 case for alleged bad faith where the Statements and Schedules were sloppy and had inadequate attention to detail. *See In re Beck*, 309 B.R. 340 (Bankr. N.D. Cal. 2004).

In addition to denying discharge, a court may impose criminal "obstruction of justice" charges upon debtors who make material false statements on their schedules. *U.S. v. Hargrove*, 98 Fed. Appx. 192 (4th Cir. 2004). When a debtor wilfully makes a false statement on his schedules or while testifying under oath, the court may increase the sentence by two levels under the Sentencing Guidelines. *Id.* at 197 (debtor willfully testified falsely on material matter when he took stand during his trial and denied owning 1988 Jaguar).

J. DUE PROCESS REQUIREMENTS OF LIEN AVOIDANCE UNDER § 522(f) and OTHER CONTESTED MATTERS

An often overlooked issue is the type of service required for motions in contested matters under Fed. R. Bankr. P. 9014. Rule 9014(b) states that "[t]he motion shall be served in the manner provided for service of a summons and complaint by Rule 7004." Because Rule 7004 allows nationwide service of process by first class mail, problems typically do not arise where the party

being served is an individual. However, due process concerns are often raised where the party being served is a corporation, partnership, or "other unincorporated association." Fed. R. Bankr. P. 7004(b)(3).

For example, a recent decision of the Ninth Circuit B.A.P. held that an order granting a motion to avoid a lien under § 522(f) was void because it "was granted without adequate notice" and therefore did not "satisfy the requirements of due process of law." *Beneficial Calif., Inc. v. Villar (In re Villar)*, 2004 Bankr. Lexis 1706, *13 (9th Cir. B.A.P. Oct. 20, 2004). In *Villar*, the debtor served her motion to avoid the lien, which was designated as a contested matter under Rule 4003(d), to the creditor's post office box without addressing it to the attention of an officer or other agent as required by Rule 7004(b)(3). The Ninth Circuit B.A.P. construed Rule 7004(b)(3) narrowly based on the following rationale: "nationwide service of process by first class mail is a rare privilege which should not be abused or taken lightly . . . it seems like a small burden to require literal compliance with the rule." *Id.* at *9-10.

K. PETITION PREPARERS--RESTRICTIONS AND GUIDELINES UNDER § 110

The definition of Bankruptcy Petition Preparers (BPPs) expanded to include websites and software that generate bankruptcy petitions from the information inputted by the debtor. *Reynoso v. Neary*, 315 B.R. 544, 552 (B.A.P. 9th Cir. 2004) ("There is no significant difference between [a website or software] and the more familiar law office practice of obtaining information from clients on input forms and recasting that data into the appropriate forms or pleadings for filing."). *See also In re Thomas*, 315 B.R. 697, 704 (N.D. Ohio 2004) (Website qualified as BPP because "[t]he debtor answered an automated questionnaire that went well-beyond the instructions accompanying the

Official forms. Moreover, the fee also included the personal assistance of a paralegal to answer additional questions either by telephone or by e-mail."). Consequently, websites must comply with §§ 110(b)(1) and 110(c)(1)'s requirements that the BPP sign the petition, provide the services' name and address, and provide the service's tax identification number. *Id.* at 705.

Under § 110(g), courts hold BPPs liable for receiving any payment, in any form, from the debtor for court fees. *In re Buck*, 307 B.R. 157, 163-64 (C.D. Cal. 2004) ("The plain meaning of § 110(g) is that a bankruptcy petition preparer is prohibited from taking possession of a petition filing fee. The statute does not include any exceptions for payments in the form of a cashier's check and it does not include exceptions for situations where the petition preparer timely files the petition in question, in accordance with the debtor's instructions.").

Courts employ state law to define the BPPs' parameters for preparing bankruptcy petitions. The Ninth Circuit held that a BPP's advice regarding whether a loan from the debtor's 401(k) was a claim constituted the unauthorized practice of law. *Taub v. Weber*, 366 F.3d 966, 971 (9th Cir. 2004) (BPP's determination regarding meaning of terms 'market value' and 'secured claim or exemption' crossed line laid down by Oregon Supreme Court). Website programs that generate complete bankruptcy forms from the debtor inputting "raw data" amounted to the unauthorized practice of law under California law. *Reynoso*, 315 B.R. at 552 ("Solicitation of information which is then translated into completed bankruptcy forms is the unauthorized practice of law, whether by website or otherwise, as is advising a debtor of the availability of particular exemptions or choosing those exemptions.").

However, a Utah Bankruptcy Court interpreted the state's unauthorized practice of law

statute to permit BPPs to employ bankruptcy software. *In re Boyce*, 2004 WL 2659669, at *9 (Bankr. D. Utah 2004) ("Software that advises and assists the purchaser in the practice of law can be purchased by anyone, attorney or non-attorney alike. This Court can find little distinction between a bankruptcy petition preparer utilizing specialized bankruptcy software for the preparation of the debtor's schedules and statements, and a retail software package that performs the same function for the debtor on the debtor's home computer."). Additionally, the court held that BPPs may charge higher fees than typists because BPPs are subject to "heightened risks and responsibilities" under § 110, which renders the BPPs fee "more akin to the fee charged by a bankruptcy paralegal." *Id.* at *4.

II. CHAPTER 13 ISSUES

A. DISCHARGEABILITY OF STUDENT LOANS FOR "UNDUE HARDSHIP" PURSUANT TO § 523(a)(8)

Courts continue to refine the definition of § 523(a)(8)'s "undue hardship," which permits the discharge of student loan debt. A debtor's current low salary does not constitute undue hardship if the debtor's "reasonably foreseeable financial prospects include the ability to earn a salary similar to the salaries that she has earned in the past." *In re Weller*, 2004 WL 2495852, at *7 (Bankr. W.D. Mo. Nov. 2, 2004). Further, a court may refuse to discharge student loans as an undue hardship where the debtor could eliminate questionable expenses and could pay the student loans after completion of the Chapter 13 case. *In re Mandala*, 310 B.R. 213 (Bankr. D. Kan. 2004). However, a Debtor need not show exceptional circumstances to prove undue hardship, he need only prove that his financial condition is unlikely to improve. *In re Nys*, 308 B.R. 436 (B.A.P. 9th Cir. 2004). One

Alabama bankruptcy court held that even Debtors who contribute a monthly tithing of 10% of their income can discharge student loans. *In re McLaney*, 314 B.R. 228 (Bankr. M.D. Ala. 2004). In the alternative to a full discharge, §§ 523(a)(8) and 105(a) are authority to grant partial discharge of a student loan. *In re Miller*, 377 F.3d 616 (6th Cir. 2004).

A debtor's "preexisting condition" will not prevent a hardship discharge of student loans. *In re Mason*, 315 B.R. 554, 561 (B.A.P. 9th Cir. 2004) ("no circuit has held that a circumstance or condition in existence at the time the debtor obtained the educational loan in question must be excluded from consideration"). However, several courts have refused to discharge student loans based on alleged medical hardship without corroborating evidence. *See In re Norasteh*, 311 B.R. 671 (Bankr. S.D.N.Y. 2004); *In re Burkhead*, 304 B.R. 560 (Bankr. D. Mass. 2004). The Tenth Circuit B.A.P. has ruled that a debtor was entitled to an undue hardship discharge even absent a showing of unique or exceptional circumstances, but would not address partial discharge due to lack of jurisdiction. *See In re Alderete*, 308 B.R. 495 (10th Cir. B.A.P. 2004).

A debtor's qualification for an income contingent repayment plan (ICRP) of student loans will not automatically preclude an "undue hardship" finding. *Limkemann v. U.S. Dept. of Education*, 314 B.R. 190, 195 (Bankr. N.D. Iowa 2004) (holding that requiring bankrupt debtor to participate in ICRP whenever eligible in lieu of receiving discharge deprives bankruptcy court of its role in determining undue hardship). *See also In re Durrani*, 311 B.R. 496 (Bankr. N.D. Ill. 2004) (debtor's ability to participate in IRCP only one factor to consider).

Undue hardship is measured as of the date of trial. The burden of proof by a preponderance of the evidence is upon a debtor. *Educ. Credit Mgmt. Corp. v. Kelly* (*In re Kelly*), 312 B.R. 200

(B.A.P. 1st Cir. 2004).

B. CHAPTER 13 PLANS WITH "SLIP IN" LANGUAGE NOT CAUGHT BY CREDITORS

The Circuits are split on the issue of whether a debtor can "slip in" language into a Chapter 13 Plan that, upon confirmation, renders any exception from discharge of the debtor's student loans as an undue burden. The Tenth Circuit continues to hold that confirmation of a Chapter 13 that contains the language "[c]onfirmation of debtor's plan shall constitute a finding [that excepting the student loans from discharge is an undue hardship] and that said debt is discharged" is valid. *Andersen v. UNIPAC-NEBHELP*, 179 F.3d 1253, 1254 (10th Cir. 1999). The Court reasoned that confirmation of the plan has a res judicata effect because "the order confirming a chapter 13 plan represents a binding determination of the rights and liabilities of the parties." Id. at 1259. If a court holds that the student loan debt is nondischargeable after confirmation, then the ruling disrupts a debtor's "reasonable and settled expectations regarding her future financial planning." Id. at 1259. The creditor should challenge the "slip in" language "by timely objecting to a proposed plan or appealing the confirmation order." *Id.* at 1258. However, the plan's language must specify that confirmation constitutes a decision that the debtor's student loan repayment is an undue hardship. *See Poland v. Educational Credit Management Corp.*, 382 F.3d 1185 (10th Cir. 2004) ("Because neither the plan nor the discharge order in this case contain any type of finding of undue hardship, we hold that *Andersen* does not apply and that the student loan debt is not discharged."). *See also Educational Credit v. Mersmann* (*In re Mersmann*), B.A.P. No. Ks-04-018 (B.A.P. 10th Cir. December 14, 2004).

The Ninth Circuit requires that notice of any "discharge by declaration" plans must be substantially equivalent to the notice sent to creditors for the commencement of an adversary proceeding to determine undue hardship. *Repp v. Educational Credit Management Corp.*, 307 B.R. 144 (B.A.P. 9th Cir. 2004) (relying on Ninth Circuit's decision in *In re Pardee*, 193 F.3d 1083 (9th Cir. 1999)). *Repp* recognized that a "discharge by declaration" method of notice is calculated "to minimize the chance that it would come to the attention of persons in the position to make litigation decisions for the creditor." *Id.* at 149. Under Rule 2002(b), notice of confirmation of a Chapter 13 plan is mailed to "nobody-in-particular at the address provided by the debtor on the list of creditors or schedule of liabilities, unless the creditor has designated a mailing address in a filed proof of claim or request for notice." *Id.* at 152. Contrariwise, the procedure to discharge a student loan requires the debtor to initiate an adversary proceeding and serve a complaint on the creditor. *Id.*; *see also* Rule 7001(6). Because "discharge by declaration" is prohibited, creditors expect: (1) the bankruptcy court will not confirm a plan that circumvents the Bankruptcy Code; and (2) the bankruptcy court will not rule on a §523(a)(8) issue until the debtor serves the creditor with a summons and complaint. *Id.* at 152-53. Under *Repp*, a "discharge by declaration" is only valid if the debtor provides notice to the creditor that is equivalent to the notice of a summons and complaint.

The Fourth and Sixth Circuits hold that "slip in" language or "discharge by declaration" denies a creditor its right to due process. In *In re Ruehle*, 307 B.R. 28 (B.A.P. 6th Cir. 2004), the court held that "Even if a discharge-by-declaration provision in a confirmation order was found to be eligible for *res judicata* effect, it would still need to pass muster under due process analysis in

order for it to be enforceable." *Ruehle* reasoned that "the 'notice' placed in [the debtor's] plan, where it was not supposed to be in the first place, was [not] reasonably calculated to inform [the creditor] that it was about to lose valuable rights." *Id.* at 34. The lack of reasonably calculated notice strips a creditor of due process because "it was not [the creditor's] duty to inquire about possible actions instituted by the Debtor that might affect the student loan where the Debtor failed to properly institute those actions by the methods set forth in the Bankruptcy Code and Bankruptcy Rules. [The creditor] had a right to expect that it would receive a summons and complaint if its rights were in jeopardy." *Id.*

C. CHAPTER 13 ELIGIBILITY REQUIREMENTS (§ 109(e)): AN UPDATE

1. Maximum Debt Amount: Should the Court Consider Amendments to Schedules or Look Beyond Schedules?

The case of *Scovis v. Henrichsen (In re Scovis)*, 249 F.3d 975, 982 (9th Cir. 2001), continues to be the most recent circuit court opinion on this issue, holding that Chapter 13 "eligibility should normally be determined by the debtor's originally filed schedules, checking only to see if the schedules were made in good faith." A number of bankruptcy courts have followed this principle over the past year, also holding that a post-petition reduction in unsecured debt was not relevant to the eligibility analysis. *See, e.g.*, *In re Hansen*, 316 B.R. 505 (Bankr. N.D. Ill. 2004); *In re Rohl*, 298 B.R. 95 (Bankr. E.D. Mich. 2003).

Other courts have recently held that courts may look beyond the schedules even where there has been no allegation of a lack of good faith, thereby considering timely-filed proofs of claim. *See In re Lower*, 311 B.R. 888, 891-92 (Bankr. D. Colo. 2004); *In re Stairs*, 307 B.R. 689 (Bankr. D.

Colo. 2004) (also holding that post-petition reduction in unsecured debt was not relevant to eligibility analysis).

2. **Majority of Courts Include Undersecured Portion of Debt as Unsecured Debt for Eligibility Purposes**

The following recent cases adopted the majority position, as outlined in *In re Scovis*, that the undersecured portion of a debt should be treated as unsecured for § 109(e) eligibility purposes: *In re Enriquez*, 315 B.R. 112, 122 (Bankr. N.D. Cal. 2004); *In re Lower*, 311 B.R. 888, 891-92 (Bankr. D. Colo. 2004).

D. DOES THE DEBTOR HAVE AN ABSOLUTE RIGHT TO DISMISS A CHAPTER 13 CASE?: AN UPDATE

1. **"Yes," Right to Dismiss is Absolute:**

In a recent unpublished decision, the United States Bankruptcy Court for the District of Idaho held that the right to dismiss a Chapter 13 case is absolute, and that said right eliminates the possible conversion of the case to Chapter 7. *See In re Wyatt*, 2004 Bankr. Lexis 1843, *6-7 (Bankr. D. Idaho Nov. 17, 2004). However, *Wyatt* also held that, while the right to convert is absolute, the right is not unconditional (i.e., the court could dismiss with prejudice to refiling within 180 days). *See id.*

2. **"No," Right to Dismiss is Not Absolute:**

Recently, the United States Bankruptcy Court for the Southern District of Texas issued an opinion holding that the right to dismiss a Chapter 13 case is not absolute "where there is a pending motion to convert or there are allegations of fraud or bad faith." *In re Fonke*, 310 B.R. 809, 814 (Bankr. S.D. Tex. 2004).

III. CHAPTER 7 ISSUES

A. DISCHARGE OF POST-PETITION ATTORNEYS' FEES IN CHAPTER 7

There is a circuit split as to whether post-petition services performed by a debtor's attorney in a Chapter 7 case are dischargeable. The Ninth Circuit holds that "all claims for lawyers' compensation stemming from postpetition services actually provided to the debtor do not fall within the automatic stay provisions of § 362(a)(6) or the discharge provisions of section 727." *In re Hines*, 147 F.3d 1185, 1191 (9th Cir. 1998). *Hines* was also followed by the United States Bankruptcy Court for the District of Colorado, where it held that "a reasonable fee for legal services, properly disclosed pursuant to Section 329(a) and Bankruptcy Rule 2016(b), regardless of whether the services are performed pre-petition or post-petition, is not subject to discharge under Section 727(b) if unpaid upon the filing of the bankruptcy petition." *In re Perry*, 225 B.R. 497, 500-01 (Bankr. D. Colo. 1998).

The Seventh Circuit has rejected *Hines*, holding that fees for post-petition attorney services are not discharged: "The most a court could do is give administrative priority to post-petition fees for work in the action's prosecution. Yet if the debtor's estate is insufficient to pay administrative claims, even those are discharged." *Bethea v. Robert J. Adams & Assoc. (In re Bethea)*, 352 F.3d 1125, 1129 (7th Cir. 2003). *See also In re Shell*, 312 B.R. 431, 435 (Bankr. M.D. Ala. 2004) (following *Bethea*).

The Second Circuit, in a case with facts distinguishable from the foregoing cases, recently held that fees of a debtor's attorney for work performed between the Chapter 11 petition date and

the date of conversion to Chapter 7 were pre-petition debts that were subject to discharge. *In re Fickling*, 361 F.3d 172, 174 (2d Cir. 2004). However, the court did not directly reach the issue of fees for services performed post-petition, but stated in dicta that "post-petition attorneys' fees . . . are not dischargeable under Chapter 7." *Id.* at 176.

B. SECTION 727(a)(3) DENIAL OF DISCHARGE FOR FAILURE TO KEEP RECORDS

1. General Standards

Courts in the Tenth Circuit have held that "a prima facie case under [Section 727(a)(3)] requires the creditor to show that the debtor 'failed to maintain and preserve adequate records and that the failure made it *impossible* to ascertain his [or her] financial condition and *material* business transactions.'" *Cadle Co. v. Stewart (In re Stewart)*, 263 B.R. 608, 615 (10th Cir. B.A.P. 2001) (quoting *Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1295 (10th Cir. 1997)). At the very least, a debtor's records must "'sufficiently identify the transactions that intelligent inquiry can be made respecting them.'" *Id.* (quoting *Hedges v. Bushnell*, 106 F.2d 979, 982 (10th Cir. 1939); *Johnson v. Bockman (In re Bockman)*, 282 F.2d 544, 546 (10th Cir. 1960)).

2. Recent Cases Adopting the Foregoing General Standards

Recent cases which adopt the foregoing general standards for determining whether denial of a discharge is appropriate under § 727(a)(3) include the following: *Razzaboni v. Schifano (In re Schifano)*, 378 F.3d 60, 68 (1st Cir. 2004) ("a discharge may be granted only if the debtor presents an accurate and complete account of his financial affairs"); *Jacobowitz v. Cadle Co. (In re Jacobowitz)*, 309 B.R. 429, 438 (Bankr. S.D.N.Y. 2004) (affirmative obligation to provide records

that "paint true and accurate picture" of debtor's financial condition at time of filing); *Klingler v. Hosler (In re Hosler)*, 309 B.R. 540, 548-49 (Bankr. C.D. Ill. 2004) ("affirmative duty on the debtor to create books and records accurately documenting his business affairs"); *Riley v. Riley (In re Riley)*, 305 B.R. 873, 883 (Bankr. W.D. Mo. 2004) ("Discharge should not be denied if the debtor's records, though poorly organized, are reasonably sufficient to ascertain the debtor's financial condition."); *Crane v. Morris (In re Morris)*, 302 B.R. 728, 736 (Bankr. N.D. Okla. 2003) (following *Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1295 (10th Cir. 1997), and *Cadle Co. v. Stewart (In re Stewart)*, 263 B.R. 608, 615 (10th Cir. B.A.P. 2001), and listing factors for determining sufficiency of disclosures); *First Nat'l Bank of Stratton, Colo. v. Thiede (In re Thiede)*, 2004 Bankr. Lexis 1404, *26 (Unpublished Bankr. D. Kan. Sept. 15, 2004) (duty to keep records of cash transactions); *Gillman v. Carson (In re Carson)*, Adv. Proc. No. 01-2326, Memorandum Decision (Bankr. D. Utah October 24, 2003) (Boulden, J.) (following *In re Brown* and *In re Stewart*).

C. IS A CHAPTER 7 DEBTOR'S RIGHT TO CONVERT HIS CASE TO A CASE UNDER A DIFFERENT CHAPTER "ABSOLUTE"?: AN UPDATE

In *In re Young*, 237 F.3d 1168 (10th Cir. 2001), the Tenth Circuit held that a case is not automatically converted upon the filing of a motion to convert; rather, interested parties must be afforded an opportunity for objections and a hearing prior to conversion. More recently, the Tenth Circuit B.A.P. rejected the argument that conversion may be denied on the basis of "bad faith" or "extreme circumstances," and held that a debtor must only meet the eligibility requirements of Chapter 13 in order to convert a case from Chapter 7 to Chapter 13. *See Miller v. Miller (In re Miller)*, 303 B.R. 471 (10th Cir. B.A.P. 2003).

Over the past year, the Ninth Circuit B.A.P. followed the holding in *Miller*. *See Croston v. Davis (In re Croston)*, 313 B.R. 447 (9th Cir. B.A.P. 2004). *See also In re Hansen*, 316 B.R. 505 (Bankr. N.D. Ill. 2004). However, the Sixth Circuit B.A.P. rejected the *Miller* case and held that factors other than eligibility requirements can prevent a Chapter 7 debtor from converting a case to Chapter 13. *See Copper v. Copper (In re Copper)*, 314 B.R. 628 (6th Cir. B.A.P. 2004).

IV. UPDATE ON SUPREME COURT CASES

Till v. SCS Credit Corp. held that courts should apply the "formula approach" to determine the adequate rate of interest on a cram-down loan. 124 S. Ct. 1951 (2004). The Court rejected the coerced loan, presumptive contract rate, and cost of fund approaches because "[e]ach of these approaches is complicated, imposes significant evidentiary costs, and aims to make each individual creditor whole rather than to ensure the debtor's payments have the required present value." *Id.* at 1960. The Court preferred the formula approach's use of the national prime rate that is adjusted "on such factors as the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganized plan." *Id.* at 1961. While the other approaches impose costly evidentiary burdens on the parties, the formula approach "depends only on the state of financial markets, the circumstances of the bankruptcy estate, and the characteristics of the loan." *Id.*

Tennessee Student Assistance Corp. v. Hood held that an adversary proceeding to determine whether the debtor's repayment of a student loan constitutes "undue hardship" is not a "suit against the state" in the context of the Eleventh Amendment sovereign immunity. 124 S. Ct. 1905, 1913 (2004). The Court reasoned that an undue hardship adversary proceeding involves in rem

jurisdiction. *See id.* at 1910. And because an in rem admiralty action is not a "suit against the state" that violates the Eleventh Amendment, neither should be an in rem bankruptcy action. The court also noted that if the state chooses not to participate in the adversary proceeding, the court may still deny that the debtor's student loan repayment is an "undue hardship." *Id.* at 1912.

Lamie v. U.S. Trustee held that unless the debtor's attorney in a Chapter 7 proceeding is employed by the trustee, then he cannot seek compensation under § 330(a)(1). 124 S.Ct. 1023, 1032 (2004). The Court reasoned that "[s]ubsection (A)'s "attorney" . . . can be read in a straightforward fashion to refer to those attorneys whose fees are authorized by §330(a)(1): attorneys qualified as §327 professional persons, that is, in a Chapter 7 context, those employed by the trustee and approved by the court . . . . section 331's reference to interim compensation for debtors' attorneys most straightforwardly refers to debtors' attorneys authorized under §327." *Id.* at 1031.

The Supreme Court recently granted cert. in *Rousey, et al v. Jacoway*, 347 F.3d 689 (8th Cir. 2003), to resolve the three-way circuit conflict over whether and to what extent Individual Retirement Accounts (IRAs) are exempt from a bankruptcy estate under 11 U.S.C. § 522 (d)(10)(E). The Second, Fifth, Sixth, and Ninth Circuits have interpreted the statute to permit exemptions for payments from IRAs. The Eighth circuit has categorically denied exemptions for future payments from IRAs. The Third circuit excludes future payments from IRAs from exemption but permits exemptions from present payments.

B. EMOTIONAL DISTRESS DAMAGES FOR VIOLATION OF THE AUTOMATIC STAY: WHETHER BUSINESS DEBTORS ARE INDIVIDUALS UNDER SECTION 362(h)

Section 362 provides that a debtor "shall recover" actual damages, costs, and attorney's fees. The award is mandatory and not within the discretion of the court.

Upon the filing of a bankruptcy petition, all creditors are automatically stayed from attempting to collect on their debts owed by a debtor. The automatic stay is broad and all encompassing. It affords the debtor a "breathing spell" from creditors' collection efforts, and prevents creditors from dismembering a debtor's estate.
One of the enforcement mechanisms for the automatic stay is codified at 11 U.S.C. § 362 (h) That section provides:

> "An individual injured by any willful violation of a stay provided by this section shall receive actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."

However, section 362(h) applies by its terms only to "individuals." That term is not expressly defined in the Bankruptcy Code, and, as a result, a significant split has developed among the circuit courts over whether the term "individual" as used in §362(h) restricts the section's application to "human" debtors. *In re Abacus Broadcasting Corp.,* 105 B.R. 925 (Bankr. W.D. Tex. 1993). The *Abacus* court weighs into the fray on the side of those courts which have held that section 362(h) applies only to natural persons.

However, those courts which have applied section 362(h) to corporate debtors have done so in light of the breadth of the automatic stay. "[I]t seems unlikely that Congress meant to give a remedy only to individual debtors against those who willfully violate the automatic stay provisions of the Code as opposed to debtors which are corporations or other like entities. Such a narrow construction of the term would defeat much of the purpose of the [automatic stay], and we construe the word "individual" to include a corporate debtor." *Budget Service Company,* 804 F.2d 289, 292 (4th Cir. 1986).

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In re Versar, 138 B.R. 620 (D. Colo. 1992), held that the automatic stay damages provision does not apply to corporate as opposed to individual debtors.

NEW CASE LAW

"Congress chose the term 'individual' to describe those who are eligible to claim actual damages under §362(h). . . By limiting the availability of actual damages under §362(h) to individuals, Congress signaled its special interest in redressing harms that are unique to human beings. One such harm is emotional distress, which can be suffered by individuals but not corporations." *Dawson v. Washington Mutual Bank*, 2004 WL 287663, 4 (9th Cir. 2004). The court read the legislative history as a whole and found that "Congress was concerned not only with financial loss, but also – at least in part– with the emotional and psychological toll that a violation of a stay can exact from an individual." *Id.* at 6.

"Because Congress meant for the automatic stay to protect more than financial interest, it makes sense to conclude that harm done to those non-financial interests by a violation are cognizable as 'actual damages.' We conclude, then, that the 'actual damages' that may be recovered by an individual who is injured by a willful violation of the automatic stay, 11 U.S.C. §362(h), include damages for emotional distress." *Id.*

"[T]o be entitled to damages for emotional distress under §362(h), an individual must (1) suffer significant harm, (2) clearly establish the significant harm, and (3) demonstrate a causal connection between that significant harm and the violation of the automatic stay." *Id.*

An individual may establish emotional distress damages clearly by:

1. Corroborating medical evidence may be offered;
2. Non-experts, such as family members, friends, or coworkers, may testify to manifestations of mental anguish and clearly establish that significant emotional harm occurred; and
3. The nexus between the claimed damages and the violation of the stay appears in the statute itself. The individual must be "injured by" the violation to be eligible to claim actual damages.

Dawson v. Washington Mutual Bank, 2004 WL 287663, 7-8 (9th Cir. Cal. 12-10-04).

Still, the majority view, and the better reasoned opinions, hold that emotional damages are not available to corporate debtors.

H. AUTHORITY OF BANKRUPTCY COURT TO ISSUE ATTORNEY DISCIPLINE AND ATTORNEY FEE ISSUES

Inherent Power:

11 U.S.C. § 105 – Power of Courttc "11 U.S.C. § 105 – Power of Court"

Section 105 provides bankruptcy courts with statutory authority to exercise civil contempt powers and to enter sanctions for civil contempt. *In re Skinner*, 917 F.2d 444 (10th Cir. 1990).

Bankruptcy courts have inherent power to sanction conduct abusive of the judicial process. *In re Courtesy Inns, Ltd., Inc.*, 40 F.3d 1084 (10th Cir. 1994).

Sanctions may be imposed against debtor's attorney and principal for bad faith filing. In re *Nursery Land Development, Inc.*, 91 F.3d 1414 (10th Cir. 1996).

11 U.S.C. § 110 – Penalty For Persons Who Negligently Or Fraudulently Prepare Bankruptcy Petitionstc "11 U.S.C. § 110 – Penalty For Persons Who Negligently Or Fraudulently Prepare Bankruptcy Petitions"

Petition preparer that used various aliases and business names was fined for flagrant pattern of fraudulent, unfair and deceptive acts. *In re Fish*, 210 B.R. 603 (Bankr. D. Colo. 1997).

11 U.S.C. § 328 – Limitations on Compensation of Professionals

A conflict of interest can justify the denial of all attorney's fees. *In re Vann*, 136 B.R. 863 (D. Colo. 1992).

Statute provides that "the trustee, with the court's approval, may employ one or more attorneys ... to represent or assist the trustee in carrying out the trustee's duties under this title." 11 U.S.C. § 327(a). The trustee and attorney may be the same person "if such authorization is in the best interest of the estate" and "the court may allow compensation for the trustee's services as such attorney . . . only to the extent that the trustee performed services as attorney ... for the estate and not for performance of any of the trustee's duties that are generally performed by a trustee without the assistance of an attorney ... for the estate." *In re Hironimus*, 26 B.R. 191 (D. Colo. 1983).

11 U.S.C. § 329 – Debtor's Transactions with Attorneystc "11 U.S.C. § 329 – Debtor's Transactions with Attorneys"

Disgorgement of all fees was appropriate sanction for failing to get the court's

approval of the attorney's employment. *In re Land*, 943 F.2d 1265 (10th Cir. 1991).

Chapter 13 attorneys do not need to submit a time and task summary if fee request is $1,000 or less, but must demonstrate in their summaries that the representation of the debtor involved unusual, unique, or troublesome aspects if seeking more than $1,000. *In re Zwern*, 94-10063 MSK (Bankr. D. Colo. 1995).

The fact that section 329 does not list ethical violations as a basis for disallowing fees does not mean that counsel's ethical improprieties are to be ignored when ruling on the reasonableness of fees. *In re Vann*, 128 B.R. 285 (Bankr. D. Colo. 1991), *aff'd* 136 B.R. 874 (D. Colo. 1992).

Failure to make disclosures required under section 329 was sufficient grounds to deny all fees even if failure was merely through inadvertence. *In re Smitty's Truck Stop, Inc.*, 210 B.R. 844 (10th Cir. BAP 1997)

11 U.S.C. § 362 – Automatic Staytc "11 U.S.C. § 362 – Automatic Stay"

Bankruptcy courts do not have authority to punish violations of the automatic stay by issuing contempt citations. *In re Hunter*, 190 B.R. 118 (Bankr. D. Colo. 1995); but see *In re Skinner*, 917 F.2d 444 (10th Cir. 1990) [affirming order of bankruptcy court imposing sanctions for violation of 362(a)].

Sanctions

Imposition of sanctions under the inherent power of the court is proper where counsel has willfully abused the judicial process or otherwise conducted litigation in bad faith. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980)

Attorney sanctioned under Rule 9011 for claiming homestead exemption against fully encumbered property after entering into stipulation with trustee not to do so, and for seeking to avoid clearly unavoidable liens. *In re Pullara*, 199 B.R. 417 (Bankr. D. Colo. 1996)

Sanctions of $10,000 upheld against corporate debtor's attorney who filed chapter 11 petition in one-asset case on day before foreclosure sale of business with no employees, no income or business activity, only one creditor, and no reasonable possibility of reorganization. *In re Nursery Land Development, Inc.*, 91 F.3d 1414 (10th Cir. 1996)

If a court determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee. Fed.R.App.P. 38.

An appeal is frivolous when "the result is obvious, or the appellant's arguments are wholly without merit." *Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987) (*en banc)*. Most courts that have decided whether Rule 38 empowers the appellate court to impose sanctions upon attorneys personally have relied in the conjunctive on Rule 38 and 28 U.S.C. § 1927 to impose sanctions on attorneys. In an appropriate case, Rule 38 alone permits sanctions against attorneys for taking a truly frivolous appeal on behalf of their client. *Id*.

Any attorney . . . 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. 28 U.S.C. § 1927.

The type of behavior that is punishable under §1927 is that which wrongfully proliferates or prolongs litigation. This may involve any misconduct that generates needless proceedings, such as the filing of a frivolous appeal.

Bankruptcy courts cannot impose sanctions under §1927, but may impose sanctions under inherent power under 105(a) to sanction conduct abusive of the judicial process. *In re Courtesy Inns, Ltd*., 40 F.3d 1084 (10th Cir. 1994).

Bad faith is not an issue because the standard for the imposition of sanctions is an objective one. The subjective mental state of the person sanctioned need not be considered. *Hill v. Norfolk & Western Ry. Co*., 814 F.2d 1192 (7th Cir. 1987).

The Tenth Circuit has also rejected any subjective bad faith requirement. *Braley v. Campbell*, *supra*, 832 F.2d at 1512. Any conduct that, viewed objectively, manifests either an intentional or reckless disregard of an attorney's duties to the court is sufficient. *Id*.

Sanctions may also be imposed for persisting in a position or prosecuting a claim after it becomes clear that the position or claim is unfounded. *Dreiling v. Peugeot Motors of America, Inc*., 768 F.2d 1159, 1165-1166 (10th Cir. 1985).

District court imposed sanctions on the Secretary of the US Department of Health and Human Services for defending an appeal of an administrative ruling denying social security disability benefits to the plaintiff. The court found that the Secretary violated Rule 11 in pursuing the appeal without a scintilla of evidence to support her position. Even though the Secretary had won the administrative hearing, the court said she should have realized the futility of prevailing on appeal and dropped the appeal. The Tenth Circuit affirmed. *Adamson v. Bowen*, 855 F.2d 668 (10th Cir. 1988).

Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs. 28 U.S.C. §1912.

J. ATTORNEY'S DUTY/ RESPONSIBILITY FOR DEBTOR TIMELY PREPARING SCHEDULES

A. Section 521 deadlines

§ 521. Debtor's duties

ADVANCE \d 4The debtor shall--

(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs;

(2) if an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate--

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;

(B) within forty-five days after the filing of a notice of intent under this section, or within such additional time as the court, for cause, within such forty-five day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and

© nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title;

(3) if a trustee is serving in the case, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;

(4) if a trustee is serving in the case, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under HYPERLINK "http://web2.westlaw.com/find/default.wl?DB=1000546&DocName=11USCAS344&FindType=L&AP=&mt=Colorado&fn=_top&sv=Split&vr=2.0&rs=WLW4" section 344 of this title; and

(5) appear at the hearing required under HYPERLINK "http://web2.westlaw.com/find/default.wl?DB=1000546&DocName=11USCAS524&FindType=L&ReferencePositionType=T&ReferencePosition=SP%3B" section 524(d) of this title.

B. *In re Cassar*, 139 B.R. 253 (Bankr. D. Colo 1992) - A debtor's motion to redeem under §722 is premature until the time limit has expired for the filing of §523 complaint and/or the time limit has expired for the filing of objections to the debtor's claimed exemptions or the property has been abandoned.

COLORADO - EXPEDITED DISMISSAL OF CHAPTER 7 CASES

Failure of the debtor to appear at the §341 creditor meeting or to provide required documents(i.e. bank statements, tax returns, payroll information) to the Trustee will now result in a dismissal of the case. Debtor cannot re-file for 180 days.

C. Other Considerations:

The timing of filing a case can pivot on may factors:

is the debtor entitled to receive tax refunds

is there a pending suit in state or federal court which will result in a judgment which exceeds the jurisdictional limits for filing Chapter 13 if an order enters prior to filing bankruptcy

similarly, if judgment enters, will the debtor's real property be subject to a judicial lien which may not be voided

is there a pending non-exempt claim in which the debtor is the plaintiff (i.e., wrongful termination, or other statutory claims)

II. CHAPTER 13 ISSUES

B. CONVERSION FROM 13 to 7: How to do it and whether absolute right.

11 U.S.C.A. § 706 - Conversion

ADVANCE \d 4**(a)** The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

(b) On request of a party in interest and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 of this title at any time.

(c) The court may not convert a case under this chapter to a case under chapter 12 or 13 of this title unless the debtor requests such conversion.

(d) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

Pursuant to 11 U.S.C. §706(a), the Debtors have the absolute right to convert a Chapter 7 case to a Chapter 13 case at any time, including subsequent to the entry of an order of discharge.

In re Young, 237 F. 3d 1168, (B.A.P. 10th Cir. 2001). Successive filing of Chapter 7 bankruptcy and Chapter 13 plan, or "Chapter 20" conversion, "is both permissible under the Code and– given the requisite scrutiny by the bankruptcy courts–entirely proper." *Id.* at 1174.

In re Rigales, 290 B.R. 401 (Bankr. D.N.M. 2003) This Court agrees that under the language of *Young, supra,* a debtor may convert his bankruptcy from a Chapter 7 to a Chapter 13 "at any time." But, due to the nature of the bankruptcy process, the plan confirmation process upon which the *Young* court relies may not provide a satisfactory cure for abuses of the conversion process.

In re Calder, 973 F.2d 862 (10th Cir. Utah 1992) The court agreed that the Bankruptcy Rules cannot override the absolute statutory right to convert pursuant to 706(a). However, it followed rules 1017(d) and 9013 to guide procedure and found that the conversion becomes effective only upon entry of an order by the court (not when filed). Thus, conversion did not happen in time to include judgement for punitive damages.

Right of Debtor to convert case under 11 U.S.C. §1307(a) is absolute.

§ 1307. Conversion or dismissal

(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable.

(b) On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

(c) Except as provided in subsection (e) of this section, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including--

(1) unreasonable delay by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees and charges required under chapter 123 of title 28;

(3) failure to file a plan timely under section 1321 of this title;

(4) failure to commence making timely payments under section 1326 of this title;

(5) denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;

(6) material default by the debtor with respect to a term of a confirmed plan;

(7) revocation of the order of confirmation under section 1330 of this title, and denial of confirmation of a modified plan under section 1329 of this title;

(8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan;
ADVANCE \d 4**(9)** only on request of the United States trustee, failure of the debtor to file, within fifteen days, or such additional time as the court may allow, after the filing of the petition commencing such case, the information required by paragraph (1) of section 521; or

(10) only on request of the United States trustee, failure to timely file the information required by paragraph (2) of section 521.

(f) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

In re Davis, 64 B.R. 358 (Bankr. S.D.N.Y. 1986) Debtors are not required to remain in Chapter 13 if they cannot satisfy obligations which they propose as feasible and which they voluntarily assumed. *In re Padalecki*, 263 B.R. 785 (Bankr. W.D. Tex 2001). Local bankruptcy rule governing conversion of Chapter 13 case to Chapter 7 does not require a debtor to file a motion to convert a Chapter 13 case to a Chapter 7 case but, rather, debtor may voluntarily convert a case by notice.

In re Carbajal, 73 B.R.446 (Bankr. S.D. Fla. 1987) Chapter 13 case would be converted to Chapter 7 upon debtor's election of conversion which she was entitled to as matter of right. HYPERLINK "http://web2.westlaw.com/find/default.wl?DB=164&SerialNum=1987065580&FindType=Y&AP=&mt=Colorado&fn=_top&sv=Split&vr=2.0&rs=WLW4.1" http://web2.westlaw.com/find/default.wl?DB=164&SerialNum=1987065580&FindType=Y&AP=&mt=Colorado&fn=_top&sv=Split&vr=2.0&rs=WLW4.1

In re Henson, 289 B.R. 741 (Bankr. N.D. Cal 2003) Upon showing of requisite "cause" to dismiss or convert debtor's Chapter 13 case based on his inability to propose confirmable plan, bankruptcy court, in exercise of its discretion, would convert case to Chapter 7 rather than dismiss it, as being in best interest of creditors and estate; conversion would place estate assets in hands of independent trustee, preserve such assets and allow for potential recovery of additional ones through use of trustee's avoiding powers, maintain the Code's priorities among creditors in an orderly distribution, and allow creditor to file nondischargeability complaint to pursue debtor outside of bankruptcy if it so chose.

II. CHAPTER 13 ISSUES

C. **ATTORNEY'S FEES** - NEED OF RETENTION ORDER? FEES DISCHARGED

1. *In Re Bethea,* 352 F.3d 1125 (7th Cir. N.D. Ill, 2003)

Pre-petition debts for legal fees are subject to discharge. "Nothing in the Code permits a categorical exception for any kind of debt other than the one listed in §523 – and legal fees are not on that list." *Id.* at 1129.

Debtors hired attorneys to prepare and prosecute their bankruptcy cases, agreeing to pay the requisite fees in installments, that were due both before and after the filing of the petitions. The lawyers performed and debtors received discharges. When the attorneys continued to collect on the unpaid fees, debtors hired new counsel, and filed adversary actions to hold the lawyers in contempt for violating the discharge order injunctions. The bankruptcy court held that the fees were reasonable under 11 U.S.C. §329(b), therefore not dischargeable and dismissed the cases. The district court affirmed. The 7th Circuit Court of Appeals vacated stating:

> Attorneys' fees are not among the debts excepted from discharge by §523. The retainer is a pre-petition, liquidated debt; but even if it were an unliquidated 'claim' for purposes of §502, that claim would also be covered. Unless §329 creates an unenumerated exception to §727(b), the debts to these attorneys were discharged.

Id. at 1127.

Query–are the implications of the *Bethea* holding and its ilk that debtor's counsel's obligations (and fee agreements) are discharged with the filing of the case? If so, must debtor's counsel be re-hired post-petition? Does debtor's counsel commit malpractice if he fails to perform post-petition work in the absence of a post-petition agreement?

2. *Lamie v. United States Trustee,* 124 S. Ct. 1023 (2004).

The bankruptcy statute (§330(a)(1)) governing compensation of professionals does not allow Chapter 7 debtor's attorney to be compensated from estate, unless the attorney is employed by trustee and approved by the court.

Attorney was hired to prepare, file and prosecute a Chapter 11 bankruptcy. Three months into the reorganization, the UST filed a motion to convert to a Chapter 7 liquidation proceeding. The court granted the motion and appointed an estate trustee. Attorney continued to provide services without approval from the appointed trustee, including amending schedules and appearing at an adversary hearing. He filed an application for fees

under §330 (a)(1). The Government objected arguing that statute makes no provision for the estate to compensate an attorney not authorized under §327. All courts agreed.

III. CHAPTER 7 ISSUES

B. DISMISSALS UNDER SECTION 707 (a)

Section 707 (a) of the Bankruptcy Code provides that a bankruptcy court may dismiss a case under this chapter only after notice and a hearing and only for cause, including–
(1) unreasonable delay by the debtor that is prejudicial to creditors;
(2) nonpayment of any fees or charges required under chapter 123 of title 28; and
(3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

The Tenth Circuit has expressly held that bad faith can be "cause" for dismissal under Section 707(a).

In re Hammonds, 139 B.R. 535 (Bankr. D. Colo. 1992), held that Chapter 7 petition was filed in bad faith, warranting dismissal of case. " [A] debtor's good faith is an implicit jurisdictional prerequisite to the filing of a case under the Bankruptcy Code... Absence of good faith is generally held to be sufficient cause for dismissal." *Id*. at 541.
ADVANCE \d 4
In re Tanenbaum, 210 B.R. 182 (Bankr. D. Colo. 1997), the court reaffirmed the Hammonds holding that "the absence of good faith of a debtor... is sufficient cause for dismissal under Section 707(a).

But See In re Etcheverry, 242 B.R. 503 (D. Colo. 1999), because there is no good-faith filing requirement in Chapter 7, a debtor's alleged bad faith cannot constitute "cause" for dismissal of a Chapter 7 case. The court specifically disagreed with Hammonds and Tanenbaum and noted that "no District Court of Colorado, Tenth Circuit, or Supreme Court case has explicitly held that such a good faith requirement exists in Section 707(a). *Id.* at 507.

In re Stephenson, 262 B.R. 871 (Bankr. W.D. Okla. 2001). While most courts have determined that the plain language of the statute does not impose a good faith requirement, this court did not need to reach the issue because it held that a dismissal would prejudice the creditors and therefore denied the relief requested.

Note: Failure to abide by the time limitations set forth in Section 521 forms the basis of a motion to dismiss by the trustee per §707(a).

IV. RECENT AND PENDING SUPREME COURT CASES

1. *Rousey v. Jacoway*, Pending

Cert granted to resolve the three-way circuit conflict over whether and to what extent Individual Retirement Accounts (IRAs) are exempt from a bankruptcy estate under 11 U.S.C. §522 (D) (10) (E). Three way circuit split:

- Whether payments from IRAs are exempt; and
- Whether such an exemption extends to the *corpus* out of which future payments will be made as well as to those payment currently being made.
- Similarly situated debtors are treated differently across circuits.

Petitioner asserts that the Eighth Circuit ruling is erroneous and that IRAs fall within the exemption defined by the statute. An IRA confers "the right to receive a payment under a stock bonus, pension, profitsharing, annuity or similar plan or contract on account of illness disability, death ,age or length of service."

The Second, Fifth, Sixth, and Ninth Circuits have interpreted the statute to permit exemptions for payments from IRAs

The Eighth circuit has categorically denied exemptions for future payments from IRAs.

The Third circuit excludes future payments from IRAs from exemption but permits exemptions from present payments.

COLORADO STATUTE - C.R.S. §13-54-102 - Exempt Property

13-54-102(1)(s):

Property, including funds, held in or payable from any pension or retirement plan or deferred compensation plan, including those in which the debtor has received benefits or payments, has the present right to receive benefits or payments, or has the right to receive benefits or payments in the future and including pensions or plans which qualify under the federal "Employee Retirement Income Security Act of 1974" as an employee pension benefit plan as defined in 29 U.S.C.§ 1002, any individual retirement account, as defined in 26 U.S.C. §408, and any plan, as defined in 26 U.S.C.§401, and as these plans may be amended from time to time.

2. *Lamie v. United States Trustee*, 124 S.Ct. 1023 (2004)

11 U.S.C. §330(a)(1), regulates court awards of professional fees, including fees for services rendered by attorneys in connection with bankruptcy proceedings. Petitioner, a bankruptcy attorney, sought compensation under

> the section for legal services he provided to a bankrupt debtor after the proceeding was converted to a chapter 7 bankruptcy. His application for fees was denied by the Bankruptcy Court, the District Court, and the United States Court of Appeals for the Fourth Circuit. Each court held that in a chapter 7 proceeding §330(a)(1) does not authorize payment of attorney's fees unless the attorney has been appointed under §327 of the Code. See 11 U.S.C. §§ 327 and 701 *et seq.* Petitioner was not so appointed, and his fee request was denied. Having granted the petition for certiorari to review this holding, we now affirm.
>
> *Lamie v. United States Trustee,* 124 S. Ct. 1023, 1027 (2004).

2. *Tennessee Student Assistance Corp. v. Hood,* 124 S.Ct. 1905 (2004)

Debtor sought discharge of student loan because of "undue hardship." The state sought a dismissal of the complaint for lack of jurisdiction, claiming Eleventh Amendment sovereign immunity. The court held that the discharge of a debt by a bankruptcy court is an in rem proceeding. "Bankruptcy courts have exclusive jurisdiction over a debtor's property, wherever located, and over the estate...the court's jurisdiction is premised on the debtor and his estate, and not on the creditors." *Id.* at 1910.

No matter how difficult Congress has decided to make the discharge of student loan debt, the bankruptcy court's jurisdiction is premised on the res, not on the persona; that States were granted the presumptive benefit of nondischargeability does not alter the court's underlying authority. A debtor does not seek monetary damages or any affirmative relief from a State by seeking to discharge a debt; nor does he subject an unwilling State to a coercive judicial process. He seeks only a discharge of his debts.

Id. at 1912.

While the adversary proceeding required service by summons, it could have been brought by motion. The Court held that "the Bankruptcy Court's in rem jurisdiction allows it to adjudicate the debtor's discharge claim without in personam jurisdiction over the State." *Id.* at 1914. Therefore, the Bankruptcy court had the authority to make the undue hardship determination without infringing on state sovereignty.

4. *Till v. SCS Credit Corp.*, 124 S. Ct. 1951 (2004)

The Supreme Court analyzes cram downs and the four methods for determining fair interest rates on installment payments, and decides that the prime-plus or formula approach, which requires adjusting the prime national interest rate based on risk of nonpayment, was the most appropriate approach.

> [T]he court should aim to treat similarly situated creditors similarly, and to ensure that an objective economic analysis would suggest the debtor's interest payments will adequately compensate all such creditors for the time

value of their money and the risk of default...These considerations lead us to reject the coerced loan, presumptive contract rate, and cost of funds approaches. Each of these approaches is complicated, imposes significant evidentiary costs, and aims to make each individual creditor whole rather than to ensure the debtor's payments have the required present value. *Id.* at 1960.