Matters of First Impression – Consumer: BAPCPA's Consumer Bankruptcy Provisions in Practice and in the Courts

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BAPCPA CONSUMER BANKRUPTCY PROVISIONS: RECENT CASES

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POST – BAPCPA CASES

1. Portion of Debt Relief Agency provisions found unconstitutional

A federal district court in Texas has ruled that the portion of §526(a)(4), dealing with a prohibition against advising clients to incur debt, is unconstitutional. *Hersh v. U.S.*, 347 B.R. 19 (N.D.Tex. 2006). Judge Godbey noted that restrictions on free speech, while sometimes appropriate if they are "narrow and necessary", must promote a compelling government interest. However, the provision prohibiting an attorney (a DRA) not to "advise an assisted person …. to incur debt in contemplation of such person filing a case under this title …" not only prevents advice which would otherwise be lawful, but also may prevent debtors from availing themselves of other alternatives to filing bankruptcy. Although this narrowprovision was deemed invalid, the provisions of §527(b) requiring the submission of specific information to the debtors was found constitutional. Further, the court found that the debt relief agency lacked standing to contest the statute based on the 5th Amendment right to counsel.

2. A Bankruptcy Court concludes that the BAPCPA provisions relating to debt relief agencies do not apply to attorneys who are members of the Bar of the Southern District of Georgia

Judge Davis voiced his concern that if attorneys are arguably within the definition of debt relief agencies under BAPCPA: "the evaluation of new risks and liabilities will preoccupy them as they strive to represent their clients, comply with existing state regulations of their practice, learn the new substantive and procedural mandates of this law, and adhere to the separate professional applicable to them as members of the Bar of this Court." The Court then determined that the new law's express inclusion of bankruptcy petition preparers was proof that attorneys were not meant to be included. The Court also concluded that the debt relief agency provisions were for the protection of consumers from the unauthorized practice of law and, therefore, could not include licensed attorneys. The Court found it illogical that BAPCPA would federalize the regulation of attorneys. *In re Attorneys at Law and Debt Relief Agencies,* 332 B.R. 66, (Bkrtcy.S.D.Ga., 2005). The United States Trustee's appeal was dismissed by the District Court because she lacked standing. CV405-206 (S.D.Ga. 8/25/06).

3. Two early cases strictly construe the credit counseling requirements of §109(h)(1)

Judge Killian from the Northern District of Florida and Judge Bihary from the Northern District of Georgia have quickly determined that the credit counseling requirements of §109(h)(1), and any requests for exemptions from the requirements must be strictly construed. In Judge Killian's case, the Debtors alleged the "exigent circumstances" of impending foreclosure of their home and repossession of their vehicle but failed to certify they had requested, but been unable to obtain, the required credit counseling within five days from their request. Judge Killian dismissed the case as having been filed by an ineligible person. *In re Booth*, BK No. 05-045002-LMK-13 (Bkrtcy.N.D.Fla. Oct. 24, 2005). In Judge Bihary's case, the *pro se* Debtor requested a waiver of the requirement, alleging she had been to credit counseling in the past and it had not been productive, and that her present situation was too complex for credit counseling. Judge Bihary gave the Debtor an opportunity to supplement her request with specific grounds complying with §109(h)(3) and obtaining a credit briefing within the 30 days of the commencement ofher bankruptcy case. A hearing was scheduled for the 31st day to determine whether the Debtor qualified for an exemption. Absent compliance by the Debtor, the Debtor would be deemed ineligible and the case would be dismissed. *In re Monteiro*, BK No. 05-85018- Ch 7 (Bkrtcy.N.D.Ga. Oct. 31, 2005).

4. Effect of noncompliance with credit counseling requirements

Amended §109(h)(1) requires individual Debtors to obtain credit counseling from an approved agency during the 180-day period preceding the filing of a bankruptcy petition. Under §109(h)(3) a Debtor may be exempted from this requirement, but only upon written certification that describes exigent circumstances which merit waiver. Additionally, the Debtor must have requested credit counseling services, but been unable to obtain them, within five days from the Debtor's request of the waiver. These requirements have been strictly construed, including enforcement where the Debtor was attempting to settle with a foreclosing creditor, but could not obtain agreement as to the settlement amount prior to the foreclosure date. A Chapter 13 case was filed to stop the foreclosure, but the Debtor was held ineligible under §109(h), and the case was dismissed. Judge Monroe noted that dismissal might adversely affect the automatic stay in the next case, to stop the next foreclosure, but stated: "The Court's hands are tied. The statute is clear and unambiguous. The Debtors violated the provision…and are ineligible to be Debtors in this case. It must, therefore, be dismissed." *In re Sosa*, 336 B.R. 113 (Bkrtcy.W.D.Tex. 2005). A Minnesota Bankruptcy Court also found that failure to meet the requirements of §109(h) made the putative Debtor ineligible to be a Debtor; held this lack of eligibility to constitute cause for dismissal under §707(a); and stated that dismissal was "the only possible outcome…." *In re LaPorta*, 332 B.R. 879 (Bkrtcy.D.Minn., 2005).

Meanwhile, a Texas Bankruptcy Court has held that the proper outcome for failure of a would-be Debtor to meet the §109(h) requirement is not dismissal of the case, but striking the petition. *In re Hubbard*, 333 B.R. 337 (Bkrtcy.S.D.Tex. 2005). Here the Debtors did not obtain credit counseling, or file proper certifications of exigent circumstances. Because they were not eligible to be Debtors based on this noncompliance, Judge Isgur reasoned that no case could have been commenced when they filed their petitions. The Court relied on §301, which states that a voluntary case is "commenced by the filing…of a petition…by an entity that may be a debtor…." Therefore, under §301, a voluntary case could not be commenced by an entity that was ineligible to be a Debtor in the case. The Court noted significant implications under BAPCPA for case dismissal, as opposed to "striking" a petition, and held that the proper remedy is to have the petitions "stricken", as there were no "cases" to dismiss. *See also, In re Watson*, 332 B.R. 740 (Bkrtcy.E.D.Va. 2005), holding application of §109(h) against individual business Debtors, as well as individual consumer Debtors, to be constitutional.

Then, in Georgia, a court had to determine whether a case filed without the proper credit counseling was void *ab initio* and should be stricken or if the court had jurisdiction over the case and could dismiss it. *In re Ross*, 338 B.R. 134 (Bankr. N.D. Ga. 2006). Judge Bonapfel, after a lengthy analysis of conflicting views, agreed with those cases that found that the court retained jurisdiction and, therefore, could proceed to issue a dismissal of the case. Judge Bonapfel noted that it would be problematic if the court lacked jurisdiction, in cases where a Trustee had already sold property under § 363, or a preference defendant had already paid a settlement to the Trustee. It was noted that since compliance with § 109(h) was not jurisdictional, it could be waived.

5. Should the petition be "stricken" or "dismissed" ?

When a debtor fails to comply with the credit counseling requirements of §109, the petition becomes one filed by an ineligible debtor. If the petition is dismissed, the serial filing provisions of §362(c)(3)(A) will become applicable on the next filing; whereas, if the petition is "stricken", it never existed, and hence the full automatic stay is available on a subsequent filing. A bankruptcy court in New York (Judge Morris) has elected to use its discretionary powers, to find that the particular circumstances of

each case should be reviewed, and that, absent cause for a dismissal with prejudice, the court may strike the petitions. The court concluded that a petition filed by an ineligible person does not commence a case, and no stay takes effect. *In re Elmendorf,* 345 B.R. 486 (Bkrtcy, S.D.N.Y. 2006).

6. Court finds BAPCPA will have no affect on vast majority of Chapter 7 Debtors

Bankruptcy Judge Isgur sitting in S.D. Texas analyzed two Chapter 7 cases using both pre- and post-BAPCPA laws, and determined that BAPCPA will have no affect on the vast majority of Chapter 7 filers. He dismissed both the *Hill* and *Heer* Chapter 7 cases under the "totality of circumstances" standard of pre-BAPCPA law, finding that the Hills could pay over 300 percent of their unsecured debt over three years and that the Heers could pay approximately 35 percent of their unsecured debt over three years. He then performed a detailed Means Test analysis of each case "in order to create a complete appellate record." He determined that, with the information he had, the Hills would have been presumed abusive under §707(b)(2) but that the Heers would not. *In re Hill*, 328 B.R. 490 (Bkrtcy.S.D.Tex. 2005).

7. Cases must be automatically dismissed on the 46th day after filing, upon debtors' failure to file either payment advices or request for extension of the 45-day deadline

Judge Boulden has concluded that amended §521(a)(1) "mandates" the dismissal of cases when debtors fail to comply with the requirements of §521(a)(1), which is the requirement of filing payment advices. The Court further held that unless a motion to extend the 45-day period has been filed prior to the 46th day, the cases are dismissed "by operation of the statute." *In re Fawson*, 338 B.R. 505 (Bkrtcy.D.Utah 2006).

In another case before the same court, the Debtor had filed her Chapter 13 Petition, with pay advices from her employer. In preparing for the confirmation hearing, the bankruptcy judge noticed that the pay advices filed by the Debtor did not satisfy the requirements of §521(a)(1)(B) - one advice from a year earlier had inadvertently been included. Since it was already beyond 45 days after the filing, the case was automatically dismissed. The Debtor then filed a Motion for a determination that she had complied with §521 by subsequently filling the correct advice; or to vacate the order of dismissal. *In re Wilkerson*, 346 B.R. 539 (Bkrtcy.Utah 2006).

Judge Boulden noted that there was no requirement for a dismissal request under §521(i)(2). The Court then found that it had no authority to override the automatic dismissal under §521(i)(1); either under §105 or Rule 60(b). Because the §521 statutory language was strict and straightforward, there was no result other than automatic dismissal upon failure to timely comply with its terms. *Accord, In re Lovato*, 343 B.R. 268 (Bkrtcy.D.N.M. 2006) and *In re Ott*, 343 B.R. 264 (Bkrtcy.D.Colo. 2006).

8. Debtor prevented from using new BAPCPA provisions to dismiss his own case.

It was only a matter of time before a Debtor attempted to twist the new provisions of BAPCPA (intended to prevent abuse BY debtors) for self-serving purposes. In Georgia, a Debtor filed a motion to dismiss, after the Trustee had decided to administer assets and had filed a motion to sell assets that the Debtor preferred to retain. *In re Parker*, Case No. 06-61224 (Bkrtcy., N.D.Ga. 2006).

The Debtor asserted that he was not eligible to be a Debtor, since he had not completed a CCC briefing as required in §109(h), or, in the alternative, that he had failed to submit pay advices, as required in §521(a), and hence the case was automatically dismissed under §521(i). Unfortunately, the facts of this case provided the Court with too many reasons to deny the motion. In particular, the Debtor had attended a consumer credit briefing (although not from an approved agency) and had affirmatively asserted in the petition that he had attended a briefing – followed by a motion to Extend the time for the Credit Counseling, thereby allowing the Court to deny the §109 portion of the motion under a waiver theory.

Next, the Debtor had asserted that he had been self-employed with several companies, and hence the pay advices were not clearly required. Finally, the Debtor had allowed the case to be administered for almost 5 months before hiring new counsel and filing the request for dismissal, thereby invoking a judicial estoppel rationale for the decision.

However, Judge Diehl recognized the problem that BAPCPA has created in the administration of estates, and reached several important conclusions. First, the Court found that the issue of eligibility under §109(h) is not jurisdictional, such that it may be waived, or judicially estopped, and the orders entered in such a case (before the entry of an order dismissing the case) are valid and binding. Further, Judge Diehl observed that §521(i) – the "automatic dismissal" provision – refers only to the "information" required by §521(a)(1), not the actual "documents", and that §521(a)(1)(B) is prefaced by the phrase "unless the court orders otherwise" with no time limitation on the court's authority to modify the filing requirements (The Court can excuse certain requirements either before or after the 45 day period.) Then, the "automatic" language of §521(i)(1) was discounted, since Congress specifically provided for the entry of an order in §521(i)(2), which implies the necessity of the Court actually considering whether required "information" has been provided. "Interpreting 'automatic dismissal' to mean that a case ceases to be pending by the mere passage of time without a court order of dismissal does not further the purposes of the statute and may cause chaos and confusion since there is no readily ascertainable way to determine whether or not a case has been dismissed….Congress could not have intended to establish a procedure which interferes with the liquidation of an estate…" The Court, commenting on the problems with the "automatic" application of the statute, noted that it would contradict the primary purpose of the statute if an automatic dismissal provisions were used by a preference defendant, to defeat a trustee's avoidance action.

9. The Trustee is not required to seek dismissal of case for failure of debtors to timely file tax returns

An Oregon Bankruptcy Court has held that §521(e)(2) of BAPCPA, which states that the debtor "shall provide" the Trustee a copy of an income tax return or transcript not later than seven days prior to the date first set for the first meeting of creditors, does not compel the Trustee to file a motion to dismiss the case. *In re Duffus*, 339 B.R. 746 (Bkrtcy.D.Or. 2006).

This was an asset case, and the Trustee filed his motion to dismiss because he felt compelled to do so due to the debtors' failure to meet the tax return requirement. Judge Alley disagreed with the Trustee, and found that where dismissal "is contrary to the interests of the estate and of creditors, the Trustee has the authority to waive an untimely delivery of documents simply by declining to file a motion." The Court noted the Trustee's primary duty of liquidating assets and paying creditors and found that these obligations "are not necessarily trumped by a perceived duty to police every other aspect of the case."

10. Held $125,000.00 homestead cap applies only to non-opt-out states

In the first published opinion applying BAPCPA, an Arizona Bankruptcy Court has ruled that new §522(p), which was ostensibly intended to prevent Debtors from taking advantage of very large or unlimited state law homestead exemptions (in states such as Florida), does not apply to most of those states (including Florida). *In re McNabb*, 326 B.R. 785 (Bkrtcy, D. Ariz. 2005). In this case the Debtor purchased a home in Arizona on April 15, 2004. Prior to that he had lived in California at least since October of 2001. The Debtor moved for abandonment of his residence from the bankruptcy estate, asserting that the equity was less than the applicable homestead exemption.

Judge Haines looked at amended §522(p) and found that it applies a $125,000.00 cap on homesteads acquired by the Debtor within 1,215 days pre-petition. The Arizona homestead exemption was $150,000.00, so the question was whether the Arizona exemption was trumped by the $125,000.00

cap of §522(p). In making his determination, Judge Haines applied the plain language of the statute, which states that the cap applies as a result of the Debtor "electing under (b)(3)(A) to exempt property under state or local law." Because Arizona had opted out of the federal exemptions, the Court reasoned that the Debtor could not have "elected" to use the state law exemptions. They were the only exemptions available. Therefore, the Court found that amended §522(p) only applies to states with homestead exemptions in excess of $125,000.00, which have <u>not</u> opted out of the federal exemption scheme. The Court noted that only Texas, with an unlimited homestead value, and Minnesota, with a $200,000.00 maximum homestead, are states to which the $125,000.00 cap of §522(p) applies.

11. Amended §522(p) held applicable to opt-out states

A Florida Bankruptcy Court later rejected *In re McNabb*, 326 B.R. 785 (Bkrtcy.D.Ariz. 2005), and held that the $125,000.00 homestead exemption cap on a residence acquired less than 1,215 days before bankruptcy applies to all state exemptions in excess of than $125,000.00. *In re Kaplan*, 331 B.R. 483 (Bkrtcy.S.D.Fla. 2005).

The *McNabb* Court applied the plain language of §522(p)(1) and limited it to situations where the homestead exemption occurs as the "result of electing" to exempt property under state law. Because no election is available with regard to opt-out states, Judge Haines concluded that this provision applies only to states which allow election between the federal and state exemption laws. (While he noted that it made little sense for the provision to be applicable in only two states, he cited the plain, unambiguous language of the statute, and the dearth of legislative history to support his strict construction.)

In *Kaplan* Judge Mark acknowledged that a literal and narrow reading of the statutory language supports the holding in *McNabb*. However, the *Kaplan* Court disagreed with the result and determined that the proper analysis would permit consideration of legislative intent "in these circumstances." After examining the legislative history of BAPCPA, Judge Mark found that even if the *McNabb* interpretation represented the "plain meaning of the statute," it was rebutted by the "contrary legislative intent" which was clearly expressed by Congress. Therefore, §522(p) and (q) were held to apply to all states (including Florida) with homestead exemptions that exceed of $125,000.00.

12. Yet another approach to §522(p)

A Nevada Bankruptcy Court has further considered the §522(p) limit on homestead exemptions when property is purchased less than 1,215 days pre-petition, and the Debtor claims a state exemption in excess of $125,000.00. *In re Virissimo*, 332 B.R. 201 (Bkrtcy.D.Nev. 2005).

In *In re McNabb*, 326 B.R. 785 (Bkrtcy.D.Ariz. 2005), Judge Haines found that §522(p) was limited in its application to states which allow Debtors to choose between state and federal exemption statutes. Conversely, in, *In re Kaplan*, 331 B.R. 483 (Bkrtcy.S.D.Fla. 2005), Judge Mark agreed that a strict reading of the language might so limit application of the statute; but determined that the Court must still consider clearly expressed, contrary legislative intent. Judge Mark found such Congressional intent and held the limitation applicable in all states.

In *Virissimo*, Judge Riegle first addressed the "plain meaning" application, and found that there is an election by a Debtor in an opt-out state. Though the federal exemptions are not applicable, a Debtor could claim them anyway; and this election would be valid if there were no timely objections to the exemptions under *Taylor v. Freeland and Kronz*, 503 U.S. 638 (1992). Therefore, under this plain language reading, the statute was held to apply in all states. As an "alternate rationale", Judge Riegle found the statutory language to be ambiguous, and noted that even if it were not, "the plain meaning of the statute will be rebutted when a contrary legislative intent is clearly expressed." She then found such intent in the legislative history of the statute. Therefore, either through (1) a plain meaning interpretation, (2) a

finding of ambiguity which requires looking beyond the language, or (3) looking beyond the plain meaning based on a clear contrary legislative intent, the Court found the $125,000.00 limitation on homestead exemptions for property purchased within 1,215 days pre-petition to be applicable to all state exemptions in excess of $125,000.00, regardless of whether the state had opted out of the federal exemptions.

13. Exemption In Transferred Equity Limited By State's Homestead Exemption Cap

Arizona Debtors sold their home and purchased a new one within 1,215 days of the petition date. $54,000.00 of equity in the old property was transferred to the new home. Under amended §522(p) the maximum homestead exemption is $125,000.00 for homes purchased within 1,215 days of the petition filing. However, the "safe harbor" of §522(p)(2)(B) provides that the amount of equity transferred from a previous residence in the same state is not included. The Debtors argued that this allowed them to add the $54,000.00 equity to the $150,000.00 Arizona exemption amount. The Trustee disagreed and objected. *In re Summers*, 344 B.R. 108 (Bkrtcy.D.Ariz. 2006).

Judge Curley first determined that the $125,000.00 cap would apply to Arizona Debtors, disagreeing with an earlier Arizona decision, *In re McNabb*, 326 B.R. 785 (Bkrtcy.D.Ariz. 2005). The Court then analyzed the "safe harbor" provision of §522(p)(2)(B), and determined that the Debtors could claim the $125,000.00 federal cap, plus transferred equity up to the $150,000.00 Arizona homestead cap (an additional $25,000.00). The balance of $29,000.00 was non-exempt property o f the bankruptcy estate.

14. Equity created by mortgage payments within 1,215 days pre-petition do not trigger §522(p) homestead exemption cap

In early 2000, about five years before the passage of BAPCPA, the Debtors purchased their residence in Texas. The purchase date was 1,773 days prior to their filing a Chapter 7 petition. They elected the state exemptions, and claimed as exempt the equity in their residence valued at $688,606.00. An unsecured creditor objected to the exemption, claiming that the equity created by mortgage payments within 1,215 days pre-petition was an interest acquired in the ho mestead, which triggered the $125,000.00 cap of §522(p). *In re Blair*, 334 B.R. 374 (Bkrtcy.N.D.Tex. 2005).

Judge Hale acknowledged that §522(p) would apply in this case, even under *McNabb*, because Texas had not opted out, and the Debtors did elect the state law exemption. The Court then framed the issue to be the proper interpretation of the term "interest" in the property, which must be acquired by the Debtor within the 1,215-day pre-petition period. The Court distinguished "equity" from "interest", and reasoned that the Debtors acquired title to their home one and one-half years prior to the start of the §522(p), 1215-day period. Therefore, the Debtors' "interest" in their homestead came into existence outside the 1,215 days, and was not subject to the $125,000.00 cap.

15. New §522(o) interpreted and applied

On the eve of his Chapter 13 filing, the Debtor sold non-exempt vehicles and applied the proceeds to payment of his home equity credit line. Under the applicable Minnesota statute, the Debtor claimed a homestead exemption which included the equity created by these payments. The Chapter 13 Trustee objected to the exemption under §522(o), and further objected to plan confirmation. *In re Maronde*, 332 B.R. 593 (Bkrtcy.D.Minn. 2005).

Judge Dreher first noted that the Debtor filed his petition on April 20, 2005, which was the same day the President signed BAPCPA, making §522(o) applicable to this case. Section 522(o) essentially provides that a homestead exemption shall be reduced to the extent of its value attributable to non-exempt property sold by the Debtor within ten years of filing, with the intent to hinder, delay, or defraud creditors. The Court stated the "pressing question" was whether the Debtor acted with the requisite, statutory intent when he sold the vehicles and paid down his mortgage. The Court then found this intent to be comparable to

that of §548(a)(1) and §727(a)(2), which also require intent to "hinder, delay, or defraud." Eleven badges of fraud were listed, but the Court stated: "…there is no need to prove all of them and there is no weighting system applicable. The simple question in the final analysis is whether Debtor is attempting to thwart his creditors rather than making an honest attempt to repay them." Judge Dreher concluded that this Debtor acted with such intent, and reduced his homestead exemption by the amount paid from the vehicle sales. Additionally, the Court denied confirmation of the plan, because the best interest of creditors test was not met with the reduced exemption. (The Court also found that the plan was not filed in "good faith" under §1325(a)(3).)

16. Amended §522(q)(1)(B)(iv) criminal act capping homestead exemption amount

In a case of apparent first impression, a Massachusetts Bankruptcy Court has interpreted the extent of the "criminal act" cap of a state homestead exemption at $125,000. *In re Larson*, 340 B.R. 444 (Bkrtcy.D.Mass., 2006).

Pre-petition, a Chapter 7 Debtor was charged with "motor vehicular homicide by negligent operation" under Massachusetts law. Though she was not convicted, the state court made findings of fact sufficient for a finding of guilt. The Court then placed the Debtor on supervised probation, and the matter was continued for a year. When she subsequently filed her bankruptcy petition and claimed a homestead exemption of $500,000, the Chapter 7 Trustee and creditors objected. They asserted that the exemption amount must be reduced to $125,000 because the Debtor had committed a criminal act that caused a death within five years prior to the filing of her bankruptcy case. The Debtor argued that she had not committed a "criminal act" within the meaning of amended §522(q)(1)(B)(iv).

Judge Hillman first looked to the plain language of the statute, noting that the homestead reduction was based upon "any criminal act, intentional tort, or willful or reckless misconduct." From this, the Court determined that "criminal act" represents one of three causes for capping the exemption amount. The Court next investigated the meaning of "criminal act" and found that the relevant authorities "recognize that the phrase 'criminal act' does not require a conviction or a certain level of culpability." Finally, the Court noted that §522(q)(1)(A) specifically requires conviction of certain felonies; so that omission of this particular language indicates it is not required in the subsequent, statutory subpart §522(q)(1)(B).

17. What Happens When No State Exemption Applies?

The Debtor had lived in Colorado for several years, but moved to Florida 23 months prior to filing her Chapter 7 petition. Because the Debtor had not lived in Florida the requisite 730 days prior to the petition date, she was barred by §522(b)(3) from claiming the Florida exemptions, and was apparently left with the Colorado exemptions. She claimed the federal exemptions instead, and the Trustee objected. *In re Underwood*, 342 B.R. 358 (Bkrtcy.N.D.Fla. 2006).

Judge Killian first analyzed Colorado exemption law and agreed with the Debtor that it was constitutionally mandated and enacted for the benefit of Colorado residents only, such that residents of other states could not avail themselves of those protections. The Debtor was therefore ineligible to claim any state exemptions, and became eligible to claim the federal exemptions pursuant to the "unnumbered sentence at the bottom of … §522(b)(3)."

18. Stay limitation for repeat filers under §363(c)(3)(A) held to apply only to formal proceedings against a debtor, and not to property of the estate

In the case of *In re Paschal*, 337 B.R. 274 (Bkrtcy.E.D.N.C. 2006), Judge Small held that termination of the automatic stay 30 days after the petition date, for repeat bankruptcy filers, applies only to formal actions, such as a judicial, administrative, governmental, or other such formal activities or

proceedings. The Court based this holding on the statutory language which provides that the stay is terminated as to "actions taken" against the Debtor.

The subsequent case of *In re Jones*, 339 B.R. 360 (Bkrtcy.E.D.N.C. 2006), analyzed what property was subject to the stay termination under §362(c)(3)(A). Judge Small again looked to the statutory language and noted that the stay terminates "with respect to the debtor." Thus, based on the unambiguous language of the statute, the Court found the stay termination to apply only "with respect to actions taken against the debtor and against property of the debtor, but does not terminate the stay with respect to property of the estate." This holding follows two Tennessee Bankruptcy Court decisions, *In re Branch*, 05-39958-B (Bkrtcy.W.D.Tenn. Jan. 4, 2006, Judge Boswell), and *In re Johnson*, 335 B.R. 805 (Bkrtcy.W.D.Tenn. 2006). *See also, Accord*, the subsequent cases of *In re Moon*, 339 B.R. 668 (Bkrtcy.N.D.Ohio 2006) and *In re Harris*, 2006 WL 1195396 (Bkrtcy.N.D.Ohio, Judge Shea-Stonum).

19. Two decisions finding (contra) that the Stay limitation for repeat filers under §362(c)(3)(A) also applies to property of the estate

A bankruptcy judge in Massachusetts has taken the opposite approach to the court in *In re Jones*, 339 B.R. 360 (Bkrtcy.E.D.N.C. 2006), and held that the automatic termination of the stay in §362(c)(3)(A) applies to property of the estate, as well as property of the debtor. *In re Jumpp*, 344 B.R. 21 (Bankr. D. Mass. 2006). Judge Rosenthal, while noting that the provision was "less than clear", concluded that "the legislative history, while sparse, does not indicate that there was an intent to differentiate between the debtor's and the estate's property." The court notes that the phrase "with respect to the debtor" – which was the key phrase used by the *Jones* court to find that the termination does not apply to property of the estate – is not used in §362(c)(4)(A) dealing with the third filing, where no stay comes into effect. Further, if the stay is not terminated as to property of the estate, §362(c)(3)(A) would become essentially meaningless.

In South Carolina, Judge Waites has also held that the stay terminates with respect to property of the estate, again citing legislative intent and considering the section as a whole. *In re Jupiter*, 2006 WL 1817065 (Bkrtcy. D.S.C.)

20. Petition filing by ineligible debtors did not trigger automatic stay

A Texas Bankruptcy Court has held that a bankruptcy filing by a putative debtor who is not eligible for bankruptcy relief, even if the filing is in good faith, does not initiate a bankruptcy case or entitle the debtor to automatic stay protection. Thus, a mortgage foreclosure sale conducted after the Chapter 13 petition was filed was neither void nor voidable. *In re Salazar*, 339 B.R. 622 (Bkrtcy.S.D.Tex. 2006).

Contra: *In re Brown*, 2006 WL 1302619 (Bkrtcy.D.Md.), where Judge Keir held that such a filing does invoke the automatic stay, which remains in effect until the case is dismissed. Hence, the post-petition foreclosure was void; and, if willfully conducted, subjected the foreclosing creditor to damages.

21. Stay terminated based on debtor's failure to elect statutory option as to secured property

The Chapter 7 debtor filed a timely statement of intentions with respect to a motor vehicle securing a creditor's claim, but failed to indicate in her statement whether she claimed the property as exempt, intended to redeem, or intended to reaffirm. Held, pursuant to §521(a)(2) and §362(h)(1)(A), the automatic stay no longer protected the secured property 30 days after the petition filing. *In re Craker*, 337 B.R. 549 (Bkrtcy.M.D.N.C. 2006).

22. 910 car surrender in Chapter 13

Finding that §506 applies likewise to the cram-down provisio n of §1325(a)(5)(B) and the surrender provision of §1325(a)(5)(C), Judge Stair held that surrender of a vehicle purchased within 90 days of bankruptcy filing left no deficiency, unsecured claim to be paid in a Chapter 13 case. *In re Ezell*, 338 Br. 330 (Bkrtcy.E.D.Tenn. 2006).

23. Held Debtor not required to pay contract rate interest on 910 car debt in Chapter 13 plan

The Court found that the "hanging paragraph" after §1325(a)(9) prohibits a Chapter 13 Debtor from paying a 910 car lender less than the full amount of its claim ("cramming down"), over such lender's objection; but does not address the rate of interest which the creditor must be paid. Thus, Judge Schermer held that the plan could provide for less than the contract rate of interest. *In re Fleming*, 339 B.R. 716 (Bkrtcy.E.D.Mo. 2006).

24. Proof required for conversion or dismissal under amended §1112

Amended §1112 of BAPCPA includes a list of items defined as "cause" to dismiss or convert a Chapter 11 case. Between subsection (O), (the 15th listed example of "cause"), and subsection (P), (the 16th and final example), is the word "and", which replaces "or" in the pre-BAPCPA statute. Not surprisingly, a defense was raised to a motion to convert or dismiss, claiming that under the amended statutory language, all of the potential cause list must be proved for dismissal or conversion to be allowed. *In re TCR of Denver, LLC*, 338 B.R. 494 (Bkrtcy.D.Colo. 2006).

The Bankruptcy Court agreed that a plain reading o f the words, giving "and" its normal conjunctive meaning, would require proof of all 16 examples of "cause". However, the Court further found that such a strict construction would "result in an absurd decision and totally unfavorable legal precedent."

Editor's Note: Amended §1104(a)(3) now provides that the Court may appoint a Trustee, rather than convert or dismiss the case, if grounds exist to divert or dismiss under §1112.

25. Retroactive application of BAPCPA *Deprizio* Amendment upheld

Section 1213 of BAPCPA, codified as §547(i), effectively does away with "*Deprizio*-type" preference actions, which were actions against non-insiders as to transfers made between 90 days and one year before the bankruptcy filing. Unlike other BAPCPA amendments, §1213 was made applicable to all cases pending at the time of BAPCPA's enactment. At that time a *Deprizio* action, brought by a creditor's committee, was not only pending, it had already been tried, but judgment had not yet been entered. The Plaintiff Committee argued that retroactive application was unconstitutional as either an uncompensated taking or a denial of due process under the Fifth Amendment. *In re ABC-NACO, Inc.*, 331 B.R. 773 (Bkrtcy.N.D.Ill. 2005).

Judge Wedhoff first noted there was nothing "inherently unconstitutional" about retroactive legislation, which must be honored absent any specific constitutional impediment. The Court then found that there was no vested property interest, as protected by the Fifth Amendment, in pursuing a *Deprizio* preference action. Next, the Court addressed the due-process argument and held that the burden was on the party challenging the legislation to show that Congress acted irrationally in enacting it. Here the amendment was rationally related to a legitimate legislative purpose of making preference claims against non-insiders subject only to the 90-day preference period. Therefore, retroactive application did not violate the substantive due-process rights of the Plaintiff, Committee.

PRE – BAPCPA CASES (WITH NOTES RE: CHANGES IN BAPCPA)

26. Debtor prevented from dismissing petition, which she did not sign.

An 8th Circuit BAP has affirmed a bankruptcy decision which denied the debtor's motion to dismiss her case. *In re Willis*, 345 B.R. 647 (8th Cir. BAP, 2006). The debtor's attorney had filed the petition, using an electronic signature, before the debtor had reviewed the documents. (The attorney had mistakenly filed it as a chapter 13, and shortly thereafter filed a mot ion/notice to convert to chapter 7.)The debtor knew of the filing, and had the benefits of the automatic stay to prevent a foreclosure of her property. After hiring new counsel, the debtor moved to dismiss or convert the case, and the bankruptcy court denied that motion. On appeal, the BAP agreed. While noting that Rule 1008 requires the petition and schedules to be signed, the court found that the doctrine of equitable estoppel would apply in this case. The elements of equitable estoppel were outlined, and it was concluded that the debtor's omission to speak and reveal this defect, after becoming aware of the filing, and the reliance of the trustee and the creditors on the petition and schedules, justified keeping the debtor in the chapter 7 proceeding. Further the defective filing was found to have been ratified by the debtor, from her participation in the case.

BAPCPA: This case applies equitable estoppel and ratification to keep the case in bankruptcy. These same arguments are being raised against post-BAPCPA debtors who try to use §521(e) or (i) to dismiss a case where the trustee has discovered or begun selling assets.

27. Florida homestead exemption trumps fraudulent transfer

Eighteen months pre-petition, the Debtors used all of a $300,000.00 tax refund to make a downpayment on their Florida residence. When their Chapter 7 Trustee sued to recover the funds, the Debtors admitted they were insolvent at the time of the transfer. They further stipulated that the $300,000.00 would not have been exempt had it not been transferred into their home; and the transfer was intended to hinder, delay, or defraud creditors whom they owed over $2 million. *In re Potter*, 320 B.R. 753 (Bkrtcy.M.D.Fla. 2005).

After closely construing applicable Florida law (including the 2001 Florida Supreme Court decision in *Havoco of America, Ltd. v. Hill*, 790 So.2d 1018); Judge Jennemann determined that creditors could avoid transfers into statutorily-created exempt property, but not into consti tutionally-created exempt property. Because the homestead exemption was part of the Florida constitution, this fraudulent transfer could not be avoided.

BAPCPA: Amended §522(o)(4) overrules this case by pre-empting Florida law in specifically allowing avoidance of this type of transfer if it occurred within ten years prior to the bankruptcy petition date. This amendment also applies where non-exempt funds are used to pay down a mortgage on entireties' property. For example, where a husband pays his personal funds against the mortgage debt on property owned with his wife as tenants by the entireties, the transfer can be avoided if it occurred within ten years of the husband's bankruptcy filing, and was made with intent to hinder, delay, or defraud creditors.

28. Minnesota homestead exemption given extra-territorial affect

The 8th Circuit Court of Appeals has affirmed the BAP decision in a case previously reported at both the bankruptcy and BAP levels. *In re Drenttel*, 403 F.3d 611 (8th Cir. 2005). In this case the Debtors moved to Arizona from Minnesota, and bought a home in Arizona which was valued at $181,682.00. They subsequently filed bankruptcy in Minnesota, which was the proper venue because they had not lived in Arizona for the better part of 180 days prior to filing. The Debtors elected to use the Minnesota state exemptions, rather than the also-available federal exemptions. They had this choice because Minnesota had not opted out of the federal exemption scheme. The Trustee objected, asserting that the Minnesota homestead exemption could not be applied to real property located in Arizona. The Bankruptcy Court held for the Trustee and the BAP reversed.

The Court of Appeals noted a split of authority on the issue, but followed those cases recognizing extra-territorial affect with respect to ownership of real property, provided that the applicable exemption law did not limit itself to real estate within its borders. Because the Minnesota statute had no such extra-territorial exemption prohibition, the Debtors were allowed to exempt property they owned in Arizona under the more generous Minnesota homestead exemption.

BAPCPA: As discussed with regard to *McNabb*, this case is overruled by amended §522(p). Because Minnesota is not an opt-out state, the Debtors did "elect " that exemption, so the issue in the *McNabb* case does not appear to apply here. Therefore, under amended §522(p), this homestead exemption would be limited to $125,000.00, rather than the $200,000.00 allowed in Minnesota. Query: Is the "extra-territorial" analysis of the state homestead exemption relevant at all after the amendments to §522?

29. Doctrine of Quasi-Estoppel applied

Approximately five years after his divorce, the Debtor filed a Chapter 7 petition. The ex-wife brought a dischargeability action under §523(a)(5), seeking a determination that certain payments required of the Debtor through the divorce property settlement agreement were non-dischargeable alimony obligations. She relied upon the Debtor's tax returns during the five years after their divorce, which indicated the Debtor had taken alimony tax deductions for the payments. *In re Breibart*, 325 B.R. 724 (Bkrtcy.D.S.C. 2004).

The Court applied the Fourth Circuit ruling of *In re Robb*, 23 F.3d 895 (4th Cir. 1994), which held that "quasi estoppel forbids a party from accepting the benefits of a transaction or statute and then subsequently taking an inconsistent position to avoid the corresponding obligations or affects." (Citing *In re Davidson*, 947 F.2d 1294 (5th Cir. 1991)). Based on this doctrine, the Debtor was precluded from subsequently claiming the payments to be something other than alimony, when they were denominated as alimony on the Debtor's tax returns.

BAPCPA: Under new §507(a)(1) and §704(10), Trustees must determine at the earliest opportunity whether support, maintenance or alimony claims exist. This case indicates a quick and sure way to accomplish this. If a payment is deducted on the Debtor's tax return, and is taxable income on the ex-spouse's return, the payment is almost certain to be in the nature of alimony. On the other hand, if the Debtor paid the taxes and the ex-spouse did not, the payment would probably be a property settlement obligation.

Amended §522(c)(1) provides that "notwithstanding any provision of applicable non-bankruptcy law to the contrary," property exempted under §522 "shall be liable for a debt of a kind specified in §523(a)(5)." Therefore, this Debtor's 401K or IRA pension plan is available to pay the outstanding alimony obligation, even though it would be otherwise exempt. Section 507(a)(1)(c) allows for payment of Trustee expenses "to the extent that the Trustee administers assets that are otherwise unavailable for the payment of [domestic support obligation] claims." Query: When read together, and applied in the context of the super-priority treatment afforded DSO's in BAPCPA, do these statutes allow Trustees to administer

pension plans or other exempt assets for the benefit of support claimants? Or, do these amendments mandate Trustee administration of these assets?

30. Trustee allowed to administer exempt property through avoidance of tax liens

The Debtor scheduled his residence at $570,000.00, and claimed a homestead exemption of $50,000.00. No objections to the exemption were raised within 30 days after the meeting of creditors. When the Trustee subsequently obtained a contract to sell the property for $975,000.00, the Debtor moved to compel abandonment, arguing there was no equity when the numerous tax liens against the property were added to the mortgage debt and homestead exemption. The tax liens covered eight different time periods, and a substantial portion of the lien amount represented tax penalties, and interest accrued on the penalties. *In re Bolden*, 327 B.R. 657 (Bkrtcy.C.D.Cal. 2005).

Judge Donovan looked to §522(c)(2)(B) and found that the exempted homestead property remained "liable" for a debt secured by a properly perfected tax lien. *United States v. Estes*, 450 F.2d 62 (5th Cir. 1971). The Court then cited *United States v. Rogers*, 461 U.S. 677 (1983), where the Supreme Court concluded that the Supremacy Clause "allows the federal government to 'sweep aside state-created exemptions.'" Therefore, it was not necessary for the IRS to object to the homestead exemption over which it had priority under §522(c)(2)(B).

The Court then found that the Trustee could avoid the penalty and interest on penalty portion of the tax liens under §724(a). Under §§551 and 349(b) the avoided liens were preserved for the benefit of the estate, with the Trustee succeeding to the priority that the avoided lien had over competing claims. Thus, under §726, the avoided lien amount would be paid first to administrative expenses and second to §507(a)(8) tax claims.

BAPCPA: Here the Trustee administered an "exempted" asset under old §522(c) for the benefit of a particular claimant, the government. What is the difference between this and administering "exempted" assets for the benefit of DSO claimants under amended §522(c)?

31. Ordinary course of business defense

The 11th Circuit Court of Appeal has examined the proof required to establish the "ordinary course of business" defense in a preference action. *In re Leaseco, Inc.,* 389 F.3d 1205 (11th Cir. 2004). The Court held that three elements are required to be proved for the defense to be effective. First, the transfer must be in payment of a debt *incurred* in the ordinary course between the Debtor and transferee. Second, the transfer must be *made* in the ordinary course between the Debtor and the transferee. Finally, the transfer must be *made* according to ordinary business terms.

In this case the parties had been doing business for only six months prior to the bankruptcy filing. The defendant argued that their credit arrangement was never altered, and that all payments were made according to this arrangement. Therefore, the creditor contended that industry standards did not apply. The Court agreed that there might be situations where the creditor could substantially depart from the established range of terms under the industry standard, as held in *In re Molded Acoustical Products, Inc.*, 18 F 3d 217 (3d Cir. 1994). However, this would apply only in situations where there had been a long-term, steady relationship between the parties. Here the Court found that because the business relationship last only six months, "the Bankruptcy Court had no choice but to evaluate their dealings strictly according to industry standards under §547(c)(2)(C)."

BAPCPA: This case is apparently overruled by amended §547(c)(2)(A). The word "and" is replaced by "or", indicating it is sufficient to prove that the transfer was made *either* in the ordinary course between the parties *or* according to ordinary business terms.

32. Another Pre-BAPCPA ordinary course defense case

The Eighth Circuit has joined the First, Third, Sixth, Seventh, and Eleventh Circuits in holding that a transferee is required under §547(c)(2)(C) to produce evidence of an "independent, objective standard of the practices of the relevant industry." *In re Bridge Information Systems, Inc.*, 447 F.3d 1076 (8th Cir. 2006).

In this case two employees of the preference defendant testified that using "remittance advice notations" to direct application of payments to specific invoices was ordinary, not only as between the parties; but was also within "objectively ordinary business terms." While the Circuit Court agreed that an employee of the transferee could produce evidence as to the third-prong, objective standard, it must be "evidence of a prevailing practice among similarly situated members of the industry facing the same or similar problems." *In re USA Inns of Eureka Springs*, 9 F.3d 680 (8th Cir. 1993). Here the evidence was "merely of the practice between the transferee and the debtor", which was insufficient under §547(c)(2)(C).

BAPCPA: The result of this case would be different under amended §547, which allows the transferee to prove "either", rather than "both" dealings between the parties and objective dealings within the industry.

33. Venue for Preference action is proper in judicial district where defendant does business

A Trustee brought an action against American Express to avoid a preferential transfer of $936.63. The adversary proceeding was filed in Alabama, where the bankruptcy case was pending. American Express filed a motion to dismiss the proceeding for improper venue, citing 28 U.S.C. §1409(b), which requires a Trustee to commence a proceeding seeking a money judgment of less than $1,000.00 "in the district court for the district in which the defendant resides." American Express argued that it resides in the Southern District of New York where its principal place of business is located. *In re Griffith*, 215 B.R. 893 (Bkrtcy.M.D.Ala. 1997). Judge Gordon held the venue was proper. The Court cited 28 U.S.C. §1391(c), which provides that a corporation shall be deemed to reside in any judicial district in which "it is subject to personal jurisdiction at the time the action is commenced." The Court reasoned that American Express would be subject to personal jurisdiction because of the corporate "doing business" test. Since American Express was regularly doing business in Alabama, it was subject to the personal jurisdiction of the Court there. It was, therefore, deemed to reside in that district, and venue was proper in the Trustee's preference action.

BAPCPA: This case, which should still be good law, relieves some of the sting from amended §1409(b), which raises the venue minimum from $1,000.00 to $10,000.00. There has been no amendment to 28 U.S.C. §1391(c), which provides that corporations are deemed to reside where they are subject to personal jurisdiction, which includes anywhere they are doing business. Thus, avoidance actions against national corporations for amounts less than $10,000.00 can probably, almost always, be brought in the "home court." (Also note that the threshold amount requiring actions to be brought where the defendant resides is $15,000.00 for consumer debts. In the case of avoidance actions against credit card companies, 28 U.S.C. §1391(c) should apply, as these defendants do business everywhere, and therefore reside everywhere.)

34. Can pigs ever become hogs in the Ninth Circuit?

Shortly after a $4,585,000.00 arbitration award was entered against him, the Debtor divorced his wife and transferred all of his community property, consisting of more than $2,000,000.00 in non-exempt assets, to his wife. He then rolled $1,400,000.00 IRA account into a pension plan he had just created, which he claimed to be ERISA-qualified. In his subsequent bankruptcy case the Chapter 7 Trustee sought to avoid the IRA rollover as a fraudulent transfer. The Bankruptcy Court granted summary judgment

against the Trustee, which was affirmed by the District Court. The case was then appealed to the Ninth Circuit. In re Stern, 317 F.3d 1111 (9th Cir. 2003).

The Circuit Court cited its prior case of Fredrick Wudrick v. Clemens, 541 F.2d 988 (9th Cir. 1971), which held that the purposeful conversion of non exempt assets into exempt assets on the eve of bankruptcy is not per se fraudulent. The majority of the panel found that this case differed from Wudrick only in the "single unspectacular fact" that Stern lost a multi-million dollar arbitration. The majority further held that the existence of other "badges of fraud" did not create an issue as to whether the Debtor acted with actual intent to hinder, delay or defraud creditors. The dissent found Wudrick to mean that conversion from non-exempt to exempt on the eve of bankruptcy does not "by itself" render it fraudulent, and that substantial evidence of fraudulent intent (as existed here) could prevent exemption of the property.

BAPCPA: Would amended §548(e) apply to the IRA rollover, at least up to $400,000.00? Under amended §522(b)(3)(C) and §522(n) the $1,000,000.00 in the IRA is exempt, but is this ERISA plan a "similar device" to a "self-settled trust," and avoidable under §548(e)(1)?

35. Pre-petition release of claim by Debtor might constitute an avoidable transfer

The founder, president, director and largest shareholder of the corporate Debtor entered into a Contribution and Release Agreement ("CRA") which provided for forfeiture of the shareholder's stock, consolidation of notes owed the shareholder by the Debtor, and mutual releases of claims by the Debtor and the shareholder. Less than a year after execution of the CRA, the Debtor consented to entry of an order for relief pursuant to an involuntary petition filed against it. The Trustee sued the insider for avoidance of preferential and fraudulent transfers, breach of fiduciary dut y, and equitable subordination of the insider's claim. The CRA was raised as a defense to the preference and fraudulent conveyance claims. The insider asserted that the Debtor had released these claims pursuant to the release terms of the CRA. The Trustee argued that the CRA releases were themselves avoidable transfers, and could therefore not serve as defenses to other avoidance claims. *In re E2 Communications, Inc.*, 320 B.R. 849 (Bkrtcy.N.D.Tex. 2004).

The Bankruptcy Court agreed with the Trustee. Judge Houser looked to the statutory definition of transfer under §101(54), and legislative history indicating the definition was "drafted to be 'as broad as possible.'" The Court then cited *Wischan v. Adler*, 77 F.3d 875 (5th Cir. 1996), which held that pre-petition causes of action are property of the bankruptcy estate. The Court next found a release of claims to be a transfer, citing *Besing v. Hawthorne*, 981 F.2d 1488 (5th Cir. 1999). Because the pre-petition release might be avoidable, the Court reasoned that it could not be a defense to an avoidance action. Finally, the Court addressed the argument that the CRA transaction was entered into at arms' length, and was therefore not subject to fraudulent transfer avoidance. The Court rejected this argument, holding that the relevant factors in a fraudulent transfer claim are the actual intent of the parties, and/or how much value the Debtor received in exchange for the property transferred. The fact that the negotiations were arms' length might be relevant to this inquiry, but it could not be dispositive. *See also, In re General Search.Com*, 322 B.R. 836 (Bkrtcy.N.D.Ill. 2005), holding that forgiveness of a debt owed the Debtor can be an avoidable fraudulent transfer.

BAPCPA: There are several amendments which might have had a bearing on this case had it happened after October 17, 2005, or later:

1. The definition of transfer has changed. Under amended §101(54) 'transfer' now includes 'the creation of a lien.'" While this addition might not be specifically applicable in this case, the argument can be made that the notion of what constitutes a transfer for Bankruptcy Code purposes has been expanded by the amendment, indicating that "as broad as possible" has been broadened, and still applies. An example of a specific application is a lien against estate property post-petition. This has been held by some Courts <u>not</u> to be a transfer for §549 avoidance purposes, but such holdings are now apparently reversed. *See In Re Hamama*, 319 B.R. 851 (Bkrtcy.E.D.Mich. 2005).

2. Amended §548 also specifically includes transfers to or for the benefit of insiders under employment contracts; and obligations to or for the benefit of insiders under employment contracts. A new subsection 548(a)(1)(B)(IV) now specifically includes such transfers and obligations, which are out of the ordinary course of business, as avoidable. While this case deals with a pre-petition release of an insider, and not specifically with an employment contract, the policy would seem to be the same. As Judge Houser found, the insider could not hide behind the defense of fair consideration simply because there was a valid contract.

3. Finally, §548(a)(1) now allows a two-year look-back period. This could be beneficial in cases where applicable state fraudulent transfer law might allow a defense to an insider which does not exist under §548. However, this amendment does not become effective until October 17, 2006 (one year after enactment).

36. Post-petition mortgage recording held not a "transfer" for §549 purposes

When the Chapter 7 Trustee learned that the Debtors' pre-petition mortgage lien was perfected post-petition, he sought to avoid the transaction as an unauthorized post-petition transfer under §549(a). This was the only basis for relief alleged in the complaint. At trial, the Trustee argued that §362 and §544(a) also provided a basis for the relief sought. *In re Hamama*, 319 B.R. 851 (Bkrtcy.E.D.Mich. 2005).

Judge Rhodes first addressed the §549(a) issue, and noted that the statute authorizes avoidance of a "transfer of property" that occurs post-petition. He then looked to the §101(54) definition of "transfer" and found that it did not include the recording of a mortgage. The Court reasoned that the mortgage was created when it was executed and delivered, and remained effective between the parties whether it was recorded or not. Therefore, the only transfer that occurred was pre-petition, which could not be avoided under §549(a). The Court then considered the pleading issues, and followed *Olsen v. American Steamship Co.*, 176 F.3d 891 (6th Cir. 1999), which held that failure to advance a theory of recovery in a pretrial statement constitutes a waiver of the theory. The §544(a) claim was not mentioned in the final pretrial order, and was therefore waived. The §362 claim was not included in the complaint, but was included in the final pretrial order. The Court found this to be a violation of a local rule which provided that the pretrial order "shall not be a vehicle for adding claims or defenses."

Editor's Note: Although not stated in the opinion, the §546 statute of limitations had probably expired, leaving the Trustee without the ability to amend and add the §544(a) claim. The §362 issue is more complicated. If a stay violation is void, as some courts hold, the recording in this case was never effective, and time is not an issue. If it is voidable, rather than void, it would require affirmative action by the Trustee, which is not limited by §546, but could be subject to a laches argument.

BAPCPA: Amended §362(b)(24) provides that the automatic stay does not apply to "any transfer that is not avoidable under §544 and that is not avoidable under §549." This means that post-petition foreclosures and/or post-petition perfection of a lien, where the creditor had no knowledge of the bankruptcy case may no longer be violations of the automatic stay. They are excepted under §549(c) unless the Trustee has recorded a copy of the bankruptcy petition in the office which maintains land records for the subject property. In this case §549(c) was not at issue. The Court held there was no post-petition transfer, making the mortgage "not avoidable under §549." However, this transfer would have been avoidable under §544(a) if it had been properly brought. Query: Would §362(b)(24) apply to this case? In other words, does the transfer need to be unavoidable under both §544 and §549 to trump the automatic stay through §362(b)(24)?

37. More Post-petition transfers: Void or voidable?

A creditor, unaware of the Debtor's bankruptcy filing, extended a post-petition loan secured by unscheduled real estate owned by the Debtor. When the property was sold post-petition, the Trustee sought to avoid the creditor's deed of trust and recover the sale proceeds. The creditor asserted the "good-

faith purchaser without knowledge" defense of §549(c). *In re DonPedro*, 43 BCD 281, 2004 WL 3187072 (Bkrtcy.N.D.Cal. 2004).

Judge Tchaikovsky found that the post-petition transfers of deeds of trust against the Debtor's property were stay violations under §362. Following *In re Schwartz*, 954 F.2d 569 (9th Cir. 1992), the Court further found that §549 was not intended to apply to actions prohibited by the bankruptcy stay. Therefore, the good-faith defense of §549(c) is not available in a stay violation case. The Court noted that under *Schwartz*, the first consideration is whether the transfer was a stay violation, and only if it were not, could the Court consider whether it is voidable under §549.

BAPCPA: This decision appears to be overruled by amended §362(b)(24).

38. Section 549(c) defense not applicable to sale in violation of §362(a)

On the day before a scheduled foreclosure sale of their residence, the Debtors filed a Chapter 13 petition. The foreclosure sale proceeded, and the property was sold to a good-faith purchaser without knowledge of commencement of the bankruptcy case. When it subsequently learned of the bankruptcy, the purchaser moved for an order declaring the sale excepted from the stay by §549(c). *In re Mitchell*, 279 B.R. 839 (9th Cir. BAP 2002). The bankruptcy court denied the motion, and the purchaser appealed. Writing for the BAP, Judge Brandt first cited *Schwartz v. United States*, 954 F.2d 569 (9th Cir. 1992) which held post-petition sales without stay relief void. The Court then found that the §549(c) good-faith purchaser defense only provides an exception to the Trustee's right to avoid a post-petition transfer under §549(a), and is therefore not applicable to a creditor's sale in violation of §362.
BAPCPA: This decision is also overruled by amended §362(b)(24).

39. Post-petition foreclosure sale avoided under §549

The 8th Circuit has found that the "present fair equivalent value" test, for avoidance under §549, is more exacting than the "reasonable equivalent value" test in §548. *In re Miller*, 545 F.3d 899 (8th Cir. 2006). The Chapter 11 Debtor (filing in Nebraska) sought to avoid a foreclosure of property, after the filing, in Nevada. (The court determined that there was no violation of the automatic stay.) The foreclosing creditor had paid a mere $3,847 (the homeowners dues) at the foreclosure sale, and had not bid in the amount of their debt. (Even considering the mortgage amount, the bid would have been approximately 70% of the alleged value of the property.) The court first recognized the Supreme Court decision in *BFP v. Resolution Trust Corp*., 511 U.S. 531, 114 S. Ct. 1757, 128 L.Ed.2d 556 (1994) which held that the price paid to a third party purchaser at a foreclosure sale would be considered "reasonable equivalent value", provided that there was compliance with applicable state laws. The 5th Circuit subsequently expanded the Supreme Court decision from §548 to §549 avoidance actions. *T.F. Stone Co. v. Harper,* 72 F.3d 466 (5th Cir. 1995). The 8th Circuit noted that there were other bankruptcy court decisions which were contrary to the 5th Circuit, but no other circuit court decisions. The Court then held that the Supreme Court *BFP* case is not binding in the case of a §549 avoidance action, and that the "safe harbor" created when a foreclosure sale is conducted pursuant to state law is not necessarily applicable in the post-petition context. The case was remanded for further findings with respect to the actual value paid, including the mortgage assumed by the foreclosing creditor.

BAPCPA: Since the new §362(b)(24) may not void a post-petition foreclosure sale, unless it is avoidable under §544 or §549, the approach to "present fair equivalent value" in §549 may become increasingly important.

40. Trustee allowed to exercise Debtor's power to revoke trust

Prior to filing his Chapter 7 petition, the Debtor created a trust, and transferred real estate into it. The trust document provided, "This shall be a revocable trust." The Chapter 7 Trustee moved for authority to revoke the Trust, asserting that the revocation power was an asset of the bankruptcy estate. The Debtor objected, arguing his interest in the trust was not property of the estate because the trust contained a spendthrift provision. The Bankruptcy Court held for the Trustee, and appeal was taken to the BAP. *In re Marrama*, 316 B.R. 418 (1st Cir. BAP 2004).

Applying applicable Maine law, the BAP first found the trust to be revocable by its settlor, the Debtor. The Court then found that the power to revoke was included as estate property under §541(a)(1), because the Debtor was the sole beneficiary of the trust, with the power to revoke the trust. Editor's Note: This is the case where the Debtor's attempt to convert to Chapter 13 was denied by the Bankruptcy Court and BAP. There is a pending appeal at the First Circuit, with an NABT Amicus brief in support of the Trustee.

BAPCPA: This transfer of assets to the trust would be an avoidable fraudulent conveyance under amended §548(e).

41. Trustee, but not estate, discharged from tax liability through §505(b)

Trustee filed post-petition tax returns well after they were due. He paid the taxes which the returns indicated were payable, and requested a determination of unpaid tax liability pursuant to 11 U.S.C. §505(b). By letter of April 25, 1997, the IRS notified the Trustee that it had accepted his returns "as filed". On May 19, 1997, the IRS filed a claim for interest and penalties in excess of the amount paid by the Trustee. The Trustee argued that the estate's liability for these amounts was discharged by the April 25 letter responding to the §505(b) request. *In re Goodrich*, 215 B.R. 638 (Bkrtcy.D.Mass. 1997). Judge Hillman held that "the discharge granted by §505(b) Does not extend to the estate, as distinguished from the Trustee." Thus the Trustee, but not the estate, was discharged from the post-petition interest and penalty tax liability. The Court further found the IRS claim to be an administrative expenses within §507(a)(1) priority.

BAPCPA: Good news. This case has been overruled by amended §505(b)(1), which adds the "estate" to the list of entities discharged from liability pursuant to the §505 IRS request and determination of taxes owed.

42. Are liquidating Chapter 11 cases *per se* subject to conversion?

The Eighth Circuit has recently considered whether §1112(b)(1) mandates conversion of liquidating Chapter 11 cases upon motion of a creditor or the U.S. Trustee. *Loop Corp., et al. v. United States Trustee, et al.*, 379 F. 3d 511 (8th Cir. 2004). In this case the Debtors filed a Chapter 11 petition intending to liquidate. After their primary assets were sold, the U.S. Trustee moved to convert to Chapter 7, citing accumulating expenses associated with estate administration, and failure to confirm a plan. Initially the creditors' committee joined the Debtors and their shareholder in opposing the motion. The Bankruptcy Court found cause for conversion, but continued the hearing to allow more time for the parties to agree on a plan. Negotiations were ultimately unsuccessful, and the committee decided conversion was appropriate. On appeal to the Circuit Court, the Debtors argued that all liquidating 11's would be subject to conversion under the Court's interpretation of continuing loss through administrative expenses, and absence of a reasonable likelihood of "rehabilitation." The Court agreed that no liquidating Debtor could meet the "rehabilitation" test, because unlike "reorganization", rehabilitation does not encompass liquidation. However, the Court noted that the language of §1112(b) is permissive, stating the Court "may" convert or dismiss. This language was held to be consistent with the Court's recognition of the

"broad discretion" of the Bankruptcy Court under §1112(b). *In re Lumber Exch. Bldg. Ltd. P'Ship*, 968 F.2d 647 (8th Cir. 1992).

BAPCPA: Amended §1112 reverses this holding.

43. Equity created by payment in Chapter 13 belongs to Debtor upon conversion to Chapter 7

The Chapter 13 Debtor scheduled a vehicle with a value of $19,000.00 securing a debt of almost $30,000.00. The Debtor made payments through her Chapter 13 plan in an amount sufficient to pay the secured portion of the debt against the vehicle in full. When the case converted to Chapter 7, the Trustee asserted that the equity in the vehicle belonged to the Chapter 7 estate. The Debtor argued that the payments made through the 13 plan were from post-petition earnings, and the equity which resulted from these payments could not be property of the Chapter 7 estate. *In re Nichols* 319 B.R. 854 (Bkrtcy.S.D.Ohio 2004).

Judge Aug noted a split of authority on this issue, with some courts finding the language of §348(f)(1)(B) to be unambiguous in providing that the allowed secured claim is reduced by Chapter 13 payments. The other line of cases, which this Court followed, have found ambiguity, and looked to the legislative history of the statute. Noting that §541(6) excludes post-petition earnings from property of the estate, the Court reasoned that this created ambiguity regarding application of such funds to a pre-petition secured claim. The Court then looked to the legislative history of §348 and found that the intent of the statute was for the Debtor, rather than the Chapter 7 estate, to benefit from the creation of equity through pay down of a secured claim.

In another case originally commenced under chapter 7, the trustee attempted to sell property 6 years after the case had been filed. Here, the opposite result occurs with respect to the appreciation in the property. The bankruptcy court agreed found that any “appreciation” resulting post-petition belonged to the bankruptcy estate and not to the debtors. Accordingly, the court held that if debtors wished to purchase their home from the bankruptcy estate, they would have to pay the appreciated value thereof. *In re Shipman*, 344 B.R. 493 (Bankr. N.D. W.Va. 2006).

BAPCPA: Under amended §348(f)(1)(C), a secured creditor that has not received payment of its claim under applicable non-bankruptcy law retains a security interest in the collateral after conversion to Chapter 7. Thus, even if the secured portion of the claim is paid in the Chapter 13, the creditor retains the lien on the property after conversion. This overrules both lines of cases described above. Neither the Chapter 7 estate nor the Debtor will now receive the benefit of the equity created by the payments in Chapter 13. The secured creditor trumps the Trustee and the Debtor under this statute. Even if the secured claim is paid in full, the unsecured balance continues to be secured by the collateral, and the Debtor must redeem or reaffirm in order to keep the vehicle.

44. Another case dealing with equity in Debtor's property created by plan payments

In his Chapter 13 case the Debtor scheduled a vehicle with no equity, along with the under-secured claim of the lienholder. The Debtor's plan was confirmed, and the secured claim was paid in full during the pendency of the Chapter 13 proceeding. However, prior to completion of the plan, the Debtor voluntarily converted his case to Chapter 7. The Chapter 7 Trustee filed a motion for turnover of the vehicle as property of the estate under §§348 and 541. *In re Woodland*, 325 B.R. 583 (Bkrtcy.W.D.Tenn. 2005).

Judge Brown looked to §348(f)(1) and found that it "dictates two things": (1) the Chapter 7 estate consists of property of the estate as of the Chapter 13 case commencement, if that property remains in the Debtor's possession; and (2) valuations made in the Chapter 13 "continue into the Chapter 7 phase." Therefore, because there was no equity in the vehicle when the Chapter 13 petition was filed, and because the Debtor retained possession of the truck, the Court held it was not Chapter 7 estate property. In so holding the Court rejected cases such as *In re Wegner*, 243 B.R. 731 (Bkrtcy.D.Neb. 2000), which had

found that post-petition payments amounted to appreciation in value which would benefit the Chapter 7 estate.

BAPCPA: In his opinion Judge Brown specifically discusses how the result would be different if this case had been filed after October 17, 2005. He noted the amendment to §348(f) which provides that evaluations of property made in the Chapter 13 case will not be applicable if the case is converted to Chapter 7, and the claim of a secured creditor will continue to be secured in the conversion to Chapter 7 unless the secured claim has been paid in full under non-bankruptcy law. In this case the "non-bankruptcy law" secured claim would have been $22,000.00, plus the contract interest rate, plus whatever default rate interest and late charges had accrued. As Judge Brown said, "This is a 180 change from the present provision." If this case had occurred post-BAPCPA it would have resulted in the vehicle becoming property of the Chapter 7 estate upon conversion, but of no value to the Trustee, as the secured claim would exceed the value of the vehicle. This would appear to be the probable result in all such cases.

Another interesting thing about this case is Judge Brown's reliance on the new law to indicate the meaning of the old law. The Court states: "If the current statute does not mean that a Chapter 13 debtor retains the benefit of payments made on allowed secured claims, Congress would have not found a reason to turn it upside down." While this certainly applies to the radical statutory change in this case, in some situations there is a compelling contra argument. For example, where Courts in different parts of the country have disagreed as to statutory interpretation, and/or specific lines of cases with different results have developed, it could be reasonably inferred that Congress intended to "clarify" the issue. From that perspective, a Court might look at the change as an indication of how the prior statute had been wrongly interpreted and applied. *See In re Reed*, 405 F3d 388 (5th Cir. 2005), where the Fifth Circuit noted that Congress had not amended §726(a)(1) as a basis for its holding.

45. Burden of proof in motion to appoint Chapter 11 Trustee

Extending its holding in *In re Marvel Entertainment Group, Inc.*, 140 F.3d 463 (3d Cir. 1998), the Third Circuit Court has held that the burden of persuasion in a motion to appoint a Chapter 11 Trustee is never "reduced from clear and convincing evidence to a preponderance of the evidence." *In re G-I Holdings, Inc.*, 385 F.3d 313 (3d Cir. 2004).

In this case an official committee moved for appointment of a Chapter 11 Trustee under §1104(a). The Committee argued that the burden of proof under *Marvel* was based on "the strong presumption in favor of a Debtor's current management." The Committee contended that management's failure to meet its fiduciary duties, including prosecution of avoidance actions, made the presumption not applicable in this case, thereby reducing the burden of proof to preponderance of the evidence. Affirming the lower courts, the Circuit Court found no link between the "presumption" and the burden of proof. Rather, the Court stated that its reference in *Marvel* to the heavy presumption against the appointment of an outside Trustee was just another way of referring to the heavy burden of persuasion (by clear and convincing evidence) that the party moving for appointment of a Trustee must bear.

BAPCPA: Amended §1104 adds two subsections which will impact decisions regarding Trustee appointment. New section (a)(3) adds a third basis for a Chapter 11 Trustee appointment. If the Court determines that grounds exist to convert or dismiss under §1112, it can instead appoint a Trustee or examiner, if that is found to be "in the best interests of creditors and the estate." The amendment to §1112 radically alters present law by essentially shifting the burden to the Debtor upon showing of cause for conversion by the moving party. Thus, the moving party in a motion to convert can obtain a Trustee appointment under §1104(a)(3) without an adverse presumption, or an elevated, clear and convincing evidence burden of proof.

New §1104(e) mandates the U.S. Trustee to move for appointment of a Trustee if there are "reasonable grounds to suspect" that the Debtor's management has participated in fraud, dishonesty, or criminal conduct in connection with the Debtor's management or public financial reporting.

Amended §1104 became effective on the date of the Bill's enactment, but applies only to cases commenced on or after the date of enactment.

46. Trustee fee reduced, based on hourly rates

In a converted Chapter 11 case, a non-attorney Trustee liquidated three parcels of real estate and sought the maximum compensation under §326(a) of approximately $160,000.00. Neither the U.S. Trustee, nor any other creditor and/or party in interest objected to the Trustee's fee application. Citing an "independent duty to investigate the reasonableness of compensat ion" under Bankruptcy Rule 2016(a); the Court reviewed the application, conducted a hearing, and reduced the Trustee's compensation to approximately $41,000.00. This amount was calculated by mult iplying the documented hoursspent by the Trustee, by his standard hourly rate. *In re Pruitt*, 319 B.R. 636 (Bkrtcy.S.D.Cal. 2004).

In so holding, Judge Adler initially noted that the statutory cap of §326(a) is "not an entitlement." Rather, the Court found that the compensation must be reasonable, based on the criteria set forth in §330(a)(3). Applying the factors listed in the statute, the Court determined the Trustee's hours spent and hourly rate to be the primary consideration in this case, which was non-operating and uncomplicated.

BAPCPA: This case, at least as far as the Court's methodology is concerned, is overruled by amendments to §326 and §330. A new §330(a)(7) provides: "In determining the amount of reasonable compensation to be awarded to a Trustee, the Court shall treat such compensation as a commission, based on §326." Additionally, and perhaps more importantly, amended §330(a)(3) deletes Chapter 7 Trustees from the list of the individuals covered by the section. Therefore, the factors relied upon in this case, including hours and rates, should no longer apply to Chapter 7 Trustees. The new §330(a)(3) now applies only to examiners, Trustees under Chapter 11, and professional persons. While Bankruptcy Courts still have discretion to determine reasonableness, the extent to which a Trustee's hours are relevant to this determination is arguably eliminated, and is certainly no longer the primary factor.

47. What are proper Rule 9011 sanctions?

A Chapter 13 petition was filed, and the case dismissed 16 days later due to the attorney's failure to file accompanying papers required by the Bankruptcy Rules. When the Debtor began calling to inquire about case status and an impending foreclosure, a new attorney was assigned to the case. Wi thout meeting or speaking to the Debtor, but with knowledge that she had signed and authorized a prior pet ition, the new attorney filed a second Chapter 13 pet ition. Unfortunately, due to a typographical error the Debtor's home address was listed incorrectly, and she received no notice of any hearings. She attended none of the proceedings, which led to case dismissal. The Debtor, who did not know about the second filing, then retained other counsel, and a third petition was filed 24 days after the second. The Trustee brought a Rule 9011 motion against the attorney who filed the unauthorized petition, and the Bankruptcy Court ordered the firm to return all the funds paid for the first filing (no charge was made for the second), and referred the matter to the U.S. Attorney and disciplinary counsel for possible criminal prosecution and disbarment proceedings. On appeal, the BAP affirmed. Further appeal was taken to the Eighth Circuit Court. *In re Briggs*, 2006 WL 38989 (8th Cir.).

The Circuit Court agreed that the actions of the attorney violated Rule 9011 for his failure to make "reasonable inquiry into whether there is a factual and legal basis for a claim before filing." However, the Court recognized the attorney's good intentions and found the sanctions to be "onerous", and an abuse of the Bankruptcy Court's discretion. The Circuit Court noted that a violation of Rule 9011 "does not necessarily require the exaction of sanctions." In a footnote, the Court expressed no opinion as to whether there might be a basis for imposing "sanctions of some nature" against the law firm; but held that the "totality of the sanction award" against the individual attorney was "heavy handed," and struck it in its entirety.

MISCELLANEOUS OTHER NON-BAPCPA CASES OF INTEREST

48. Mandatory disgorgement of interim fee award

In a case previously reported, the Sixth Circuit has affirmed the lower court holding that upon conversion to Chapter 7, Chapter 11 professional fees must be disgorged if necessary to effect a pro rata distribution to all Chapter 11 administrative claimants. *Specker Motor Sales Co. v. Eisen*, 393 F.3d 659 (6th Cir. 2004). The Circuit Court held that §726(b) "plainly mandates a pro rated distribution of assets among creditors in the same statutory class." Therefore, disgorgement of interim fees was mandatory; and in no way subject to the discretion of the Court.

49. Pre-petition checks which were honored post-petition did not reduce property of the estate

At the time of their bankruptcy filing, the Debtors had a checking account with a balance of $1,783.80. Post-petition, the bank honored several checks which were written before the petition was filed. The Chapter 7 Trustee moved for turnover of the entire balance, less $200.00 which the Debtors had exempted. The Trustee, joined by the U.S. Trustee, argued that the Debtors were required to turn over the funds pursuant to §§521(4) and 542(a). *In re Dybalski*, 361 B.R. 312 (Bkrtcy.S.D.Ind. 2004)

Judge Coachys first applied the *Barnhill v. Johnson*, 503 U.S. 393 "date of honor" rule, and concluded that the transfers from the checking account occurred post-petition. Thus, the ent ire balance on the petition date was property of the estate. The Court next looked to *Boyer v. Carlton, Fields, Ward, Emmanuel, Smith and Cutler, P.A.*, 100 F.3d 53 (7th Cir. 1996), which required turnover of estate funds from a law firm which no longer had possession of them. The Court noted that §542(a) "requires the delivery of the property *or the value of the property*." Therefore, the Debtors were ordered to pay the full balance in the account, less the exempt portion, to the Trustee. Finally, the Court found that the Trustee was entitled to proceed by motion rather than adversary proceeding under to Rule 7001(1), which specifically excludes actions to compel the Debtor (as opposed to a third party) to deliver property to the Trustee.

50. Court allows receiver appointment in LLC in which Trustee had an interest.

When he filed his petition, the Chapter 7 Debtor was a member of an LLC. While the case was pending, the Trustee discovered numerous insider transactions being conducted by the LLC, which were contrary to the operating agreement, and which systematically excluded the bankruptcy estate. The Trustee brought an action against the LLC in Bankruptcy Court, wherein he sought, among other relief, appointment of a receiver for the LLC. *In re Ehmann*, 334 B.R. 437 (Bkrtcy.D.Ariz. 2005).

Judge Haines first determined the LLC interest to be personal property under applicable Arizona law. Therefore, upon his bankruptcy filing, the Debtor's interest in the LLC, both economic and non-economic, became property of the bankruptcy estate. The Court rejected the Trustee's request for judicial dissolution of the LLC, which was not a remedy provided in the operating agreement. Rather, the Court determined that the Trustee was entitled to have a receiver appointed to maintain the operations of the LLC.

51. Unenforceable claim disallowed

A Chapter 7 Debtor objected to a creditor's claim on the ground that the applicable state law statute of limitations had lapsed pre-petition, making the claim unenforceable. An evidentiary hearing was held, and the Bankruptcy Court found that the Debtor had carried his burden as to this affirmative defense. Judge Somma noted that the claims were contractual in nature, and that under applicable Massachusetts law a contracts action must be commenced within six years after it accrues. Here the last charges comprising the claim were incurred over seven years prior to the bankruptcy filing, rendering it unenforceable at that time. The claim was, therefore, disallowed. *In re Makein*, 334 B.R. 527 (Bkrtcy.D.Mass. 2005).
Editor's Note: Holders of credit card accounts frequently file proofs of claim with mere summaries that do not indicate the age of the charges. Many Courts have denied Trustee objections to such claims for lack of sufficient documentation, based on the Debtor's scheduling of the claim. This case highlights one reason why such documentation is important. While Debtors may recognize that they incurred a debt, they might not understand that it could no longer be legally collected. Trustees should be entitled to independently determine the validity and enforceability of such claims.

52. Absolute right to convert?

Four appellate panels have recently ruled on the issue of whether a Debtor has an absolute right to convert a case from Chapter 7:

The Ninth Circuit BAP has found an absolute right to convert under §706(a) unless 1) the case has been previously converted; and 2) the Debtor is not qualified to be a Debtor under the conversion chapter. The Court refused to find an implicit "good faith" requirement in the statute. *In re Croston*, 2004 WL 1908111 (9th Cir. BAP Arizona). The Tenth Circuit BAP addressed the issue in *Miller v. United States Trustee*, 303 B.R. 471 (10th Cir. BAP 2003), and also found a one-time absolute right to convert.

On the other hand, the First Circuit BAP has held the right to convert is not absolute, but may be denied only in extreme circumstances, which were found in this case. *In re Marrama*, 313 B.R. 125 (1st Cir. BAP, Mass.). Likewise, the Sixth Circuit BAP found no absolute right to convert, even if there has been no prior conversion and the Debtor meets Chapter 13 eligibility requirements. *In re Cooper*, 314 B.R. 628 (6th Cir. BAP, 2004) *aff'd* 426 F.3d 810, (6th Cir., 2005).. The Court agreed with the First Circuit that conversion may be denied in extreme circumstances, and held that a request for conversion made in bad faith, or representing an attempt to abuse the bankruptcy process may be denied.

Editor's Note: The First Circuit case has been appealed to the Court of Appeals.

53. Trustee has standing to pursue assigned creditor claims

The Fourth Circuit Court has recently held that *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972), does not apply to creditor causes of action which are unconditionally assigned to a Trustee for the benefit of the bankruptcy estate. *In re Bogdan*, 414 F.3d 507 (4th Cir. 2005).

In *Caplin* the Supreme Court held that Trustees lack standing to bring claims specific to creditors, on the creditors' behalf. This was not the case in *Bogdan*, where the Court noted that the assigned claims of creditors were being asserted by the Trustee, on behalf of the estate. Therefore, if those creditors recovered at all, it would be through pro rata sharing with the other creditors of assets collected for the estate. This fact also distinguished the Ninth Circuit case of *Williams v. California First Bank (In re Estate of Chaklan Enters., Inc.)*, 859 F.2d 664 (9th Cir. 1988), where the assignments obtained by the Trustee reserved "the bulk of any recovery" for the assigning creditors. The *Bogdan* Court found the causes of action were property of the estate acquired post petition, which the Trustee was "authorized to 'collect and reduce to money' on behalf of the estate."

The Circuit Court further rejected the defense of *in pari delicto*, which bars a wrongdoer from recovering against alleged co-conspirators. The Court found no application for this doctrine where the Trustee was suing on behalf of the estate as assignee of creditor claims. Finally, the Court rejected the argument that the unlikely possibility of a surplus case, where a distribution to the Debtor might occur, could be dealt with properly, when and if it ever existed. In closing, the Court stated that the "remote chance" of a possible distribution to the Debtor, co-conspirator "should not deter the more fundamental policy undergirding the bankruptcy system: allowing the Trustee to maximize the value of the estate so that the claims against the Debtor are paid to the fullest extent possible."

54. Supreme Court holds preference action against state not barred by sovereign immunity

Extending its holding in the recent case of *Tennessee Student Assistance Corporation v. Hood*, 541 U.S. 440, the Supreme Court has found the Bankruptcy Clause of the Constitution, which empowers Congress to establish "uniform Laws on the subject of Bankruptcies throughout the Uni ted States," to have effected a subordination of state sovereignty within the limited sphere of bankruptcy jurisdiction. *Central Virginia Community College, et al. v. Katz, Liquidating Supervisor for Wallace's Bookstores, Inc.*, 126 S. Ct. 990, 2006 WL 151985 (U.S. 2006).

Writing for the five-justice majority, Justice Stevens described bankruptcy jurisdiction as principally *in rem*. He noted that states, no different from other creditors, are bound by Bankruptcy Court discharge orders. He further noted that the absence of excessive debate at the Constitutional Convention over insertion of the Bankruptcy Clause indicated general agreement about creating a uniform federal bankruptcy system. The fact that the Bankruptcy Clause gave *in rem* power to Congress, and took it away from the states, would have been understood to give Congress the further power to authorize proceedings to enforce such *in rem* jurisdiction, including authorization to avoid preferential transfers, and recover the transferred property.

In his dissent, joined by Justice Scalia and Justice Kennedy, Justice Thomas essentially argues that the majority opinion overrules *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), without admitting so. He further argues that neither the text, structure, or history of the Constitution indicates that the Bankruptcy Clause manifests a consent by states to be sued by private citizens; in contrast to all other provisions of Article I.

BAPCPA AMENDMENTS AND CASE LAW UPDATES

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CHAPTER 7

I. LIMITATION ON THE AUTOMATIC STAY

A. Automatic Terminations

a. In BAPCPA, there are numerous provisions which provide that the automatic stay is immediately terminated if the debtor fails to perform certain activities or to meet responsibilities required by the amendments. BAPCPA includes new procedures for granting of relief from the automatic stay provisions under §362 under certain conditions. Specifically, 11 U.S.C. §362(j)[1] provides that "on request of a party in interest, the courts shall issue an order under subsection (c) confirming that the automatic stay has been terminated".

B. Failure to File or Comply With Requirements of the Statement of Intention

a. §362(h), as amended, vacates the stay and removes property from the estate if a debtor fails to timely file the statement of intention with respect to personal property and fails to indicate in the statement whether she is surrendering such property or retaining it.[2] If a debtor is retaining such personal property, she must either redeem pursuant to *§722*[3], enter into a Reaffirmation Agreement under §524(c),[4]or assume an unexpired lease of such property pursuant to 11 U.S.C. §365(p).[5] Further, the debtor is required to timely take the actions specified in such statement. The failure to do so will result in termination of the automatic stay.[6]

C. Prompt Relief from the Automatic Stay

a. In 1994, *§362(e)* was amended to require a court to hold a hearing on a motion to vacate the automatic stay within 30 days. If a court failed to timely hold a hearing, the automatic stay was terminated effective on the 31st day. Many courts complied with the requirement by holding a preliminary hearing on the motion within the 30 day period and then holding a final hearing on a date outside the 30 day period. To ensure that a prompt final determination is made on a motion for relief from the automatic stay, *§362(e)*[7] provides that in a chapter 7, 11 or 13 case filed by an individual, the automatic stay terminates 60 days after the request is made by party in interest unless a *final decision* has been rendered by the court within the 60 day period. In essence, the court is now required to

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1 11U.S.C. § 362(J) (2005).
2 11 U.S.C. 362(h)(1)(A) (2005).
3 11 U.S.C. § 722 (2005).
4 11 U.S.C. § 524 (c) (2005).
5 11 U.S.C. § 365(p) (2005).
6 11 U.S.C. § 362(h) (2005).
7 11 U.S.C. § 362(e) (2005).

render a final decision on a motion to vacate the automatic stay within 60 days after the filing of the motion.

D. Additional Limitations on the Automatic Stay

a. If a debtor files two cases within one year, the stay will be limited to 30 days in the second case.[8] In the event that the debtor files a third case within the one year period, there is no automatic stay.[9] A court for cause may extend the automatic stay if it finds that the subsequent case is filed in good faith. The reason for this requirement is provided within *§§362(c)(3)(C)* and *362(c)(4)(D)*[10] which create a rebuttable presumption that the second and third cases are not filed in good faith. The presumption can be rebutted if a debtor or a party in interest through clear and convincing evidence demonstrates that a chapter 7 case will result in discharge, that a confirmed plan will be fully performed in an 11 or 13 case, and that there was substantial justification for a debtor's failure to comply with the requirements that resulted in the dismissal of the prior case.

1. In *In re Norman*, 346 B.R. 181 (Bankr. N.D. W.V., 2006), the court held that the stay was terminated when the debtor filed a motion to extend on the 28th day after filing the petition, because there was no time for notice and a hearing within the 30-day period. The debtor argued that he was only required to file within the period and not obtain an order, pursuant to §362(c)(4)(B). The court held that because he was a first-time filer, that section did not apply.
2. See also *In re Mark*, 336 B.R. 260 (Bankr. D. Maryland, 2006) (the debtor's second case was filed in good faith, because the debtor was not a serial filer, and his prior case had been dismissed because he had lost his source of income.)

E. In Rem Relief

a. §362(d)(4)[11] has been added to allow in certain cases in rem relief from the automatic stay as to real property if the debtor engaged in a scheme to hinder, delay, or defraud a creditor holding a security interest in real property, or if the debtor transferred an interest in real property with the intent to hinder, delay or defraud a creditor. The provision allows a creditor meeting its requirements to obtain an order for in rem relief from the automatic stay that can be recorded with a register of deeds and that will effectively remove the property from property of the estate. In rem orders remain effective for up to two years.

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[8] 11 U.S.C. § 362(c)(3) (2005).
[9] 11 U.S.C. § 362(c)(4) (2005).
[10] 11 U.S.C. §§ 362(c)(3), 362(c)(4)(D) (2005).
[11] 11 U.S.C. § 362(d)(4) (2005).

***In re Abdul Muhaimin*, 343 B.R. 159 (D. Maryland, 2006)**,

In this combined case, the various debtors had filed multiple bankruptcies to avoid foreclosure. The court held that there were three required elements for granting relief under §362(d)(4): 1) the debtor's current bankruptcy filing must be part of a scheme; 2) the scheme must be to hinder, delay, and defraud creditors; and 3) the scheme involved either a transfer of real property without creditor consent or court approval, or multiple bankruptcy filings affecting the property. The court held that the use of "and" rather than "or" in the phrase "hinder, delay, and defraud" meant that the scheme must attempt all three; if the scheme does not hinder and delay and defraud, §362(d)(4) does not apply.

The court held that the burden of proof was on the creditors and that they had failed to establish that the multiple filings were part of a scheme to defraud creditors. The creditors had the option to request imposition of an equitable servitude against imposition of the automatic stay under the rule of *In re Yimam*, 214 B.R. 463 (Bankr. D. Maryland, 1997). The creditor in one case did so, and the court granted that request and imposed an equitable servitude of 180 days; the remainder of requests for stay lift were denied, as the creditors did not meet the burden of showing fraud.

F. Evictions and Wrongful Detainer Actions

a. A landlord who successfully concludes an eviction and obtains a judgment for possession is now excepted from the effects of the automatic stay subject to the requirements set forth *in §362(b)(22).*[12] A debtor has the right to obtain a stay if a debtor has the right to cure the pre-petition default under the lease pursuant to nonbankruptcy law. *Section 362 (b)(22)* read in conjunction with *§362(l)*[13] allows the debtor a 30-day stay if the debtor files a petition and serves the lessor with a certification under penalty of perjury that: (1) the circumstances exist under applicable nonbankruptcy law which would permit the debtor to the cure monetary default giving rise to the judgment of possession after the judgment for possession was entered; and (2) the debtor has deposited with the court the rent that becomes due during the 30-day period after the filing of the bankruptcy petition. *Section362 (l)(2)* further provides; that a debtor must comply with paragraph (1) and within 30 days file with the court a further certification under the penalty of perjury that the debtor has cured under applicable bankruptcy law the entire monetary default that gave rise to the eviction and judgment for possession. In the event that that the debtor meets these requirements, the exception to the automatic stay under *§362(b)(22)* does not apply.

b. Another protection given to landlords is an exception to the automatic stay based upon endangerment of the property or if the lessee has engaged in the illegal use of controlled substances. This exception to the automatic

[12] 11 U.S.C. § 362(b)(22) (2005).
[13] 11 U.S.C. § 362(l) (2005).

stay is contained within *§362(b)(23).*[14] III.

c. Cases on 11 U.S.C. § 362(c):

<u>*In re: Thaddeus Rudolph Jones, Jr.*, 339 B.R. 360 (Bankr. E.D.N.C. 2006)</u>

The Court referred to holding in *In re Paschal*, 337 B.R. 274 (Bankr. E.D.N.C. 2006) to determine the meaning of "action taken" as used in 11 U.S.C. §362(c)(3)(A). The Court in *Paschal supra* defined the words "action taken" as "a formal action such as a judicial, administrative, governmental, quasi-judicial, or other essentially formal activity or proceeding."

The Court stated that the meaning of the words "with respect to the debtor" in 11 U.S.C. §362(c)(3)(A) is plain and consistent with not only other provisions of 11 U.S.C. §362, but also other sections of the Bankruptcy Code. The Court noted 1.) 11 U.S.C. §362(a) differentiates between acts against the debtor, against property of the debtor, and against property of the estate; 2.) 11 U.S.C. §362(b)(2)(B) specifically permits domestic support obligations to be collected from "property that is not property of the estate"; 3.) 11 U.S.C. §362(c) distinguishes between the stay of acts against property of the estate and the stay of other acts; and 4.) 11 U.S.C. §521(a)(6) specifically provides that the automatic stay is terminated "with respect to the personal property of the estate or of the debtor" if the debtor does not reaffirm of redeem property within 45 days after the First Meeting of Creditors. Therefore, the Court reasoned, if Congress intended the automatic stay terminated under 11 U.S.C. §362(c)(3)(A) as to property of the estate it would have specifically indicated that the automatic stay terminates under 11 U.S.C. §362(c)(3)(A) with respect to property of the estate.

The Court held that 11 U.S.C. §362(c)(3)(A) terminates the stay with respect to actions against the debtor and against property of the debtor, but does not terminate the stay with respect to property of the estate. In this case, the only action taken by a Creditor against the Debtor was a foreclosure proceeding brought by National City Home Loan Services. As the real property securing National's secured claim is still property of the estate, it was protected by the automatic stay of 11 U.S.C. §362(a)(4) and an extension of the stay was not needed under 11 U.S.C. §362(c)(3)(A).

<u>*In re: Thomas R. Johnson*, 335 B.R. 805 (Bankr. W.D. Tenn. 2006)</u>

The Court analyzed the plain meaning of the language of 11 U.S.C. §362(c)(3)(A) in conjunction with the language of 11 U.S.C. §362(c)(1). The Court found that the 30 day time period for the automatic stay imposed by 11 U.S.C. §362(c)(3)(A) is only applicable to "debts" or "property of the debtor" and is not applicable to "property of the estate". As such, property of the estate, pursuant to 11 U.S.C. §541 and 11 U.S.C. §1306, continues to be protected by the automatic stay even after the 30 day time period has expired. The Court granted the Debtor's Motion to extend the stay over the Creditor's objection on December 29, 2005 and issued the instant opinion on January 9, 2006 to clarify its ruling.

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[14] 11 U.S.C. § 362(b)(23) (2005).

All property under 11 U.S.C. §541 or 11 U.S.C. §1306 is "property of the estate" and remains property of the Debtor's Chapter 13 estate until the case is dismissed, discharged, or the Court orders otherwise. The 30 day time period imposed by 11 U.S.C. §362(c)(3)(A) is not applicable to "property of the estate" and will not terminate. Therefore, the automatic stay did not terminate as to the Debtor's home on the thirtieth day following the filing of the Debtor's second bankruptcy petition as it remained "property of the estate" and any Creditor seeking to foreclose or repossess the property needed to file an appropriate motion seeking relief from the automatic stay to avoid violating the automatic stay.

***In re: Timothy & Annae Sanders*, Case No. 06-40096 (Bankr. E.D. Mich. 2006) - Order Denying Motion For An Order Confirming That The Stay Has Been Terminated Entered April 6, 2006**

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) provides two specific instances in which a Court is directed to enter an order "confirming" the status of the automatic stay. These mandates are found in 11 U.S.C. §362(c)(4)(A) and 11 U.S.C. §362(j). Neither is the basis for the Creditor's motion for an order confirming that "no stay is in effect". Instead, the Creditor's motion is based on 11 U.S.C. §365(p)(1). 11 U.S.C. §365(p) provides for the automatic termination of the stay if a lease of personal property is rejected. Therefore, no order is required to effectuate the termination of the automatic stay provided by 11 U.S.C. §365(p) and the Court is not required to issue such order.

Neither 11 U.S.C. §362(c)(4)(A) nor 365(j) direct the Court to enter an order confirming the status of the automatic stay as it relates to 11U.S.C. §365(p). 11 U.S.C. §365(p) does not contain a directive to the Court to enter and order confirming that the stay is terminated under that subsection of the Bankruptcy Code, the Court declined to enter an order "confirming" whether the stay had been "automatically terminated" under 11 U.S.C. §365(p).

***In re Moore*, 337 B.R. 79 (Bankr. E.D. N.C. 2005)**

The Bankruptcy Court for the Eastern District of North Carolina was confronted with the question of whether a Chapter 13 case remains "pending" after dismissal but before closure for the purposes of determining whether the automatic stay terminates after 30 days of a subsequent filing. The Court, in finding that a prior case was not "pending" once it was dismissed, first examined the meaning of that term in Black's Law dictionary, which defines "pending" as "remaining undecided; awaiting decision". Because there is nothing left to decide once a case is dismissed, the Court reasoned that a dismissed case was no longer "pending" under the common definition of that term. The Court next examined the use of "pending" in Section 109(g) of the Code and cases interpreting that section. Again, the Court found that "pending" has been found to mean "not dismissed" in the Bankruptcy context. Finally, policy considerations also served to confirm that a dismissed case is not pending as a debtor is no longer protected by the automatic stay upon dismissal. Because the plain meaning of the term, case law, and policy all weighed in favor of a narrow interpretation of "pending", the Court found that the debtor's case was no longer pending once it was dismissed. Therefore, even though

the debtor's first case was dismissed but not closed less than one year prior to the commencement of the subsequent case, the stay was not limited to 30 days under Section 362(c)(3).

In re Schlitzer, 332 B.R. 856 (Bankr. W.D. N.Y. 2005)

The Bankruptcy Court for the Western District of New York considered whether Section 362(h), which provides for the termination of the automatic stay regarding secured property when a debtor fails to file a statement of intention, is applicable to Chapter 13 cases. In this case, the debtor had failed to files schedules and a statement of intention. The trustee filed a motion requesting that the stay be extended and that the debtor's property continue to be property of the estate. The Court found that because Section 362(h) refers to the statement of intention required under Section 521(a)(2) and the latter section is applicable only to Chapter 7 debtors, the stay is not automatically terminated when a Chapter 13 debtor fails to file a statement of intentions.

In re Toro-Arcila, 334 B.R. 224 (Bankr. S.D. Tex 2005)

The Bankruptcy Court for the Southern District of Texas considered whether Section 362 allows a Court to hear a motion to extend the stay filed, but not heard, within 30 days of filing the bankruptcy petition. The Court first examined Section 362(c)(3)(B) which governs motions to extend the stay for debtors who had one other case pending in the year prior to the current petition. Because Section 362(c)(3)(B) mandated that the motion to extend the stay be filed *and* heard within 30 days, the debtor could not proceed with his motion pursuant to this section. The Court, however, then turned to Section 362(c)(4)(B) which addresses motions to impose the stay when the debtor has had multiple repeat filings and no stay is in effect after the time of filing. Unlike Section 362(c)(3)(B), Section 362(c)(4)(B) does not mandate that the hearing on such a motion occur within 30 days of filing the petition. Rather, only the motion must be filed within 30 days. The Court, therefore, was faced with the dilemma of whether Section 362(c)(4) applied to single repeat filers as well as multiple repeat filers. In finding that Section 362(c)(4) was applicable to single repeat filers, the Court applied rules of statutory construction which state that Congress tends to avoid surplus language. If Section 362(c)(4) were meant to apply *only* to multiple repeat filers, then the accompanying language of Section 362(c)(4)(D), which addresses whether a case has been filed in good faith, would be rendered meaningless. Consequently, since Section 362(c)(4)(D) could only have meaning if it were applied to single repeat filers, the Court found that the debtor could have a hearing on a motion to impose the stay if only the motion is filed within 30 days.

In re Taylor, 334 B.R. 660 (Bankr. D. Minn. 2005)

The Bankruptcy Court examined what constitutes sufficient notice to creditors when a debtor files a motion to extend the stay pursuant to Section 362(c)(3)(B). In this matter, the debtors had mailed notice of the hearing on the motion to extend to creditors only five and eight days before the hearing. The Court, in finding that the motions to extend the stay failed for lack of notice, determined that the debtors should have complied with the

local bankruptcy rule that provided for notice of hearing in the absence of a Federal Rule directly on point.

***In re Collins*, 334 B.R. 655 (Bankr. D. Minn. 2005)**

Bankruptcy Court for the District of Minnesota considered what parties should be given notice of a motion to extend the automatic stay. In this matter, the debtor filed a motion to extend the stay in a Chapter 7 case, but served only the United States Trustee and the Chapter 7 Trustee with notice of the motion. Section 362(c)(3)(B) requires that such a motion may be granted upon "notice and hearing". Section 102(l) defines "notice and hearing" as requiring notice "as is appropriate in the particular circumstances". The Court, turning to procedural due process requirements, found that a debtor seeking to extend the stay must give notice to all creditors to which the debtor intends to extend the stay.

***In re Collins*, 335 B.R. 646 (Bankr. S.D. Tex. 2005)**

Bankruptcy Court for the Southern District of Texas applied the factors set forth in *In re Charles (II)* to deny a debtor's motion to extend the stay. The Court first set out to determine whether a presumption existed that the case was not filed in good faith. The Court focused on whether the debtor could show that circumstances had changed since the last case. Noting that no circumstances had changed other than the debtor's income actually falling since the prior case, the Court found that a presumption existed that the case was not filed in good faith. Consequently, the debtor now shouldered the burden of rebutting this presumption by the high standard of clear and convincing evidence. The Court, applying the factors establishing good faith as set forth in *Charles (II)*, but with the higher burden of proof, found that the debtor could not rebut the presumption and, therefore, the motion to extend was denied.

***In re: Warneck*, 2006 WL 62667 (Bankr. S.D.N.Y. 2006)**

When no party objects and no presumption of abuse arises, a request to extend the automatic stay should be liberally granted. Because the debtors did not meet any of the criteria of 362(c)(3)(C)(i)(I), (II) or (ii), the Court looked specifically at the debtors' changed circumstances to determine whether the presumption of bad faith applied. In this case, the Warnecks' daughter and son-in-law (who had funded the plan in the prior case) each submitted affidavits stating they were willing and able to fund the debtors' plan through to completion. The Court found no evidence either the daughter or son-in-law would again experience the difficulties that had led to the previous dismissal. Furthermore, in determining whether to grant a motion to extend the automatic stay, it is not necessary to determine whether the plan as proposed will be confirmed, only whether "any reason exists" as to why the plan will not be performed fully.

***In re Paschal*, 337 B.R. 274 (Bankr. E.D. N.C. 2006)**

Termination of stay is limited to "actions" taken and not in full extent of the stay. Debtor filed a motion to extend the 30-day stay of §362(c)(3). The stay termination

provided by §362(c)(3) is based on the following language:

> The stay under subsection (a) with respect to any **action taken** with respect to a debt or property securing such debt or with respect to any lese shall terminate with respect to the debtor on the 30th day after the filing of the later case.

In parsing the meaning of this language, the court held that “the term 'action' means a formal action, such as a judicial, administrative, governmental, quasi-judicial, or other essentially formal activity or proceeding.” Furthermore, the term “taken” means an action in the past, prior to the filing of the debtor's bankruptcy petition." Because no creditor had taken a prepetition “action,” the court held that “no protections of the automatic stay are terminated in this case by §362(c)(3)(A) and that it is not necessary to continue the automatic stay under § 362(c)(3)(B).”

***In re Charles*, 334 B.R. 207, 218, 219, 223 (Bankr. S.D. Tex. 2005)**

The presumption of a bad faith filing precluding an extension of the automatic stay if unrebutted, did not arise when the debtor voluntarily dismissed her prior case and she had filed all required documents, provided adequate protection, and performed under her plan. The debtor's original Chapter 13 case was dismissed at the request of her mortgagee (to give the mortgagee and debtor an opportunity to work through a loss mitigation program) but when negotiations failed the debtor filed a second case within the one year period. The rebuttable presumption under §362(c)(3)(C) only arises if the prior Chapter 13 case was dismissed for one of the reasons listed under §362(c)(3)(C)(i)(II). "A case is presumed to not be filed in good faith if: (i) the debtor had more than one previous case pending during the previous year; (ii) a case pending within the previous year was dismissed for failure to file certain :required documents, provide adequate protection., or perform under a confirmed plan; or (iii) there has not been a substantial change in the financial or personal affairs of the debtor since the most recent case was dismissed or there is no other reason to detem1ine that the new case would result in a discharge." Here, the debtor voluntarily dismissed her case at the request of a creditor and, accordingly, the presumption would not arise. Even without facing the presumption the debtor still has the burden of establishing that the case was filed in good faith as to the creditors for which the debtor is seeking an extension of the stay. Although "good faith" is not defined it the code, factors to be considered "include whether the debtor truly intends to effectuate rehabilitation and whether the plan evidences an attempt to abuse the spirit of the Bankruptcy Code. '" For the purposes of objective good faith under §362(c)(3), the Court analyzes whether this case is likely to result in a discharge. For the purposes of subjective good faith, the Court employs the 'totality of the circumstances' test in analyzing the debtor's motives and her relationship with her creditors. The subjective test requires the court to examine the nature of the debt, the collateral, the activity of the debtor immediately prior to the filing of the bankruptcy, the debtor's conduct in the current cases, the reasons why the debtor wishes to extend, the stay, and other circumstances. Here the principal creditor agreed that the case was .filed in good faith. No other creditor appeared to oppose the requested extension of the stay. There is a reasonable likelihood that the debtor would accomplish the plan. and the "potential benefits to Ms. Charles if the automatic stay is extended are patent. If

successful, she may be able to retain her homestead, which alone raises substantial equitable considerations. ... Moreover, equitable factors require the Court to consider competing interest. In this case, no creditor opposed the extension of the automatic stay." Without any creditor opposition there is no evidence that indicates that any creditor would be banned by the extension of the stay. Accordingly, the court granted the debtor's request and extended the stay.

***In re Phillip*, B.R. 2006 WL91311(Bankr.E.D.Okla. 1/6/06)**

In granting a motion to extend the automatic stay after a showing of changed financial circumstances, the court stated that "Attorneys who practice before this Court are advised that if their Motion to Extend the Automatic Stay is unopposed, the Court may grant the Motion under certain circumstances without the necessity of a hearing. In order to do so, there must be proper notice and opportunity to object provided to all creditors. In addition... the Court must find that counsel in their Motion have property pled all the elements under §362(c)(3) including rebutting by clear and convincing evidence that the case was not filed in good faith."

***In re Galanis*, 334 B.R. 685 (Bankr. D. Utah 2005)**

Whether to extend the stay on a repeat filing relies upon the totality of the circumstances. The presumption that the case was not filed in good faith arises under § 362(c)(3)(C) arises, the party moving to extend the automatic stay must carry its burden by "clear and convincing evidence" but if the presumption does not arise a party in interest must carry its burden under 363(b)(3)(B) by a "preponderance of the evidence." In determining good faith under §363(b)(3)(B) it would use a "totality of the circumstances" approach and adopted the following *Gier* factors in determining what, under the totality of the circumstances, constituted good faith: 1) the timing *of* the petition; 2) how the debt(s) arose; 3) the debtor's motive in filing the petition; 4) how the debtor's actions affected creditors; 5) why the debtor's prior case was dismissed; 6) the likelihood that the debtor will have a steady income throughout the bankruptcy case, and will be able to properly fund a plan; and 7) whether the Trustee or creditors object to the debtor's motion. The court granted debtors' motions to extend the 30-day stay of § 362(c) as to all creditors.

***In re Ermi*, 2006 Bankr. LEXIS 1998 (Bankr. N.D. Ohio, 2006)**

The debtors listed a lease on a Caravan in Schedule G. In an amended Statement of Intention, they indicated they were going to assume the lease under §362(h)(1)(A). DaimlerChrysler moved to terminate the automatic stay and asked for a comfort order. §362(h) states that if a debtor fails to timely file his Statement of Intention, the stay will be terminated. The court held that BAPCPA approves the use of comfort orders, but §362(j) does not provide the basis for a comfort order under §362(h) by virtue of §362(c). The court held that comfort orders are not allowed in a §362(h) situation.

***In re Gillcrese*, 346 B.R. 373 (Bankr. W.D. Penn., 2006)**

The debtor filed Chapter 13 in 2002; the case was later dismissed in 2005. The debtor refiled in December 2005 without filing a motion to extend the stay. The debtor admitted that the stay was terminated as to the debtor's property, because the 30-day period prescribed by §362(c)(3)(A) had passed. The plain language of the statute terminates the stay as to the debtor, but it does not mention property of the estate. §362(c)(4)(A)(i) is more broad, terminating the stay completely for debtors filing for the third time or more. If Congress had intended §362(c)(3)(A) to remove all the protections of the stay, it would have done so as it did in §362(c)(4)(A)(i). Instead, §362(c)(3)(A) enumerates specific items upon which the stay will be terminated. The stay is not terminated as to property of the estate; only as to property of the debtor.

***In re Williams*, 346 B.R. 361 (Bankr. E.D. Penn., 2006)**

The debtor, after filing his second bankruptcy case, failed to file a motion to extend the stay within the 30-day period prescribed by §362(c)(3)(A); the stay was automatically terminated. The debtor argued that the court had the power in equity to reinstate the stay after the 30-day period under §105(a); he also argued that the stay did not terminate as to property of the estate. The court held that it did not have equitable power to reinstate the stay when there was no timely motion, but the stay was terminated as to the debtor only and not as to property of the estate, which was still protected by the stay.

G. Credit Counseling

***In re Fuller*, 2005 WL 3454699 (Bankr. W.D. Pa. 2005); *In re Granda*, 2005 WL 3348878 (Bankr. 2005); *In re Skarbek*, 2005 WL 3348879 (Bankr. W.D. Pa. 2005).**

Pre-petition, the debtors completed a course and obtained a Certification Of Completion Of Instructional Course Concerning "***Personal Financial Management***" (emphasis added). The debtors filed this certificate in connection with their Chapter 13 bankruptcy petition. The court noted that this is the certificate to obtain a discharge and not the certificate of credit counseling required to qualify for bankruptcy relief under §109. Consequently, the court directed the debtors to obtain the correct counseling and to file the correct certificate.

***In re Miller*, 336B.R. 232 (Bankr. W.D. Pa. 2006)**.

To satisfy §109(h), the debtor must fi1e a formal certificate from a credit counseling agency. Debtor filed a motion to extend time to file credit counseling certificate. Rather than file a formal certificate, the debtor filed a telecopy from the credit counseling agency stating that the debtor received counseling but that she had not received a certificate because she had not paid the $50 fee. The court held that the telecopy failed to meet the legal requirements of a "certification" but held that it constituted a motion to extend time to obtain and file the formal certificate from the credit counseling agency. In a footnote, the court stated that the credit counseling agency would have an administrative expense claim if it delivered the certificate to the

debtor and the fees were reasonable.

***In re Cobb*, 343 B.R. 204 (Bankr. E.D. Arkansas, 2006)**

The debtors filed their Chapter 13 petition pro se on 3/10/06. With their petition, they filed a typewritten statement waiving the requirement to obtain credit counseling; their home was scheduled to be sold in foreclosure on 3/13/06, and they were unable to make an appointment with a credit counselor until 3/16. The statement said that the debtors would provide a certificate from the credit counselor after their appointment, but had to file their petition immediately in order to save their house. They filed the credit counseling certificate on 3/24/06, showing that counseling had been received 3/16/06. The US Trustee objected to the waiver; the Chapter 13 Trustee and the creditors did not object.

The court held that in order to waive the credit counseling requirement, a debtor must satisfy the requirements of §109(h)(3)(A) – that the debtor must submit a certification to the court that 1) "describes exigent circumstances that merit a waiver…" and 2) that states that the debtor attempted to get credit counseling from an approved nonprofit agency but could not obtain its services during the 5-day period following the request for services, and that such certifications are satisfactory to the court. Some courts have held that a certification must be attested as containing true statements; others have held that certifications need not be sworn under penalty of perjury. This court held that statements in a certification to the court for waiver of the credit counseling requirement must be sworn under oath. There was no indication that the debtors' statement filed with the petition was sworn under oath. The court did not decide whether the other requirements for waiver were met, although it did note that other courts were split on whether eminent foreclosure is an exigent circumstance.

***In re Afolabi*, 343 B.R. 195 (Bankr. S.D. Indiana, 2006)**

The debtor filed a Chapter 13 petition along with a Certification of Exigent Circumstances one day before a sheriff's sale. The Certification was submitted under §109(h)(3)(A) to waive the credit counseling requirement, because the sale was to take place the next day, and the debtor claimed to have no time to schedule a credit counseling session within the 24 hours between the petition filing and the sale. The Certification also stated that the debtor was negotiating with the mortgage company up until he filed for bankruptcy. The court held that "exigent circumstances" do not include "circumstances that hastened or precipitated the bankruptcy filing" but rather circumstances that "prevented the debtor from being able to obtain credit counseling prior to filing for bankruptcy." The debtor waited until the last minute to file for bankruptcy; his "self-created emergency does not constitute 'exigent circumstances.'" The debtor's "negotiations" with the mortgage company were more likely "a one-sided attempt to stop the inevitable," but even if not, the court could not find that the negotiations prevented the debtor from obtaining credit counseling.

The debtor's Certification also stated that he could not get an appointment within 5 days after 5/16/06. The court held that a debtor must attempt to obtain credit counseling within 5 days prior to filing the petition.

***In re Rodriguez*, 336 B.R. 462 (Bankr. D. Idaho, 2006)**

The debtors filed a Chapter 13 petition on November 2, 2005. The wife was facing garnishment unless a bankruptcy notice was received by her employer by November 3. They first contacted counsel in early October following a garnishment; the wife knew the law was changing but didn't know about the credit counseling requirement. Two more garnishments occurred, and then the husband lost his job. On November 2, the debtors attempted to contact two credit counseling agencies over the internet at their attorney's office, but they were unable to obtain assistance from either one. Their attorney advised them to file, because they might have "exigent circumstances" to get them out of the credit counseling requirement. After filing, the debtors made credit counseling arrangements. §109(h) requires that a debtor file with the bankruptcy petition a certificate showing credit counseling. §109(h)(3)(A)(i) states that if a debtor submits a certification describing "exigent circumstances that merit a waiver" of the requirement, the debtor has a "temporary exemption" from the requirement. The debtors filed a "Request for Waiver of Timely Filing of Title 11 USC §109(h) Credit Certificate" the day after filing the petition. The court held that a "certification" must be more than a motion signed by counsel; it must follow 28 USC § 1746(2), which has the following form: "I declare (or *certify*, verify or state) under penalty of perjury that the foregoing is true and correct. Executed on (date)." [emphasis supplied by the case]. The certification must satisfy three elements – it must describe exigent circumstances, it must describe an inability to obtain credit counseling within 5 days; and the court must find it satisfactory.

To comply with the first element, the "exigent circumstances" described must relate to an urgent need to file a petition, establishing something sufficiently different from typical reasons – "the described and certified facts must show what makes this debtor different from all the others who are expected to comply with §109(h)(1)." To comply with the second element, the certification must state that the debtor requested credit counseling prior to filing and that the agency contacted advised the debtor that the counseling session could not take place within 5 days. Finally, the court must be satisfied by the certification, which is discretionary. The court held that the debtors here did not meet the requirements. Even if they had established exigency and contact with credit counselors, the court was not satisfied. The case was dismissed.

***In re Ashley*, 2006 Bankr. LEXIS 354 (Bankr. E.D. Virginia, 2006)**

The debtor filed Chapter 7 on February 3, 2006. She had previously filed a Chapter 13 case in 1998; that case was converted to a Chapter 7, and she was granted a discharge on May 8, 1999.

There are three requirements for waiving the credit counseling obligation. If the debtor files a certificate with the court setting forth "exigent circumstances", stating that the debtor requested credit counseling from an approved agency but was unable to obtain services within 5 days of the request, and that is satisfactory to the court. The debtor here did not file such a certificate. She has not set forth any exigent circumstances showing a need for immediate bankruptcy filing, and she has not stated that she attempted to obtain credit counseling services. She indicated that she was unaware of the requirement; the court therefore dismissed the case.

See also:

a. *In re Carey*, 341 B.R. 798 (Bankr. M.D. Florida, 2006) (debtors failed to fulfill the requirements of §109(h)(3)(A)(ii) by first attempting to obtain credit counseling after the filing, and the court held that striking the petition was proper)
b. *In re Bricksin*, 346 B.R. 497 (Bankr. N.D. Cali., 2006) (debtors complied with the credit counseling requirement by remaining in credit counseling initially entered 180 days prior to the petition filing, even though they failed to file a certificate, because they were "in compliance with [the law's] spirit")
c. *In re Wilson*, 346 B.R. 59 (Bankr. N.D. N.Y., 2006) (case dismissed for failure to comply with the credit counseling requirement, because imminent foreclosure is not "exigent circumstances" and the debtors must sign the certification and not just their attorney)
d. *In re Piontek*, 346 B.R. 126 (Bankr. W.D. Penn., 2006) (case dismissed as to the debtor wife, because the debtor husband's separate satisfaction of the credit counseling requirement is not imputed to his jointly filing wife)
e. *In re Petit-Louis*, 344 B.R. 696 (Bankr. S.D. Florida, 2006) (debtor was entitled to waive the credit counseling requirement on the grounds that he only spoke Creole)
f. *In re Elmendorf*, 345 B.R. 486 (Bankr. S.D. N.Y., 2006) (case was stricken rather than dismissed, because the debtor was not actually a "debtor" since she had not filed her certificate showing compliance with the credit counseling requirement).

H. Reaffirmations: Disclosures and *In Re Latanowich*

a. The special notices and the modified B240 Reaffirmation Agreements have been incorporated into the code through §524(k). 524(k) supplements the requirements to obtain a valid reaffirmation set forth in 524(c) and (d).

b. §524(k)(2) states that the "disclosures made shall be made clearly and conspicuously and in writing." It further provides that the terms "Amount Reaffirmed" and "Annual Percentage Rate" shall be disclosed more conspicuously than other terms. The requisite disclosure must also contain language that states "before agreeing to reaffirm a debt, review these important disclosures."[15]

c. Under Summary of Reaffirmation Agreement, the agreement must state "this summary is made pursuant to the requirements of the Bankruptcy Code."[16]

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15 11 U.S.C. 524(k)(3)(A).
16 11 U.S.C. 523(k)(3)(B).

d. §524(k)(3) requires that Reaffirmation Agreements:

1. Outline the rights of the debtor
2. Specify the amount of the debt being reaffirmed
   A. The agreement must contain the term "amount reaffirmed" and must state "this amount is the total amount of the debt you have agreed to reaffirm by entering into this agreement . . . your credit agreement may obligate you to pay additional amounts which may come due after the date of this disclosure. Consult your credit agreement."[17]
3. Specify additional charges or costs imposed upon the debtor
4. Specify the annual percentage rate, and simple interest rate. As stated previously, this term must be more conspicuous than the other terms of the agreement.[18]
5. Provide a statement of the repayment schedule, if elected by the creditor
6. Provide a description of the property to which the lien is attached in the case of a secured debt
7. Specify the original purchase price of the items
8. Provide a statement that the debtor has the right to consult an attorney
9. Provide a statement that the reaffirmation agreement must be filed with the court before it becomes effective
10. Provide a statement that the debtor has the right to rescind the reaffirmation within 60 days of filing

***In re Reardon*, 2006 Bankr. LEXIS 1238 (Bankr. D. N.H., 2006)**

The debtor signed a reaffirmation agreement with Allen Mello Dodge for a vehicle. For such an agreement to be enforceable, it must be entered into before discharge is granted under §727, and §524(k) disclosures must have been made at or before the time the agreement is signed by the debtor. The agreement must be filed with the court, and the court must determine that the agreement does not impose an undue hardship on the debtor. The agreement in this case did not comply with §524(k)(3) because it failed to identify the creditor to whom notice of rescission should be given or any address to which the debtor should mail such notice. Additionally, the court held that the agreement failed to meet the requirement that the agreement be "accompanied by the best available evidence of the claim and, as appropriate, copies of the underlying contractual agreement" as set forth in AO 4008-1(b)(2). The agreement was filed with the Installment Contract, which was not an agreement between the debtor and the lienholder but between the debtor and the dealer. The court held that there was not enough evidence supporting any claim or agreement between the parties. The court held that the agreement was improperly completed and "too vague, uncertain, and contradictory to constitute an enforceable agreement." The court disapproved the agreement.

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17 11 U.S.C. 523(k)(3)(C) & (D).
18 11 U.S.C. 523(k)(3)E).

I. Reaffirmations: The Fourth Option

a. Prior to BAPCPA, §521 provided that if an individual debtor's schedule of assets and liabilities included consumer debts which are secured by property of the estate:

1. The debtor must, within 30 days after the filing of the petition or on or before the date of the meeting of creditors, whichever is earlier, file with the clerk a statement of his intention with regard to such property.

b. The debtor had the option of surrendering, redeeming, or reaffirming, but was obligated to perform the stated intention within 45 days after filing of the statement of intention.

c. The construction of §521 led to a dispute as to whether a Chapter 7 debtor could continue making regular payments on a secured consumer debt without entering into a written reaffirmation agreement.

d. Through Amendments to §521, Congress has now abolished the fourth option also known as "pay and drive" or "ride through". See *In re Donald*, 343 B.R. 524 (Bankr. E.D. N.C., 2006), infra.

1. See also *In re Steinhaus*, 2006 Bankr. LEXIS 2116 (Bankr. D. Idaho, 2006) (the automatic stay was terminated after the Statement of Intention indicated the debtor would retain and make payments on the vehicle but failed to indicate whether the debtor would reaffirm or redeem;) and *In re Boring*, 346 B.R. 178 (Bankr. N.D. W.V., 2006) (the automatic stay was terminated after the debtor only indicated on her Statement that she would retain and pay on the vehicle, and not whether she would reaffirm or redeem).

e. §521, as amended, provides that insolvency and bankruptcy provisions in contracts and lease agreements are valid and that such provisions create a default if the automatic stay is vacated as a result of the debtor's failure to assume a lease pursuant to §365(p), reaffirm a contract pursuant to §524(c), or redeem pursuant to §722.[19]

1. Recent case developments:
   - A. *In re Rowe*, 342 B.R. 341 (Bankr. D. Kansas, 2006) (relief from stay automatically granted when the debtor chooses the fourth option, but the creditor's right to repossess is determined by state law)
   - B. *In re Anderson*, 2006 Bankr. LEXIS 2015 (Bankr. D. Delaware, 2006)
   - C. See also *In re Winters*, 69 B.R. 145 (Bankr. D. Ore., 1986) (enforcing a default provision in the security agreement

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[19] 11 U.S.C. 521(a)(6).

would be a violation of the stay), and *In re Rose*, 21 B.R. 272 (Bankr. D. N.J., 1982)

***In re Donald*, 343 B.R. 524 (Bankr. E.D. N.C., 2006)**

The debtors filed Chapter 7 on January 27, 2006 and signed a reaffirmation agreement for the debt on their Lexus. The purchase price was $12,335, but the outstanding debt was $8,502.90. The loan documents contain a clause that states that filing bankruptcy constitutes default. The payments were current as of the date of filing. The debtors' attorney did not sign a declaration or affidavit under §524(c)(3). The agreement was filed April 5, 2006. The debtors' Statement of Intention indicated that the debtors would retain the vehicle and continue to make payments, but it did not mention reaffirming the debt. The debtors argued that they could keep the car without reaffirming and that they signed the agreement only to make sure they could keep the car if they were wrong.

Pre-BAPCPA, there was a "ride-through option" (also called the "pay and drive"), in which a debtor could keep a vehicle and continue to pay the vehicle creditor without reaffirming the debt. While a minority of courts pre-BAPCPA held that this was not the case and that the debtor had to choose redemption, reaffirmation, or surrender, the majority held that the debtor was not required to choose only one of these three options; he could choose to "ride through". The notice of intention requirement was a notice requirement only and did not alter the debtor's rights with respect to the property. The BAPCPA amended §521, but none of these amendments eliminated the "ride through option".

§362(h) creates an exception to §521(a)(2)(C) so that any debtor who does not comply with the time limits for filing his statement of intention will lose the protection of the automatic stay, and the property is no longer the estate's. The purpose of this exception is to encourage debtors to comply with §521. In order to do so, the debtor must state his intention to reaffirm or redeem; otherwise, the stay is lifted. This section terminates the stay, but it does not eliminate the ride-through option.

§521(a)(6) eliminates the ride-through, but only in cases in which the creditor has an allowed claim for the purchase price. The court stated that this provision would rarely be applicable in Chapter 7 cases, because for a claim to be allowed, a proof of claim must be filed. Creditors do not file proofs of claim in no-asset Chapter 7s. Even if one is filed and the claim is an "allowed claim", it must be for the "purchase price", which is not the same as a claim for a "purchase money obligation" or one secured by a PMSI. It is the price agreed upon for which property is sold and purchased. The court held that if Congress had meant something other than the full purchase price, it would have said so. Creditors rarely have an allowed claim for the full purchase price. In this case, the debtors had paid down their debt, so the claim was for less than the purchase price, and the court held that §521(a)(6) did not apply.

The court held that ipso facto bankruptcy default clauses are permitted by the amendments but that the agreement must also contain the required disclosures; in this case, the disclosures were incorrect or misleading.

Two courts have determined that BAPCPA eliminated the ride-through option; this court agreed. The court held that the addition of §§521(a)(2)(C), 362(h), 521(a)(6) and 521(d) indicates that Congress intended to eliminate the ride-through.

The reaffirmation agreement was approved, because there was no undue hardship. The court held that in other cases, it may be that a debtor may sign a reaffirmation agreement that the court disapproves, but may still keep the vehicle while making payments. The court also held that a creditor may allow a debtor to keep a vehicle and pay on it without reaffirming the debt.

***In re Norton*, 2006 Bankr. LEXIS 1788 (Bankr. E.D. Tenn., 2006)**

The debtor filed Chapter 7 on May 2, 2006; the petition included her Statement of Intention, which stated that the debtor would retain and make payments on a parcel of real property and a PT Cruiser. The Trustee moved to extend the period of time in which the debtor had to perform the Statement as to the car, and also to extend the stay. The court held that because the Trustee's motion was filed 16 days prior to the deadline for filing the Statement, the motion was timely. The court granted the motion, holding that the car was of consequential value to the estate and that the secured creditor had a substantial equity cushion; the court ordered the debtor to turn the vehicle over to the Trustee. The debtor's case was dismissed for failure to timely submit tax returns.

***In re Anderson*, Case No. 06-10297 (Bankr. D. Delaware, 2006)**

The debtors reaffirmed various debts according to their Statement of Intention, including a debt owed on their vehicle. The debtors did not sign any reaffirmation agreements. After discharge, the debtors defaulted, and the creditor repossessed the vehicle. The debtors reopened their bankruptcy case in order to file a Show Cause Petition. The debtors argued that the fourth option was still viable under BAPCPA.

BAPCPA added §521(a)(6), which requires that the debtor either reaffirm the debt or redeem the property within 45 days after the first meeting of creditors in order to keep the vehicle if the creditor has both a purchase money security interest in the property and an allowed claim. That section also states that failure to reaffirm or redeem will result in a termination of the stay as to that property. The creditor did not file a proof of claim in this case, but the court held that whether the claim was an "allowed claim" need not be decided, because the creditor was entitled to repossess pursuant to §§ 521(a)(2)(C) and 362(h)(1). §521(a)(2)(C) refers to §362(h), which states in subsection (1) that the stay will be terminated if the debtor fails to file a Statement of Intention agreeing to surrender, redeem, reaffirm, or assume, and perform that intention. The term "allowed claim" is not used in this section, and there is no language describing the "fourth option". In this case, the debtors filed the Statement but did not reaffirm the debt, and the court held that the stay was terminated.

The original contract between the debtors and the creditor contained a default on filing clause; BAPCPA makes such clauses enforceable under §521(d) when the debtor fails to comply with §521(a)(6) or §362(h)(1) or (2). State law permits repossession via a default on filing clause. The court held that the creditor did violate the discharge injunction when it sent the debtors a letter charging them with the deficiency on the vehicle after the debt had been discharged. The court held that sanctions are only ordered to deter future conduct, and the debtors did not regain possession of the vehicle.

J. Additional Mandatory Disclosures

a. §524(k)(3)(J) has been added to require the following statements:

1) Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.

2) This section also requires a statement advising the debtor to "read the disclosures in Part A carefully. Consider the decision to reaffirm carefully. Then, if you want to reaffirm, sign the reaffirmation agreement in Part B."

3) If you were represented by an attorney during the negotiation of this agreement, your reaffirmation becomes effective upon the filing of the agreement with the Court, unless the reaffirmation is presumed to have an undue hardship as explained in Part D.

4) If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home.

5) YOUR RIGHT TO RESCIND (CANCEL) YOUR REAFFIRMATION AGREEMENT. You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, which ever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (canceled).

6) WHAT ARE YOUR OBLIGATIONS IF YOU REAFFIRM THIS DEBT?
-A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

7) ARE YOU REQUIRED TO ENTER INTO A REAFFIRMATION AGREEMENT BY ANY LAW?
No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

8) WHAT IF YOUR CREDITOR HAS A SECURITY INTEREST OR LIEN?
Your bankruptcy discharge does not eliminate any lien on your property. A 'lien' is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the security property if you do not pay the debt or if you default on the debt. If the lien is on an item of personal property that is exempt under your State's law or that the Trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you make a single payment to the creditor equal to the current value of the security property, as agreed by the parties or determined by the court.

K. Certification of Debtor's Attorney

a. §524(k)(5)(A) requires the debtor's attorney to certify the following in reaffirmation agreements:
   1. He/she is the attorney for the Debtor and represented this Debtor during the course of negotiating this Reaffirmation Agreement;
   2. That the agreement represents a fully informed and voluntary agreement by the Debtor and does not impose an undue hardship on the Debtor or any dependent of the Debtor;
   3. He/She has fully advised the Debtor of the legal effect and consequences of this Reaffirmation Agreement including but not limited to a default under such agreement.

b. §524(k)(5)(B)
   1. If a presumption of undue hardship has been established the certification shall state that in the opinion of the attorney the debtor is able to make the payment
      A. The presumption can be avoided if schedules I and J and the debtors Statement in Support of the Reaffirmation Agreement clearly displays the debtors ability to make the payments required in the reaffirmation agreement

   2. Must also include signature of Debtor's attorney and the date signed

L. Debtor's Statement in Support of the Reaffirmation Agreement

a. §524(k)(6)(A) requires the following statement by the debtor:

I believe this reaffirmation agreement is in my best interest and will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received is $_________, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total $_______, leaving $_________ to make the required payments on this reaffirmed debt. I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make payments here:
____
____
____
____
____
____
_________________.

I received a copy of the Reaffirmation Disclosure Statement in
Part A and a completed and signed reaffirmation agreement.

b. If the debtor is not represented by an attorney, in the negotiation of the reaffirmation agreement *524(k)(7)* requires that the debtor file a Motion for Court Approval.

c. The Motion must state:

I am not represented by an attorney in connection with this reaffirmation agreement.

I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement of Support of this affirmation agreement.

Therefore, I ask the court for an order approving this reaffirmation agreement.

d. If the Court grants the debtor's motion and approves the reaffirmation agreement, the court order must state the following:

The Court grants the debtor's motion and approves the reaffirmation agreement described above.

e. §524(l) states that "notwithstanding any other provision of this title, the following shall apply:"

1. A creditor may accept payments from the debtor before and after the filing of an agreement of the kind specified in subsection (c) with the court;
2. A creditor may accept payments from a debtor under such agreement that the creditor believes in good faith to be effective;
3. The requirements in subsections (c)(2) and (k) shall be satisfied if the disclosures required under those subsections are given in good faith.

M. Presumption of Undue Hardship

a. Pursuant to §524(m)(2), a reaffirmation agreement is presumed to be an undue hardship on the debtor, until 60 days after it is filed with the court, if the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's statement in support of the agreement is less than the scheduled payments on the reaffirmed debt.

b. This presumption may be rebutted in writing by the debtor if the debtor's statement contains an explanation that identifies additional sources of funds to make the scheduled reaffirmation payments.

c. If the presumption is not rebutted to the court's satisfaction, then the court ***may*** disapprove the reaffirmation agreement.

d. However, no reaffirmation agreement will be disapproved without notice and a hearing and this section mandates the conclusion of this hearing before the entry of the debtor's discharge.

***In re Quintero*, 2006 Bankr. LEXIS 906 (N.D. Cali., 2006)**

The debtor filed Chapter 7 on February 13, 2006. The debtor submitted a reaffirmation agreement on April 4, 2006 for a Mitsubishi Lancer. The value of the vehicle was $8,000; the reaffirmed debt was $11,824.70. The court would not have approved the agreement prior to BAPCPA; the "pay and drive" option was available to allow the debtor to make payments and use the vehicle without being liable on a deficiency if the vehicle were repossessed and foreclosed. However, the court held that BAPCPA has eliminated the "pay and drive" option in §521(a), which states that a debtor must file a statement of intention with respect to the retention or surrender of the property, and the debtor may not retain the property without signing a reaffirmation agreement. Additionally, added section 524(k) requires certain disclosures to the debtor by the creditor prior to the debtor's signing the reaffirmation agreement. Amended section 524(c) provides that such an agreement is enforceable only if the debtor received these disclosures prior to signing the agreement. The court stated that it would approve the agreement if it were enforceable, as the debtor seemed able to pay, but the agreement was not enforceable because the required disclosures were not made, and the agreement did not contain a motion, declaration, or proposed form of order.

The Code is ambiguous as to whether the creditor may repossess the vehicle even though the debtor is current on her payments. The court held that the creditor could not do so, because the purpose of BAPCPA was "consumer protection". Congress could not have intended to give a secured creditor power to take a debtor's car away by failing to comply with disclosure requirements. The court held that the automatic stay was still in place under §362(h)(1)(B), since the creditor in effect had refused to enter an enforceable reaffirmation agreement with the debtor.

In re Payton, 338 B.R. 899 (Bankr. D. N.M., 2006)

The debtors filed Chapter 7 on December 27, 2005. They filed a reaffirmation agreement with Wells Fargo for a Chevy truck. The debtors' Schedules I and J showed a monthly deficit of nearly $400, while the income and expense figures in the reaffirmation agreement showed a surplus of $752. The Schedules also showed that both debtors were employed, and they had four minor children. The title of the truck, attached to the agreement, showed an odometer reading of 8 miles. Schedule B/25 showed the mileage at 44,000. The debtors' Statement of Intention indicated that the debtors would reaffirm their motor home debt but retain and continue to pay on their vehicles rather than reaffirm. They then sought to reaffirm the truck debt.

The court held that there is a presumption of undue hardship if the monthly income and expenses listed in the reaffirmation agreement show a loss or gain that is less than the reaffirmation payment; the debtor may rebut the presumption by showing other sources of income.

The court held that the court is not required to rely solely on the expenses and income listed in the reaffirmation agreement in deciding whether to approve or disapprove the agreement. The court is not required explicitly to approve a reaffirmation agreement. The court held that the agreement was an undue hardship upon the debtors, because the payments would cause them to continue "going underwater each month by $314", ultimately resulting in a default and deficiency judgment, snowballing into "a disaster for the Debtors and their children." The debtors would not necessarily lose the truck; they could still agree to make voluntary payments to Wells Fargo for the use of the truck, and Wells Fargo could repossess it (but could not get a deficiency or make any collections efforts).

The court held that it need not notify Wells Fargo of the hearing, because such notice is only required if the budget numbers in the agreement itself show a deficit if the debtor makes the required payments. Here, the agreement showed a $752 surplus exceeding the monthly payment. The court held that the income and expenses on Schedules I and J are irrelevant for notice purposes.

In re Laynas, 345 B.R. 505 (Bankr. E.D. Penn., 2006)

The debtor's schedules showed monthly income of $2,324 and monthly expenses of $3,075. The reaffirmation agreement with the motor vehicle creditor stated that the debtor's income was $2,800, while expenses were $2,600. Prior to BAPCPA, reaffirmation agreements were only subject to judicial scrutiny if the debtor's attorney did not file an affidavit or declaration that the debtor was fully informed and could make the payments, or if the debtor was unrepresented. The court would ascertain whether the

agreement imposed an undue hardship on the debtor and whether it was in the debtor's best interest. BAPCPA changed the requirements and made them more stringent. Not only are the agreement and the declaration by debtor's counsel required, but also a Statement in support of the agreement signed by the debtor and, if court approval is necessary, a motion and order for approval. The debtor's Statement must show monthly expenses and income; if the difference between the two is less than the monthly payment under the agreement, a presumption of undue hardship arises, and court review is required regardless of whether the debtor's attorney submitted a declaration or affidavit. The presumption may be rebutted in the debtor's Statement, but if not to the court's satisfaction, the court may disapprove with notice and a hearing.

In this case, the debtor's Schedules I and J showed different numbers than the Statement; according to the schedules, the debtor could not afford the payment. Even though the numbers in the Statement did not create the presumption of undue hardship, the court evaluated the accuracy of the information in the Statement by looking at other indicators of financial condition. The debtor did not provide an explanation for the differences between the Statement and the schedules. The court held that courts should also consider other factors regarding "the debtor's best interest", such as whether the debtor needs the vehicle or whether the debtor would actually lose the vehicle without the agreement (ride through). The court disapproved the agreement.

See also:

a. *In re Mendoza*, 2006 Bankr. LEXIS 1698 (Bankr. W.D. Texas, 2006) (the court presumed hardship after the debtors did not file their Statement in Support of Reaffirmation Agreement, even though the attorney certification was present)

b. *In re Stillwell*, 2006 Bankr. LEXIS 1847 (Bankr. N.D. Okla., 2006) (the court presumed hardship after the debtors' schedules indicated they could not afford the reaffirmation agreement payments, even though the debtors speculated that overtime would allow them to make the payments)

N. Limitations on the Automatic Stay

a. If the debtor chooses to retain personal property and either reaffirm or redeem, §521(a)(6) provides that it must be accomplished within 45 days after the date first set for the 341 hearing.

b. If the debtor fails to either reaffirm or redeem pursuant to the Statement of Intention within the 45-day time period, the property ceases to become property of the estate.[20] If the debtor fails to assume a lease, the leased property ceases to become property of the estate and the stay is automatically terminated.[21]

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[20] 11 U.S.C. 362(h)(1)(B).

[21] 11 U.S.C. 365(p).

c. The stay will be vacated and the property removed from the estate if the debtor fails to timely file the Statement of Intention and fails to indicate in the statement whether he is retaining or surrendering the property.[22] Further, the debtor is required to timely take the actions specified in the Statement. If the debtor is retaining the property, he must either redeem pursuant to §722, reaffirm pursuant to §524(c), or assume an unexpired lease pursuant to §365(p). Otherwise, the stay will be terminated.

b. Recent Case Developments:

1. *In re Woods*, 16 CBN 449 (Bankr. E.D. Mich., 2006)(the court is not required to enter an order confirming whether the automatic stay was terminated pursuant to §521(a)(6).)
2. *In re Craker*, 337 B.R. 549 (Bankr. M.D. N.C., 2006) (the automatic stay was terminated after the debtor filed her statement of intention within the prescribed time period but failed to indicate on the statement whether she intended to reaffirm, redeem, or surrender.)

VI. REDEMPTION

A. Amendments Affecting Redemption

a. The provision governing redemption is *§722*. Prior to the amendment, it provided that:

1. An individual debtor may, whether or not the debtor has waived the right to redeem under this section, redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if such property is exempted under Section 522 of this title or has been abandoned under section 554 of this title, by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien.

b. Prior to the amendments, there was an issue as to whether the redemption amount could be paid in installments. The minority of courts allowed the debtor to redeem in installments.

2. The Court in *In re Bell* noted that the bankruptcy court's inability to monitor the installment payments and to expeditiously and meaningfully enforce the installment redemption raises serious issues of adequate creditor protection and prohibited installment redemption.[23]
3. In *In re Schweitzer*, the Court stated that Congress was well aware that the typical debtor may not be financially able to afford a lump sum redemption. However, the Court also noted that the reaffirmation process was available to such debtors who sought to

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[22] 11 U.S.C. 362(h)(1)(A).

[23] 700 F.2d 1053 (6th Cir. 1983).

make installment payments. The Court further acknowledged that reaffirmation alternative may be imperfect, but that the "deficiencies are more properly direct to Congressional review, and consequently, provide a poor excuse for judicial legislation."[24]

c. §722 has been amended to explicitly require that the redemption amount be paid in full at the time the property is redeemed. As amended, §722 states:

"an individual debtor may, whether or not the debtor has waived the right to redeem under this section, redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if such property is exempted under §522 of this title or has been abandoned under §554 of this title, by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien ***in full at the time of redemption***."

d. Federal Rule of Bankruptcy Procedure 6008 still applies and the issues raised in *Sears, Roebuck & Co. v. Spivey*,[25] and *In re White*[26] have been left unresolved by the amendments to §722. Therefore, it is recommended that creditors obtain orders for redemption.

B. Amendments Affecting the Valuation of Collateral

a. A dispute existed relating to the valuation of secured property and resulted in division among jurisdictions as to how value was to be determined in a §722 redemption context.

b. To emphasize the division, statutory interpretation by the U.S. Bankruptcy Court for the Northern District of Illinois resulted in 3 different methods of determining value (average trade in value, replacement value and the mid-point between wholesale and retail value).[27]

1. The Northern District of Illinois in *In re Triplett* relied on legislative history and case law in concluding that the debtor had to pay the creditor the value of the collateral, not the balance due on the contract, in order to redeem.[28]
2. Several years later, the Northern District of Illinois ruled in *In re Smith* that replacement value applies in the context of a Chapter 7 redemption.[29]

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24 19 B.R. 860 (Bankr. E.D. N.Y. 1982); In re Clark, 10 B.R. 605 (Bankr. C.D. Ill. 1981); In re Miller, 4 B.R. 305 (Bankr. E.D. Mich. 1980); In re Cruseturner, 8 B.R. 581 (Bankr. D. Utah 1981).

25 265 B.R. 357 (E.D. N.Y. 2001).

26 231 B.R. 551 (D. Vt. 1999).

27 In re Triplett, 256 B.R. 594 (Bankr. N.D. Ill. 2000); In re Smith, 307 B.R. 912 (Bankr. N. D. Ill. 2004); In re Stark (Bankr. N.D. Ill. 2004)

28 In re Triplett, 256 B.R. 594 (Bankr. N.D. Ill. 2000).

3. In 2004, the same year as the Court's decision in *In re Smith*, the same Court held that the mid-point value was appropriate and noted that "the valuation issue cannot be resolved by resorting to either the statutory text of 722 or its legislative history."[30]

c. The most extreme valuation standard was established in *In re Donley*. The Bankruptcy Court in the Southern District of Ohio found that the replacement value standard is not appropriate in chapter 7 cases because such a standard does not reflect the purpose of the valuation and the proposed disposition or use of such property.[31] The *Donley Court* noted that the legislative history of *§722* does not support the replacement value standard. The Court held that the appropriate valuation standard should be that which the creditor would receive if the redemption did not occur and it were forced to repossess and sell the property, which in this case, consisted of two mobile homes. The Court further held that the agreed upon appraised value of $10,000 for the mobile homes was irrelevant because such value assumed that the trailers would remain in place. The Court noted that, under a repossession and resale of the property, this assumption would be false. In concluding that the debtor could redeem the mobile homes for $1,250, the Court noted that extensive repairs would be needed after the mobile homes were removed from the property and that a purchaser would not be expected to offer much money for the mobile homes.[32]

d. §506 has been amended to provide that the value for redemption shall be the replacement value without deducting for the costs of sale or marketing.[33] This amendment adopted the Supreme Court's holding in Rash.[34]

e. §506(a)(2) further clarifies the valuation standard by defining the replacement value as the "price a retail merchant would charge for property of that kind considering the age and condition of the property at the time the value is determined."

***In re Mayland*, 2006 Bankr. LEXIS 967 (Bankr. M.D. N.C., 2006)**

The amount financed on the debtors' vehicle was $24,129.90. The debtors filed Chapter 7 on March 17, 2006; the balance due was $20,398. The case was converted to Chapter 13; the Motion to Redeem was filed on March 22 with the vehicle valued at $12,125. The debtors argued that the proper valuation method was 90% of the NADA value. The creditors argued that the entire NADA value, $13,900, was proper. Pre-

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29 In re Smith, 307 B.R. 912 (Bankr. N.D. Ill. 2004).
30 In re Stark (Bankr. N.D. Ill. 2004).
31 In re Donley, 217 B.R. 1004 (Bankr. S.D. Ohio 1998).
32 Id.
33 11 U.S.C. 506(a)(2).
34 Associates Commercial Corporation v. Rash, 117 S.Ct. 1879, 138 L.Ed. 148 (1997).

BAPCPA, the standard for valuing property in Chapter 13 cramdown was set out by *Rash*. Thereafter, most courts used replacement value. Pre-BAPCPA, the court used 90% of the NADA value as the replacement value to account for the car being in less than peak condition. The majority of courts, however, held that *Rash* did not apply in Chapter 7 cases. BAPCPA amended §506(a) to state that personal property securing an allowed claim is replacement value at the time of filing without deductions for costs of sale or marketing. The court held that in the case of property acquired for personal, family, or household purposes, "replacement value" is the price a retailer would charge considering the age and condition of the property. The court held that 90% of NADA was a proper starting point and consistent with §506(a)(2). The court held the new standard applicable to both Chapter 7 and Chapter 13 cases for redemption purposes. In this case, 90% of NADA was the proper valuation because the vehicle was purchased for personal purposes.

***In re Brown*, 2006 Bankr. LEXIS 713 (Bankr. D. S.C., 2006)**

The debtor filed Chapter 13 on January 19, 2006. The debtor's motion to redeem valued his vehicle at $6,000 for redemption, based on the NADA value and the Blue Book value for a certain trim level of Intrepid. The creditor valued a different trim level and came up with $8,575, noting that the car required $656 in repairs. Pre-BAPCPA, the proper valuation method for Chapter 7 redemption was "replacement value more closely related to a retail value". The BAPCPA amended §506(a)(2) to create a specific method for determining redemption value. That section states that the value for personal property used primarily for personal, family, or household purposes should be determined based upon the price a retailer would charge for similar property in that condition at that time, but without deducting costs for sale or marketing. In this case, the only evidence of the vehicle's condition was the estimate offered by the creditor that the vehicle requires $656 in repairs. Subtracting $656 from the $8,575 asserted by the creditor, the court held that the redemption value was $7,919.

VII. LEASES

a. When the 1978 Code was enacted few, if any, personal property leases existed. In the early 1990s, leases became one of the preferred methods for individuals to obtain vehicles or other property.
   1. Section 365 has been amended to reflect the economic realities of the evolution that has occurred in consumer credit and provides that an individual may assume a lease in a Chapter 7 case by notifying a creditor in writing of the debtor's intent to assume the lease.
   2. Not later than thirty days after notification, the debtor must assume the lease and the liability becomes the liability of the debtor and not the estate.
      A. Creditors may condition their consent to the assumption upon the cure of all pre-petition defaults.

b. The failure of a debtor to assume a lease will give rise to a termination of

the automatic stay and removal of the property from the estate under § 362(h)(1).[35]

c. In assumptions, Fed. R. Bankr. P. 6006 currently applies and requires that the debtor file a motion to assume the lease and obtain an order from a bankruptcy court.

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[35] 11 U.S.C. § 362(h)(1) (2005).

VIII. DISCHARGE AND DISCHARGEABILITY

A. Amendments that Affect Discharges

a. §727, pre-amendment, provided that "the court shall grant the debtor a discharge unless the debtor has been granted a discharge . . . in a case commenced within 6 years before the date of the filing of the petition."

b. §727, as amended, expands the time between Chapter 7 discharges from 6 years to 8 years.[36]

c. §727 has also been amended to include material misstatements in an audit and the failure to make necessary papers/records available for inspection in connection with an audit as grounds for denial of a discharge.[37]

d. Furthermore, a debtor can also be denied a discharge for the failure to complete an instructional course concerning personal financial management after filing his petition.[38]

e. However, a debtor can still receive a discharge even if he fails to complete such course if:
    1. The debtor is a person described in *§109(h)(4)*[39] or if the United States Trustee (or bankruptcy administrator) determines that the approved instructional courses are not adequate.[40]

f. §727(a)(12) has been amended to provide that a debtor may not be granted a discharge if there is a pending proceeding that might give rise to a limitation of the homestead exemption under §522(q)(1).

g. Entry of a discharge may also be delayed if there is an action pending in which the debtor may be found:
    1. Guilty of a felony, or
    2. Liable for a debt arising from
        A. Violation of federal Securities Exchange Act or similar state law.

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36 11 U.S.C. 727(a)(8)
37 11 U.S.C. 727(d)(4)
38 11 U.S.C. 727(a)(11)
39 109(h)(4) describes a debtor who the court determines, after notice and hearing, suffers from an impairment by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities (incapacity), that is so physically impaired as to be unable to participate in an in person, telephone, or Internet briefing (disability), or that is in active military duty in a military combat zone.
40 Id.

B. Criminal act, intentional tort, or willful or reckless misconduct causing serious physical injury or death to an individual
C. RICO civil penalty.[41]

h. §1328(a) has been amended to provide that a discharge will not be granted to a debtor who owes domestic support obligations until there is a certification that the debtor is current with such post-petition obligations.

i. The Act also adds *§1141(d)(6),* the plain wording of which provides that confirmation of a plan does not discharge a debtor that is a corporation from certain debts, including:

Debts specified in *§523(a)(2)(A)* and *§523(a)(2)(B)* (obtaining credit, property, financing or refinancing through fraud, etc..) owed to a domestic governmental unit or owed to a person as a result of an action filed under subchapter II of Chapter 37 of Title 31 or any similar state statute (debts owed to a governmental unit obtained by fraud) OR:

For a tax or customs duty with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or to defeat such tax or customs duty.

j. Despite the plain wording, the legislative history makes it clear that the intent is to bar from discharge the above referenced debts owed by a debtor that is an individual.

B. Dischargeability: Taxes:

a. The three year look back period for priority treatment of taxes is suspended for any period in which collections was prevented by existence of a confirmed plan, an offer in compromise (OIC), or a prior automatic stay plus an additional 90 days[42]. This extends the exception relating to the discharge of tax obligations under *§523(a)(1).*

C. Luxury Goods or Services/Extensions of Credit:

a. §523(a)(2)(c) currently provides that consumer debts owed to a single creditor and aggregating more than $1,225 for luxury goods or services incurred by an individual debtor on or within 60 days before the order for relief, or cash advances aggregating more than $1,225 that are extensions of consumer credit under an open end credit plan obtaining by an individual debtor on or within 60 days before the order for relief, are presumed to be nondischargeable.

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[41] 11 U.S.C. 727(a)(12)
[42] Section 507(a)(8)(C)

b. §523(a)(2)(c) has been amended to extend this presumption to debts incurred for luxury goods or services incurred within ***90 days prior of the filing of the Order for Relief in the amount of $500.00 dollars.*** Extensions of credit on an open end credit plan as defined in *§130* in the Truth in Lending Act are presumed to be non-dischargeable if incurred within **70 days prior to the Order of Relief if the amount is equal to or in excess of $750.00 dollars.**

D. Amendments that Affect Dischargeability of Student Loans

a. §523(a)(8) has been expanded to cover the full range of loans including educational benefits overpayments, scholarships, stipends, aide insured or guaranteed by a governmental unit or under any program funded in whole or in part by a governmental unit or non-profit institution or *§528(a)(8)(B)* any other educational loan that is a qualified education loan as defined in *§221(d)(1)* of the Internal Revenue Code of 1986.

1. The undue hardship standard still applies in actions seeking to except student loans from discharge.
2. The majority of cases have adopted the Brunner standard and this standard is unaltered by the Act.[43] The Brunner standard is a three part test that requires that the debtor establish (1) that she cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if forced to repay the loans, (2) that additional circumstances exist indicating this state of affairs is likely to persist for a significant portion of the repayment period for student loans; and (3) that she has made a good faith efforts to repay the loans.[44]

E. Amendments that Affect Governmental Obligations/Debts

a. 11 U.S.C. §523(a)(14) provides that debt incurred to pay the Internal Revenue Service or other U.S. obligations are non-dischargeable.

b. Congress has created an additional exception to discharge to except obligations created to pay governmental units other than the United States if such debt would be non-dischargeable under §523(a)(1).

1. This amendment was prompted as a result of individuals paying state or local property taxes, income taxes, and other obligations due to governmental units with credit cards.
2. This provision excepts from discharge those obligations that would fall within §523(a)(1).
3. In essence, most obligations owed to local, state or federal taxing authorities due within 3 years prior to the filing of the bankruptcy case are excepted from discharge under this provision.

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43 Brunner, 831 F.2d. 395 (2d Cir. 1987).
44 Id.

F. Drunk Driving Exceptions

a. Debts for death or personal injury caused by the debtors operation of a motor vehicle, vessel, or aircraft while intoxicated from using alcohol, a drug, or another substance are excepted from discharge under the amended §523(a)(9). This provision resolves a dispute among jurisdictions as to whether vessels and watercraft were intended to be included in "motor vehicles" under 523(a)(9). The amendment adopts the holding of the Southern District of Florida in *Williams v. Radijov* which held that a boat is a motor vehicle for the purposes of 523(a)(9).[45]

G. Amendments that Affect the Dischargeability of Non-Support Marital Debts

a. Pursuant to amendments to §523(a)(15), all property settlements resulting from divorce or separation proceedings not covered by the support provisions of §523(a)(5) are nondischargeable.

b. This provision is no longer subject to the requirements of §523(c) and the 60 day limitation for the filing of an adversary complaint imposed pursuant to Federal Rule of Bankruptcy Procedure 4007(c).

c. The amendment also deleted the undue hardship and the balance of harm test contained within 523(a)(15)(A) & (B).
   1. The 7th Court employed these tests in the Matter of Crosswhite and held that a spouse who seeks to have marital debt excepted from discharge has the initial burden of proof as to whether the debt is nonsupport debt that was incurred in the course of a divorce.
   2. The Court further held that, once the spouse overcomes that burden, the debtor then has the burden of establishing inability to pay and hardship that would be imposed upon him if required to do so.[46]

d. §523(a)(5) as amended clearly provides that a grant of a discharge does not discharge an individual debtor from any debt for a domestic support obligation.
   1. §523(a)(5) previously provided that a grant of a discharge does not discharge an individual debtor from any debt "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement . . . "

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45 111 Bankr. 361 (S.D. Fla. 1989).

46 Matter of Crosswhite, 148 F.3d 879 (7th Cir. 1998).

H. Amendments Affecting Dischargeability of Election Law Fines

a. Pursuant to §523(a)(14)(B), debts incurred to pay fines or penalties under Federal election law are non-dischargeable.

I. Amendments Affecting Dischargeability of Condo Dues

a. §523(a)(16), as amended, provides that post-petition dues/fees are non-dischargeable for as long as the debtor or trustee holds an equitable, legal or possessory interest in the unit.

J. Amendments Affecting Dischargeability of Prisoner's Fees

a. The list of non-dischargeable fees assessed against prisoners has been expanded to include those fees imposed under state law that are comparable to fees assessed under federal law.

K. Dischargeability of Pension Plan Loans

a. Amendments to §523 provide that obligations owed to a pension plan established by an employer under IRC §§401, 403, 408, 408A, 414, 457 and 501(c) to the extent:
   1. Permitted under ERISA §408(b)(1) or subject o IRC §72(p).
   2. Permitted loan from a thrift savings plan meeting the requirements of 5 U.S.C. 8433(g).

L. Payment Advices

***In re Lovato*, 343 B.R. 268 (Bankr. D. N.M., 2006)**

The court was required to dismiss the debtor's Chapter 7 case, because the debtor failed to file "copies of all payment advices or other evidence of payment within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor." §521(a)(1)(B)(iv). §521(i) mandates that the case be dismissed automatically on the 46th day after the filing if the debtor fails to file the payment advices within 45 days after filing the petition, unless 1) the debtor requests an extension within the 45 day period and the court finds justification for a time extension, or 2) the trustee files a motion within the 45 day period and the court finds that a) the debtor made a good faith to file the documents and b) the case would be in the best interest of the creditors. In this case, the debtor did not file the advices on time, nor did the debtor request an extension. The trustee did not make a motion requesting that the case not be dismissed. The court held that it had no discretion as to the time limits set forth in §521 and that dismissal was required, "because BAPCPA leaves the Court with no discretion to fashion any reasonable or equitable solution." The case was dismissed.

***In re Jackson*, 2006 Bankr. LEXIS 2054 (Bankr. S.D. Iowa, 2006)**

The debtors filed Chapter 7 on April 28, 2006. The documents submitted with the petition did not include payment advices or their Chapter 7 Means Test. They filed their Means Test on May 9, 2006 and their employee income records on June 12. The wife's records did not have payment advices for the pay periods of 3/5-3/18 and 3/19-4/1. On June 13, the court entered an order dismissing the case, finding that the payment advices were incomplete. The debtors filed the missing advices on June 20, and on June 23, they filed a motion for relief from the dismissal order.

§521(a)(1) requires that the debtor file, unless the court orders otherwise, copies of all payment advices or other evidence of payment received within 60 days prior to filing. §707(a)(3), left unchanged by BAPCPA, states that if a debtor fails to file any of the information required by §521(a)(1), on motion of the US Trustee, after notice and a hearing, the court may dismiss the case. The court held that under Chapter 13, the case may be dismissed or converted to a Chapter 7 only on request of the U.S. Trustee if the debtor fails to file the information required under §521(a)(1). 11 U.S.C. § 1307(c)(9). The court held that cases may also be dismissed automatically pursuant to §521(i)(1) if the case does not comply with §521(a)(1). The court held that such dismissals could not be performed sua sponte; a party in interest must file a §521(i)(2) request for entry of an order of dismissal.

***In re Wilkinson*, 346 B.R. 539 (Bankr. D. Utah, 2006)**

The debtor filed copies of payment advices for the 7-month period prior to bankruptcy. One payment advice was missing for a pay period within the 60 days prior to the filing. The debtor failed to file a replacement advice within the 45-day period specified in §521(a)(1). The debtor argued substantial compliance. The court held that the case was automatically dismissed on the 46th day under the clear and unambiguous statutory language. The court held that it had no equitable discretion to grant relief.

CHAPTER 13

I. 910-DAY VEHICLE CLAIMS

A. Generally

a. BAPCPA has amended §1325(a) for the benefit of creditors with a purchase money security interest securing debt incurred by the debtor for the purchase of a motor vehicle within 910 days prior to the petition filing date. Generally known as the "Hanging Paragraph", the provision at the end of §1329(a)(9) states:

> *For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.*

b. The majority of cases hold that the Hanging Paragraph, as it modifies claims under §1325(a)(5) in relation to §506, prevents a debtor from bifurcating and cramming down a claim by a creditor holding a purchase money security interest in a motor vehicle purchased for personal use within 910 days prior to the petition date. Thus, for the Chapter 13 Plan to be confirmed, such a creditor must be treated as fully secured up to the amount of the claim, with interest payable at the *Till* rate, in equal monthly installments adequate to ensure that the creditor receives the full amount of the claim.

1. *In re Johnson*, 337 B.R. 269 (Bankr. M.D. N.C., 2006)(denying confirmation of the Plan, which proposed cramdown, because the Hanging Paragraph disallowed bifurcation and cramdown of 910 claims).
2. *In re Robinson*, 338 B.R. 70 (Bankr. W.D. Missouri, 2006) (denying confirmation of the Plan, which proposed cramdown, because the Hanging Paragraph disallowed bifurcation and cramdown of 910 claims).
3. *In re Horn*, 338 B.R. 110 (Bankr. M.D. Ala., 2006)(allowing bifurcation because after multiple refinancing, the creditor did not have a PMSI).
4. *In re Parish*, 2006 Bankr. LEXIS 1205 (Bankr. M.D. Florida, 2006)(granting the creditor's Motion to Strike the Debtor's Motion to Value, because a 910 claim could not be stripped down).
5. *In re Brown*, 339 B.R. 818 (Bankr. S.D. Georgia, 2006)(holding that 910 claims were allowed secured claims and denying Plan

confirmation for failure to provide for present value to the 910 claim holders).

6. *In re Montoya*, 341 B.R. 41 (Bankr. D. Utah, 2006)(denying confirmation of the Plan, which proposed cramdown, because the Hanging Paragraph disallowed bifurcation and cramdown of 910 claims).
7. See also *In re Turner*, 2006 Bankr. LEXIS 628 (Bankr. D. S.C., 2006); *In re Montgomery*, 341 B.R. 843 (Bankr. E.D. Kentucky, 2006); *In re Quevado*, 2006 Bankr. LEXIS 1194 (Bankr. S.D. Cali., 2006); *In re Vega*, 344 B.R. 616 (Bankr. D. Kansas, 2006); and *In re Arguin*, 345 B.R. 876 (N.D. Ill., 2006).

c. The minority rule is set forth in *In re Carver*, 338 B.R. 521 (Bankr. S.D. Georgia, 2006), which held that the Hanging Paragraph completely removes the 910-day vehicle creditor's status as a secured creditor and that such creditor is unsecured for purposes of the Chapter 13 Plan. *Carver* held that a 910-day vehicle claim must receive payments that are the greater of 1) the full amount of the claim without interest, or 2) the cramdown amount with interest paid on the secured portion. Id. at 528.

d. Another interpretation has been set forth in *In re Wampler*, 2006 Bankr. LEXIS 1192 (Bankr. D. Kansas, 2006), which held that finding 910 claims to be fully secured would result in an "absurd conclusion". Id. at 17-18. The opinion stated that "[l]anguage within the context of §1325(a) requires a different interpretation of the phrase 'allowed secured claim' than was considered by the Supreme Court in [*Dewsnup v. Timm*, 502 U.S. 410 (1992)]." *Wampler* at 22. The court found that if a 910 creditor were treated as the majority of courts held, with its claim fully secured regardless of the collateral's value, debtors would be unable to discharge the unsecured portion, no matter how small the secured portion. Id. at 25. The court relied upon a recent revision of *Collier on Bankruptcy*:

> *Language added at the end of section 1325(a) by the 2005 amendments to the Bankruptcy Code removes certain claims from the protections of section 1325(a)(5). This new language states that for purposes of section 1325(a)(5), section 506 shall not apply to certain claims. Such claims, therefore, cannot be determined to be allowed secured claims under section 506(a) and are not within the ambit of section 1325(a)(5). Such claims may still be modified under section 1322(b)(2), which allows modification of the rights of holders of secured claims, with certain exceptions, but the restrictions on modification that apply to allowed secured claims under section 1325(a)(5) do not apply. A debtor is presumably bound only by the dictates of good faith and the other provisions of the Code in determining how such claims may be modified. Some courts, understandably, may look to prior law for guidance regarding what modifications are equitable.*

8-1325 Collier on Bankruptcy-15th Ed. Rev. P 1325.06(1)(a).

e. The anti-cramdown provision only applies to motor vehicles purchased for personal use; any property not a motor vehicle may be determined to be some "other thing of value" purchased within 1 year prior to the petition filing. *In re Curtis*, 345 B.R. 756 (Bankr. D. Utah, 2006) (holding that tractor-trailers are not motor vehicles, but are other things of value and subject to the anti-cramdown provision).

B. Interest on 910 Vehicle Claims

a. Since deferred payments aggregating to the *amount* of the claim on the effective date cannot fully compensate a creditor for the *value* of the claim, a creditor is entitled to compensation for the lost time-value inherent if paid in installments. "In order for the secured creditor to get payments over time under the plan having a present value equal to the allowed amount, as the above quoted statutory language directs, the debtor normally pays interest on the allowed amount." *GMAC v. Jones*, 999 F.2d 63, 66 (3d Cir. 1993); see also *Rake v. Wade*, 508 U.S. 464, 472, note 8 (1993), *superseded on other grounds by statute*, *Financial Sec. Assur. v. T-H New Orleans Ltd. Pshp. (In re T-H New Orleans Ltd. Pshp.)*, 116 F.3d 790, 796 (5th Cir. 1997); *In re Ehrhardt*, 240 B.R. 1, 4 (B.C. W.D. Mo. 1999); *In re Felipe*, 229 B.R. 489, 491 (Bankr. S.D. Fla. 1998); *In re Jones*, 188 B.R. 281 (Bankr. D. Or. 1995); *In re Johnson*, 63 B.R. 550, 551 (Bankr. D. Colo. 1986); *In re Mothershed*, 62 B.R. 113 (Bankr. E.D. Arkansas 1986); *In re Gincastro*, 48 B.R. 662 , 665 (Bankr. D. R.I. 1985); *In re Williams*, 44 B.R. 422 , 425 (Bankr. N.D. Miss. 1984); *GMAC v. Lefevre*, 38 B.R. 980, 984 (Bankr. D. Vt. 1983); *In re Trent*, 42 B.R. 279, 281 (Bankr. W.D. Virginia 1984); *Norton Bankruptcy Law and Practice 2d* § 122:8 (1998); *Lundin Chapter 13 Bankruptcy 3d* § 111-1 (2002).

1. Likewise, the Congressional Record indicates that section 1325(a)(5)(B)(ii) "contemplates a present value analysis that will discount value to be received in the future." H.R. Rep. No. 598, 95th Cong. 2d Sess. 414, *reprinted in* 1978 U.S. Code Cong. & Ad. News 6370.

b. The Supreme Court in *Till v. SCS Credit Corp.*, 541 U.S. 465 124 S. Ct. 1951; 158 L. Ed. 2d 787 (2004), set forth the interest rate applicable to secured debts crammed down pursuant to section 1325(a)(5) of the bankruptcy code. The *Till* Court interpreted section 1325(a)(5)(B)(ii) to require an interest rate that compensates creditors for the additional risk of default when it encounters a bankrupt debtor. The Court in *Till* required an interest rate of prime, plus a risk factor depending on the qualities of the debtor.

c. In the context of the BAPCPA, the majority of courts that have held that the Hanging Paragraph prevents bifurcation also hold that the *Till* rate of

prime plus risk of nonpayment is the correct rate of interest to apply to Chapter 13 cases to 910-day claims.

d. In *In re Robinson*, supra, the court held that because Congress did not specifically overturn *Till* when it enacted BAPCPA, *Till* is still good law and is still applicable to claims affected by the Hanging Paragraph. Id. at 74-75. The court noted that debtors are still permitted to modify the rights of secured creditors under §1322(b)(2), and the Supreme Court in *Till* included interest rates within the rights that may be modified. Id. at 75.

1. See also *In re Wright*, 338 B.R. 917 (Bankr. M.D. Ala., 2006)(holding that *Till* is not confined to cases involving undersecured creditors, but to all Chapter 13 cases in which the Plan is confirmed over creditor objection).
2. *In re Fleming*, 339 B.R. 716 (Bankr. E.D. Missouri, 2006)(holding that 910 claims are still subject to modification under §1322(b)(2), including the interest rate, and that the *Till* rate is appropriate for meeting the present value requirement).
3. *In re Wright*, 338 B.R. 917 (Bankr. M.D. Ala., 2006)(holding that *Till* applies to all cases that are confirmed over the objection of a secured creditor regardless of the claim's value).
4. *In re Shaw*, 341 B.R. 543 (Bankr. M.D. N.C., 2006)(holding that if Congress had intended to overturn *Till* in the BAPCPA amendments, it would have done so).
5. *In re Pryor*, 341 B.R. 648 (Bankr. C.D. Ill., 2006) (holding that interest is to be calculated at the *Till* rate in order to meet the present value requirement of §1325(a)(5)(B)).
6. See also *In re DeSardi*, 340 B.R. 790 (Bankr. S.D. Texas, 2006); *In re Scruggs*, 342 B.R. 571 (Bankr. E.D. Arkansas, 2006); *In re Murray*, 2006 Bankr. LEXIS 1374 (Bankr. M.D. Georgia, 2006); *In re Brooks*, 2006 Bankr. LEXIS 1129 (Bankr. E.D. N.C., 2006); *In re Bufford*, 2006 Bankr. LEXIS 1052 (Bankr. N.D. Texas, 2006); *In re Soards*, 2006 Bankr. LEXIS 1084 (Bankr. W.D. Kentucky, 2006); and *In re Lowder*, 2006 Bankr. LEXIS 1191 (Bankr. D. Kansas, 2006).

e. The minority view is set forth in the following cases:

1. *In re Carver*, supra, finding that the Hanging Paragraph did not prevent bifurcation of a 910 claim, held that such claim must receive payments that are the greater of 1) the full amount of the claim without interest, or 2) the cramdown amount with interest paid on the secured portion. *Carver* at 528.
2. *In re Wampler*, supra, finding that the Hanging Paragraph stripped a 910 claim of its secured status, held that such claim "may not include unmatured or… postpetition interest." Id. at 32.
3. *In re Taranto*, 2006 Bankr. LEXIS 1184 (Bankr. N.D. Ohio, 2006) held that because a 910 claim is fully secured under the Hanging

Paragraph regardless of the value of the collateral, the risk that *Till* protects against is reduced. Id. at 12. The court held that applying the prime plus rate set forth in *Till* would result in a windfall to holders of 910 claims, since their claims have already been subject to "artificial inflation". Id. at 12. "The Court will not blindly apply *Till* given this different context where no such risk exposure exists." Id. at 12-13, citing *Bank of Montreal et. al. v. Official Committee of Unsecured Creditors (In re American Homepatient, Inc.)*, 420 F.3d 559, 568 (6th Cir. 2005)(declining to apply *Till* in a Chapter 11 cramdown under a different context from that of *Till*).

C. Equal Payments

a. §1325(a)(5)(B)(iii) requires equal monthly payments to creditors in confirmed Chapter 13 cases.

b. §1325(a)(5)(B)(iii)(II) requires that the amount of periodic payments made to the holder of a claim secured by personal property over the life of the Plan "shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan." 11 USC §1325(a)(5)(B)(iii)(II).

1. In *In re Bufford*, the Bankruptcy Court for the Northern District of Texas, Dallas Division, looked to §361, as applied to §§362, 363, or 364, for guidance on what constitutes "adequate protection". *In re Bufford*, 2006 Bankr. LEXIS 1052 at 30 (Bankr. N.D. Texas, 2006).
2. The court in *Bufford* agreed with the Fifth Circuit that within the context of §362, adequate protection is " 'the amount of an asset's decrease in value from the petition date'". *Bufford* at 32, quoting *In re Stembridge*, 394 F.3d 383, 387 (5th Cir. 2004). The court held that payment of the creditor's claim in full over the life of the plan with in interest rate that protects the value of the claim as of the petition date was sufficient to meet this standard for adequate protection.

c. In *In re DeSardi*, 340 B.R. 790 (Bankr. S.D. Texas, 2006), the court held that the provision only requires that payments be equal monthly from the time payments begin until the time they are set to end. The court noted that §1325(a)(5)(B)(ii) used the language "as of the effective date of the plan"; yet the equal monthly payments provision, §1325(a)(5)(B)(iii), did not use such language. That section merely provides that "If… property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts." The court held that the payments must be level once begun and terminate once the creditor was fully paid.

1. *DeSardi* held that adequate protection is required to begin in the first month of a plan, however, even if equal payments do not begin until later.

d. In *In re Davis*, 343 B.R. 326 (Bankr. M.D. Florida, 2006), the court declined to determine the "parameters of what qualifies as 'equal monthly payments.'" Id. at 7.

e. See also *In re Wagner*, 342 B.R. 766 (Bankr. E.D. Tenn., 2006) (the plan could not be confirmed because it proposed a balloon payment in the 24th month).

D. Surrender in Full Satisfaction of a 910 Vehicle Claim

a. §1325(a)(5)(C) allows a debtor to surrender collateral to a creditor to meet plan confirmation requirements.

   (a) Except as provided in subsection (b), the court shall confirm a plan if:

   …(5)(C) the debtor surrenders the property securing such claim to such holder.

b. In *In re Ezell*, 338 B.R. 330 (Bankr. E.D. Tenn., 2006), the court held that §1325(a)(5)(C) is also subject to the Hanging Paragraph, and that surrender of a 910-day vehicle is in full satisfaction of the claim, because such a claim is fully secured for the amount of debt owed. See also *In re Payne*, 2006 Bankr. LEXIS 1696 (Bankr. S.D. Bankr. Ohio, 2006)(The plain meaning of the Hanging Paragraph is that it is to apply to all of §1325(a)(5)).

   1. *In re Brown*, 2006 Bankr. LEXIS 1583 at 14 (Bankr. N.D. Florida, 2006)(holding that "[i]f the 910 claim of a creditor is fully secured upon a debtor's retention of the vehicle under §1325(a)(5)(B), then it is completely logical that it is also fully secured upon surrender under §1325(a)(5)(C).").
   2. *In re Sparks*, 2006 Bankr. LEXIS 1589 (Bankr. S.D. Ohio, 2006)(finding the decision of *In re Payne* to be "well-reasoned").
   3. See also *In re Long*, 2006 Bankr. LEXIS 1605 (Bankr. E.D. Tenn., 2006); *In re Osborn*, 2006 Bankr. LEXIS 1839 (Bankr. W.D. Missouri, 2006); *In re Nicely*, 2006 Bankr. LEXIS 2068 (Bankr. W.D. Missouri, 2006); and *In re Evans*, 2006 Bankr. LEXIS 2215 (E.D. Mich., 2006).

c. One case, *In re Duke*, 2006 Bankr. LEXIS 1318 (Bankr. W.D. Kent., 2006), held that although the Hanging Paragraph applies to all of §1325(a)(5), including subsection C, property rights in estate assets is determined by state law, and surrender of a 910-day vehicle does not fully satisfy the claim, allowing a creditor to pursue the deficiency claim.

E. Adequate Protection

a. Section 1326(a)(1) provides that "unless the court orders otherwise, the debtor shall commence making payments no later than 30 days after the date of the filing of the plan or the order for relief, whichever is earlier, in the amount – A) proposed by the plan to the trustee… and C) that provides adequate protection directly to a creditor holding an allowed claim secured by personal property to the extent the claim is attributable to the purchase of such property by the debtor for that portion of the obligation that becomes due after the order for relief, reducing the [plan payments to the Trustee] by the amount so paid and providing the trustee with evidence of such payment, including the amount and date of payment."

b. The court in *In re Beaver*, 337 B.R. 281, 284 (Bankr. E.D. N.C., 2006) refused to hold that this provision requires payments directly to the creditor in all situations; the court held that "if the debtor has chosen another method of providing adequate protection, no pre-confirmation direct payments are needed." The court noted that direct cash payments are only one way to provide adequate protection, but not "the exclusive method," and if Congress had intended to change that well-established practice, it would have done so expressly. Id. at 284-285.
   1. In its first footnote, the court added that courts have discretion to revoke any requirement of direct payments according to §1326(a)(1), which begins "unless the court orders otherwise…" Id. at 284.
   2. See also *In re Simmons*, 2006 Bankr. LEXIS 1163 (Bankr. D. S.C., 2006)(holding that even if the debtor is required by the statute to make payments directly to the creditor, such requirement is irrelevant if the court orders otherwise).

c. In *In re Clay*, 339 B.R. 784 (Bankr. D. Utah, 2006), the court held that §1326(a)(1) showed Congressional intent to allow debtors to continue contract payments directly to the creditor, and that because the debtor is required make adequate protection payments directly to the creditor under §1326(a)(1)(C), the debtor should be able to make the direct payments after confirmation. Id. at 788.

F. Disposable Income

a. §1325(b) provides the formula for calculating a debtor's disposable income. *In re Quarterman*, 342 B.R. 647 (Bankr. M.D. Florida, 2006). See also *In re McGuire*, 342 B.R. 608, (Bankr.W.D. Missouri, 2006)

b. §707(b) sets forth the formula for determining reasonable expenses for an above median income debtor in order to determine whether the filing of a Chapter 7 case is an Abuse of the Bankruptcy Code. *In re Fuller*, 2006 Bankr. LEXIS 1615 (Bankr. S.D. Ill., 2006).
   1. *In re Hardacre*, 338 B.R. 718, 721 (Bankr. N.D. Texas, 2006)
   2. *In re Alexander* 344 B.R. 742 (Bankr. E.D. N.C., 2006)
   3. *In re Schanuth*, 342 B.R. 641 (W.D. Missouri, 2006)
   4. *In re Barr*, 341 B.R. 181 (M.D. N.C., Greensboro Div., 2006)
   5. *Baxter v. Johnson (In re Johnson)*, 346 B.R. 256 (Bankr. S.D. Georgia, 2006)
   6. *In re Pak*, 343 B.R. 239, (Bankr. N.D. Cali., 2006)
   7. *In re Guzman*, 345 B.R. 640 (Bankr. E.D. Wisc., 2006)
   8. *In re Gress*, 344 B.R. 919 (Bankr. W.D. Missouri, 2006)
   9. *In re Renicker*, 342 B.R. 304 (Bankr. W.D. Missouri, 2006).

c. "Under section 1325(b)(1)(B), if the trustee or an unsecured creditor objects to the debtor's plan, the court may not approve the plan unless the plan provides that all of the debtor's 'projected disposable income' during the 'applicable commitment period' will be applied to pay unsecured creditors." *Hardacre* at 721.

d. "Section 1325(b)(2) provides that 'disposable income' means current monthly income reduced by… 'amounts reasonably necessary to be expended' for the maintenance and support of the debtor or her dependents. In order to determine [such amounts], section 1325(b)(3) requires the debtor to compare the current monthly income multiplied by 12 [("annual income")] to the 'median family income' for families of a like size who live in the same state as the debtor." *Hardacre* at 721. The result is that the expenses and analysis under §707(b) can arguably constitute the debtor's disposable income under §1325(b)(2).
   1. §101(39A), a new provision, defines "median family income" as that calculated and reported by the Census Bureau in the most recent year. *Hardacre* at 721. §1325(b)(3) states that if the debtor's annual income exceeds the median family income for similar households in her state, then the expenses must be determined by use of the means test in §707(b)(2). *Hardacre* at 722.
   2. Even debtors whose income is below the state median family income must pay all disposable income to unsecured creditors, determined by §1325(b)(2)(A) and (B). *In re Quarterman*, supra.

3. A debtor's non-filing spouse's income is included in "current monthly income" "to the extent that is is paid 'on a regular basis for the household expenses of the debtor or the debtor's dependents.' Thus… current monthly income does not include *all* the income of the non-debtor spouse, but rather only amounts expended on a regular basis for household expenses." Id. at 651, citing §101(10A)(B).

e. After determining the applicable commitment period and whether the means test will be used to calculate the debtor's expenses, the debtor must submit a Plan committing the "projected disposable income" during the period. *Hardacre* at 722, citing §1325(b)(1).

1. Projected Disposable Income

a. §1325(b)(1)(B) requires that a Plan propose to apply all of a debtor's "projected disposable income" to payments to unsecured creditors.

   1. The phrase "unsecured creditors" does not include unsecured priority creditors, because such creditors were already considered in calculating disposable income. *In re Wilbur*, 344 B.R. 650 (Bankr. D. Utah, 2006)

b. The court in *Hardacre*, supra, noted that "disposable income" is defined as "current monthly income" minus expenses, under §1325(b)(2); but "current monthly income" is the debtor's average income for the six months pre-petition, under §101(10A). The court held that "projected disposable income" is based upon "the debtor's anticipated income during the term of the plan." *Hardacre* at 722. The court noted that Congress clearly intended that "projected disposable income" should be construed differently than "disposable income", since "projected" modifies "disposable income" as it is defined in §1325(b)(2). *Hardacre* at 722.

c. Current monthly income is an initial measure, but not an ultimate measure, of a debtor's ability to fund his Chapter 13 plan; the court must also evaluate the debtor's past financial status. *In re Foster*, 2006 Bankr. LEXIS 2259 (N.D. Ind., 2006). The court in *Foster* held that the debtor had, in the past, received bonuses regularly, and that such bonuses should be included in the projected disposable income. Id. at 26.

d. The court in *In re Jass*, 340 B.R. 411, 415-416 (Bankr. D. Utah, 2006) held that "projected disposable income" requires the court to consider both past and future finances of the debtor. The court held the statute's clear meaning to be that "a debtor must propose to pay unsecured creditors the number resulting from Form B22C [disposable income], unless the debtor can show that this number does not adequately represent the debtor's budget projected into the future." Id. at 416.

1. The court noted that Congressional intent "bolsters its holding that the number resulting from B22C is not always a debtor's 'projected disposable income.'" Id. at 417.
2. If there is adequate evidence to rebut a presumption of the B22C figure, the court will allow the debtor to project a budget from Schedules I and J to determine "projected disposable income". Id. at 418.
3. See also *In re Alexander*, 344 B.R. 742 (Bankr. E.D. N.C., 2006)(disagreeing with *Hardacre* and following *Jass*, holding that projected disposable income should be calculated using the disposable income formula set forth in §1325(b)(2)); *In re Demonica*, 345 B.R. 895 (Bankr. N.D. Ill., 2006), (holding that the debtor's projected disposable income must be based upon the debtor's Schedules I and J rather on an "historical average"); and *In re Grady*, 2006 Bankr. LEXIS 1496 (Bankr. N.D. Georgia, 2006) (holding that projected disposable income should be paid based upon the debtors' financial situation as of the petition date).

2. Means Test

a. Under the Means Test, the court calculates the debtor's income, subtracts certain living expenses, and multiplies the result by 60; if the product is greater than $10,000, there is a presumption of abuse of the bankruptcy process. *Hardacre* at 721, citing §707(b)(2)(A)(i).

b. §1325(b)(3) states that if the debtor's annual income exceeds the median family income for similar households in her state, then the expenses must be determined by use of the Means Test. *Hardacre* at 722.

c. Congress' purpose in creating the Means Test was "to 'ensure that those who can afford to repay some portion of their unsecured debts [be] required to do so.'" *Hardacre* at 725, quoting 151 Cong. Rec. S2470 (March 10, 2005).

d. §707(b)(2)(A)(ii)(I) permits standard expense deductions developed by the IRS. There are national standards, but there are also local standards for housing costs and for ownership and operating costs for vehicles. §707(b)(2)(A)(iii) permits deduction of average monthly payments on secured debts. The debtor is allowed to make deductions from both subsections, under §707(b)(2)(A)(i).

e. §707(b)(2)(A)(ii)(I) states that "Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payment for debts." The court in *Hardacre* explained that "payment for debts" in this provision means "payments on secured debts for mortgage and car ownership expenses", thus eliminating a double deduction under (ii) and (iii). *Hardacre* at 726-727.

1. A debtor is permitted to deduct the greater of 1) his monthly mortgage and car payments or 2) the IRS Standard deductions. *Hardacre* at 727.

f. In *In re Walker*, 2006 Bankr. LEXIS 845 (Bankr. N.D. Georgia, 2006), the court held that when a debtor plans to surrender collateral, the payments to that creditor for that collateral are to be deducted from the debtor's current monthly income as an expense for purposes of the means test.

   1. This is the minority view; in contrast, see:

      A. *In re Love*, 2006 Bankr. LEXIS 2081 (M.D. Ala., 2006) (disagreeing with the court in *Walker* and holding historical income should be matched with future expenses)

      B. *In re Edmunds*, 2006 Bankr. LEXIS 2255 (D. S.C., 2006) (holding that expenses are forward-looking and should not be taken directly from Form B22C)

      C. *In re Crittendon*, 2006 Bankr. LEXIS 2172 (M.D. N.C., 2006) (holding that the plan did not comply with §1325(b) because expense deductions represented payments to creditors for collateral that was to be surrendered).

3. Applicable Commitment Period

a. The "applicable commitment period" is the Plan term (three (3) years for below-median income debtors and five (5) years for above-median income debtors) unless it provides for payment in full of all unsecured claims in a shorter time frame. *Hardacre* at 722, citing §1325(b)(4)(A)(i).

b. The majority rule is that the "applicable commitment period" is a temporal requirement; it is measured as a "period", which is a "chronological division." *Schanuth*, supra, at 607 (citing Merriam-Webster). The Court in *Schanuth* held that if Congress had intended the "applicable commitment period" to be a multiplier, "Congress surely could have described it as such." Id. at 607. The court held that §1325(b)(4)(B) would be rendered awkward and meaningless if the "applicable commitment period" was interpreted as a "monetary concept", because although both theories have the effect of allowed secured claims being paid in full, "the syntax resulting from a temporal reading… is far more logical" and such an interpretation is in line with pre-BAPCPA practice. Id. at 608.

   1. The court in *In re McGuire*, supra, agreed with the *Schanuth* court that the "applicable commitment period" is a temporal requirement and not a monetary one. After reiterating that the disposable income calculated on Form B22C is merely a "starting point, not a determinative number", the court held that "if a court is not required to confirm a plan simply because the debtors propose a plan payment in the Form B22C amount, it follows that a court is not required to confirm a plan because it proposes to pay a total

sum equal to the Form B22C amount multiplied by the applicable number of months." Id. at 20.

2. In *In re Dew*, 344 B.R. 655 (Bankr. N.D. Ala., 2006), the court held that the time periods in §1325(b)(4)(A) are "period[s] of time over which Chapter 13 plan payments must be made, not a multiplier for use in calculating the total amount to be paid into the plan regardless of its term."
3. In *In re Nevitt*, 2006 Bankr. LEXIS 1763 at 12 (Bankr. N.D. Ill., 2006), the court agreed with *Schanuth* and *McGuire* and held that the requirement is temporal. "A monetary interpretation would allow a debtor to cease making payments any time before the expiration of the applicable commitment period when the base amount is paid in full, rather than when the unsecured creditors are paid in full." Id. at 11-12.
4. In *In re Davis*, 2006 Bankr. LEXIS 1812 at 19-20 (Bankr. E.D. Mich., 2006), the court agreed with the holding in *Schanuth*, construing the words "period" and "commitment" as terms that "contemplate or suggest… an obligation to do something over a period of time."
   A. The court held that Congress would have expressly used the word "multiply" if it had intended "applicable commitment period" to be a multiplier. Id. at 20. Construing the phrase as a multiplier would also be inconsistent with other sections of the BAPCPA. Id. at 24.
   B. The court also held that if the phrase were a multiplier, a debtor could "cash out" unsecured creditors "at a discount" post-confirmation by paying a pre-determined amount.

5. See also *In re Gress*, supra; *In re Alexander*, supra; and *In re Renicker*, 342 B.R. 304 (Bankr. W.D. Missouri, 2006).

c. The minority rule is that the "applicable commitment period" is a multiplier, and thus a monetary requirement.
   1. The court in *In re Fuger*, 2006 Bankr. LEXIS 1198 (Bankr. D. Utah, 2006) disagreed with the holdings of *Schanuth* and *McGuire*, citing the pre-BAPCPA case *Miller v. Loan Star Mortgage, Inc. (In re Miller)*, 325 B.R. 539, 543 (Bankr. W.D. Penn., 2005), which stated that " 'the object is not to force the debtor to make payments over a period of time; the object is to give creditors some recovery on their claims…'" *Fuger* at 15, citing *Miller*.
   2. *Fuger* held that the phrase "applicable commitment period" was ambiguous. *Fuger* at 5. The court held that the phrase is **both** monetary ("in the sense that it has always required debtors to commit to pay unsecured creditors a set return") and temporal ("in the sense that it has always required debtors to determine that return by projecting over a specific time period" and provides a time limit). Id. at 13.

3. See also *In re Carlin*, 2006 Bankr. LEXIS 1797 (Bankr. D. Oregon, 2006)(declining to discuss the issue since the parties were both treating the phrase as a monetary provision rather than temporal).

II. CONVERSION AND DISMISSAL

***In re Pak*, 343 B.R. 239 (Bankr. N.D. Cali., 2006)**

The debtor filed Chapter 7 on 10/31/05. A Chapter 7 case filed by an individual debtor with primarily consumer debts must be dismissed if the court finds that the filing was an abuse of the Bankruptcy Code. Under the means test of §707(b)(1), there is a rebuttable presumption of abuse. Here, the debtor was unemployed during the six months prior to filing and had below-median income, thus passing the means test. However, a case can also be dismissed under §707(b)(3) based on bad faith or the totality of the debtor's financial circumstances. The U.S. Trustee argued that while there was no bad faith, the debtor became employed and began to earn over $100,000 annually.

The court held that the filing was an abuse. The debtor's actual ability to repay his debts is to be considered in the "totality of the circumstances" test. The court examined the provisions of Chapter 13 to analyze the debtor's ability to repay his debts. Following the reasoning in *In re Jass*, 340 B.R. 411 (Bankr. D. Utah, 2006), the court looked at the debtor's "actual and anticipated future income" and not just "current monthly income" to determine the debtor's ability to repay. After expenses, the debtor's projected disposable income was $1,117.20 per month, which over the life of a Chapter 13 plan would only pay 19% of his unsecured debt. The court held that although 19% was a small percentage payment, the dollar amount over the life of a Chapter 13 plan would be high. The court also held that the debtor's expenses were excessive. The court ruled that the case be dismissed or converted to Chapter 13.

***In re James*, 345 B.R. 664 (Bankr. N.D. Iowa, 2006)**

The debtor, shortly prior to filing bankruptcy, received large bonuses from work. The debtor supported his sick wife and several of his family members. Knowing he would file bankruptcy, the debtor used his bonuses to treat himself with frivolous purchases. The court held that this was abuse under bad faith and totality of the circumstances tests prescribed in §707(b)(3)(A) and (B), as the debtor could have used his bonuses to pay down his $24,165.22 in unsecured debts.

III. STATUTORY INTERPRETATION

a. In *U.S. v. Ron Pair Enterprises Inc.,* 489 U.S. 235, 242, 109 S.Ct. 1026, 1031 (1989) the Court indicated the following:

1. The plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982). In such cases, the intention of the drafters, rather than the strict language, controls.

b. The Sixth Circuit in applying the mandates of the Supreme Court has indicated the following:

1. As the United States Supreme Court has instructed courts in examining the provisions of the Bankruptcy Code. "[we] have stated time and time again that the courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain,* 503, U.S. 249, 253, 254, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992) (citation omitted). That statement is consistent with the United States Supreme Court's principles that statutory interpretation is a holistic endeavor which must begin with the language of the statute itself. Resort to an examination of legislative history is appropriate only to resolve statutory ambiguity, and in the final analysis, such examination must not produce a result demonstratively at odds with the purpose of the legislation. *See Taylor v. Freeland & Kronz,* 503 U.S. 638, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992); *Pennsylvania Dept of Public Welfare v. Davenport,* 495 U.S. 552, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990); *Kelly v. Robinson,* 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986). The Sixth Circuit has likewise noted that statutes "must be read in a 'straightforward' and 'commonsense' manner," and that "[w]hen we can discern an unambiguous and plain meaning from the language of a [statute], our task is at an end." *Rogers v. Laurain (In re Laurain),* 113 F.3d 595 (6th Cir 1997) (citations Omitted); see also *Bartlik v. United States Dep't of Labor,* 62 F.3d 163 (6th Cir. 1995); and *Andersson v. Security Fed. S& L (In re Andersson)*, 209 B.R. 76 (Bankr. Fed. App. 1997)

c. In addition, the Supreme Court has recently given additional guidance on bankruptcy legislation by indicating that previous Courts' interpretation of the phrase, the use of the phrase in other sections of the bankruptcy legislation, the understanding of the phrase that is reflected in dictionaries, and the context of the phrase are to be applied when reviewing bankruptcy legislation. Justice Thomas, writing for a unanimous Court in the case *Rousey v. Jacoway* 544 U.S. 320; 125 S. Ct. 1561; 161 L. Ed. 2d 563 (2005), stated the following:

1. We turn first to the requirement that the payment be “on account of illness, disability, death, age, or length of service.” *Ibid.* We have interpreted thae phrase “on account of “ elsewhere within the Bankruptcy Code to mean because of,” thereby requiring a causal connection between the term that the phrase “on accout of” modifies and the factor specified in the statute at issue. *Bank of America Nat. Trust and Sav. Assn. v. 203 North LaSalle Street Partnership,* 526 U.S. 434, 450-451, 119 S.Ct. 1411, 143 L.Ed.2d 609 (1999). In reaching that conclusion, we noted that “because of” was “certainly the usage meant for the phrase at other places in the [bankruptcy] statute,” including the provision at issue here -- §522(d)(10)(E). *Ibid.* This meaning comports with the common understanding of “on account of”. See, *e.g.,* Random House Dictionary of the English Language 13 (2d ed. 1987) (listing as definitions “by reason of,” “because of”); Webster’s Third New International Dictionary 13 (1981) (hereinafter Webster’s 3d) (same). The context of this provision does not suggest that Congress deviated from the term’s ordinary meaning.

d. Another tenet of statutory interpretation is that unless Congress manifestly changes a provision and overrules established case law, the case law continues to maintain its vitality and the Court should give deference to that established case law. *Dewsnup v. Timm,* 502 U.S. 410, 436 112 S. Ct. 773; 116 L.Ed.2d 903 (1992). Further, after reviewing a statute, the statute should be read to give full meaning to all of the provisions and subsections included within that provision.