

# **Concurrent Workshop**

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## Hot Consumer Topics in Chapter 7

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**HOT CONSUMER TOPICS IN CHAPTER 7  
14<sup>TH</sup> ANNUAL SOUTHEAST BANKRUPTCY WORKSHOP  
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**AUTOMATIC DISMISSAL**

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**I. INTRODUCTION**

It was only a matter of time before a debtor attempted to twist the provisions of BAPCPA (intended to prevent abuse by debtors) for self-serving purposes. It happened after a rainy night in Georgia, when a debtor filed a motion to dismiss his case after the trustee filed a motion to sell assets, specifically a Fantasy Houseboat that the debtor preferred to retain. Debtor's effort was primarily centered on his asserted lack of failure to timely obtain consumer credit counseling (CCC) from an approved agency and to file all the information required under § 521. In the seminal case, *In re Parker*, 351 B.R. 790, 792-793 (Bankr. N.D. Ga. 2006), Judge Diehl began her opinion as follows:

A primary purpose of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), which became effective for cases filed after October 17, 2005, was to counteract the perceived abuse of the Bankruptcy Code by debtors. This case involves the attempt by a Chapter 7 debtor to use the eligibility and automatic dismissal of BAPCPA to abuse the bankruptcy system. The Court will not misconstrue these provisions so as to support Debtor's actions and therefore will DENY Debtor's Motions to Dismiss.

**II. STATUTORY REQUIREMENTS**

Under BAPCPA, the documents a debtor must file in connection with a bankruptcy case have been significantly expanded under § 521(a)(1), which provides in pertinent part that the debtor shall file a list of creditors and:

B. Unless the court orders otherwise –

...  
(iv) copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor.

The penalty for failure to file timely the information required by § 521(a)(1) appears in § 521(i):

...  
(i)(1) Subject to paragraphs (2) and (4) and notwithstanding section 707(a), if an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the

information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46<sup>th</sup> day after the date of the filing of the petition.

(2) Subject to paragraph (4) and with respect to a case described in paragraph (1), any party in interest may request the court to enter an order dismissing the case. If requested, the court shall enter an order of dismissal not later than 5 days after such request.

### III. *PARKER* AND OTHER LOWER COURT CASES

In *Parker*, the debtor asserted he was not eligible to be a debtor, since he had not completed a CCC briefing as required in § 109(h). In the alternative, he argued that he had failed to submit pay advices as required in § 521(a), making the case automatically dismissed under § 521(i). Unfortunately for the debtor, the facts 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 done so, which was followed by a motion to extend the time for credit counseling. This allowed the court to deny the § 109 portion of the motion under a waiver theory. The debtor had also previously asserted that he had been self-employed with several companies, so the pay advices were not clearly required. Finally, the debtor had allowed the case to be administered for almost five months before hiring new counsel and filing the request for a dismissal. In that time period, debtor had consented to numerous orders extending deadlines to object to discharge and had not opposed the trustee's motion to employ an agent for the sale of his Fantasy Houseboat nor had he ever objected to that sale. Thus, judicial estoppel was invoked.

In her opinion, Judge Diehl recognized the problems 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 that 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. Thus, the court could excuse certain requirements either before or after the 45-day period. The “automatic” language of § 521(i)(1) was also 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” had been provided. Mr. Parker had taken the position throughout the case, until his motion to dismiss was filed, that there were no pay advices. At the hearing on his dismissal motion, he claimed that he did have pay advices but failed to produce any at the hearing (nor did he ever produce any).

The court stated: “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....” *See also In re*

*Riddle*, 344 B.R. 702 (Bankr. S.D. Fla. 2006) (where Judge Cristol addresses these issues in verse to the meter of *Green Eggs and Ham*), and in *In re Withers*, 2007 WL 628078 (Bankr. N.D. Cal. 2007) (Judge Tchaikovsky follows the *Parker* reasoning where the debtor sought dismissal after the trustee began administering assets that the debtor wanted to retain).

A number of bankruptcy courts prior to and after *Parker* have taken a hard-line approach holding that there was no discretion, and a case deficient in the “information” requirements stood dismissed automatically. *See, e.g., In re Wilkinson*, 346 B.R. 539 (Bankr. D. Utah 2006); *In re Fawson*, 338 B.R. 505 (Bankr. D. Utah 2006); *In re Williams*, 339 B.R. 794 (Bankr. M.D. Fla. 2006); *In re Lovato*, 343 B.R. 268 (Bankr. D. N.M. 2006); *In re Hall*, 368 B.R. 595 (Bankr. W.D. Tex. 2007); *In re Brickey*, 363 B.R. 59 (Bankr. N.D. N.Y. 2007); *In re Calhoun*, 359 B.R. 738 (Bankr. E.D. Mo. 2007); and *In re Catania*, 397 B.R. 667 (Bankr. W.D. N.Y. 2008). In most, but not all, of the cases taking this hard-line approach, the party seeking dismissal is not the debtor.

In *Warren v. Weirum*, 378 B.R. 640 (N.D. Cal. 2007), the district court agreed with *Parker* that § 109 requirements pertaining to CCC were not jurisdictional and could be waived or subject to judicial estoppel but disagreed that the requirement to file pay advices could be waived after the initial 45-day period had expired even though “debtors who seek to manipulate the bankruptcy process by intentionally withholding documents required under § 521 ... are provided with an undeserved opportunity to ‘test the waters’ of bankruptcy and thereby minimize their exposure to creditors.” *Id.* at 647.

In *In re Herrera*, 2008 WL 5274013 (Bankr. S.D. Fla.), a creditor had argued that debtor’s non-compliance with the filing requirements (incomplete and inaccurate statements and schedules) resulted in automatic dismissal of the case. Judge Mark disagreed, finding that a challenge to the accuracy or completeness of schedules filed under § 521(a)(1) should be “framed in a complaint objecting to discharge.” The court found that § 727 and adversary complaint procedures “provide a fair opportunity for both sides to litigate the issue.” Although not applicable here, the court pointed out that other cases with inaccurate disclosures could be asset cases, or become so through exemption objections or avoidance actions. In such cases, § 727 would allow “an appropriate remedy and also allow administration of the case.” By contrast, dismissal under § 521(i) would prevent administration and deprive creditors of a potential distribution. *See also In re Timmerman*, 379 B.R. 838 (Bankr. N.D. Ohio 2007) (“Allowing Timmerman to dismiss to the prejudice of creditors would impair the integrity of the bankruptcy system”) and *In re Lilliefors*, 379 B.R. 608 (Bankr. E.D. Va. 2007) (debtor may not make a mockery of the judicial system).

#### IV. CIRCUIT COURT AUTHORITY

The only Circuit Court to consider the automatic dismissal issue occurred in the recent case of *In re Acosta-Rivera*, 557 F.3d 8 (1<sup>st</sup> Cir. 2009). Here, debtor’s unresolved employment discrimination suit had been pending for roughly eight years and had twice been appealed to the Supreme Court of Puerto Rico, with debtor seeking reinstatement, back pay, and compensatory damages. Although this chose in action was plainly an asset of the debtor’s estate, it did not appear on the original bankruptcy schedules, or the first or second amended schedules, and only

after several further amendments (not material to the case) did the debtors place a value on it (\$2.7 million). When the trustee sought to settle the lawsuit for less than debtors believed it to be worth (but enough to create a surplus estate), debtors sought an automatic dismissal due to the failure to timely file payment advices and other information. The bankruptcy court thought it had the authority to enter an order excusing non-disclosure after the time for filing the required information had expired and refused to dismiss the case. However, the district court reversed, holding that the refusal to dismiss was beyond the scope of the court's authority.

Addressing § 521(a)(1), the circuit court stated:

Writ large, the provision in question expands the debtor's duties of financial disclosure to the extent that he or she must now file with the bankruptcy court 'unless the court orders otherwise' six tranches of financial information (including payment advices and an itemized statement of monthly net income). *Id.* at p. 9.

The circuit court proceeds to adopt the "more flexible" reading set forth in *Parker* which "honors the policy behind the Act by vesting bankruptcy courts with greater discretion to discourage bankruptcy abuse. Because any party in interest may request an order of automatic dismissal, debtors with something to hide are liable to treat dismissal as an escape hatch to be opened as needed." *Id.* at pp. 12-13.

The circuit court recognized some implicit support in the legislative history for debtor's position but concluded:

Still, we must caution against trying to stretch a morsel into a meal. The amendments to section 521 are a part of an abuse-prevention package. With Congress's core purpose in mind, we are reluctant to read into the statute by implication a new limit on judicial discretion that would encourage rather than discourage bankruptcy abuse. It is safe to say that Congress, in enacting BAPCPA, was not bent on placing additional weapons in the hands of abusive debtors.

...

In our view, Congress must have recognized that bankruptcy courts would still need a meaningful opportunity to gauge whether missing information is 'required' in a particular case. We conclude, therefore, that when the missing information has become irrelevant or extraneous and the court, in lieu of dismissal on that account, 'order[s] otherwise,' section 521(i) does not compel dismissal of the case.

...

We do not decide today whether bankruptcy courts possess unfettered discretion to waive the disclosure requirements *ex post*. Where, however, there is no continuing need for the information or a waiver is needed to prevent automatic dismissal from furthering a debtor's abusive conduct, the court has discretion to take such an action.

In this case the bankruptcy court, acting with care and restraint, was faithful to the evolving statutory scheme. Its order was, therefore, within the compass of its discretion.

*Id.* at pp. 13-15.

## **REAFFIRMATION AGREEMENTS**

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### **I. Background:**

A. In the Fourth Circuit, reaffirmation agreements were not necessary prior to the effective date of BAPCPA. *In Re Belanger*, 962 F2d 345 (4<sup>th</sup> cir, 1992).

B. Reaffirmation agreements apply only when a consumer debt is secured by a purchase money security interest in personal property.

### **II. Statutory Provisions:**

#### **A. Debtor's Duties: 11 U.S.C. § 521**

1. Section 521a(2)(A) provides that within 30 days of filing the case the debtor shall file a statement of his intention. The debtor has three options: surrender, reaffirm, or redeem. There is no statutory fourth option of retaining without reaffirming or redeeming.

2. Section 521a(2)(B) requires the debtor to perform the intention within 30 days after the first date set for the meeting of creditors.

3. Section 521a(6) provides that an individual debtor shall “not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, no later than 45 days after the first meeting of creditors...., either enters into an reaffirmation agreement or redeems the property”.

#### **B. Early Termination of the Automatic Stay for Non-Compliance**

1. Section 362(h) terminates the automatic stay and renders that property is no longer property of the estate if the debtor fails to comply with § 521 (a)(2).

2. Simply being current is not a valid defense to a stay relief motion. . . .  
“Retaining property and continuing to make regular payments is not one of the options available under the Bankruptcy Code.” *In re Faught*, 2006 Bankr. LEXIS 62 (Bankr W.D.Ky)

C. ***Ipsa Facto Clause*** -Section 521(d) provides that nothing in this title shall limit the operation of an *ipso facto* clause if the debtor fails to comply with Sub-section (a)(6) or § 362 (h).

**D. Impact of Undue Hardship**

1. Section 524(m)(1) hardship is presumed if monthly income minus monthly expenses is less than the payment on the reaffirmed debt.
2. When a presumption of hardship is triggered, the agreement must be reviewed by the court. The debtor may rebut hardship in writing. If the presumption is not rebutted, the court may disapprove such agreement.

**III. Attorney Certification**

A. **The reaffirmation agreement is enforceable if accompanied by an attorney certification which states:**

1. such agreement represents a fully informed and voluntary choice by the debtor;
2. that the agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and
3. that the attorney has fully advised the debtor of the legal effect and consequences of the agreement and any default under such an agreement. § 524(c)(3).

B. **Presumption Of Undue Hardship-** 524(k)(5)(B) provides that if a presumption of undue hardship has been established with respect to such agreement, such certification shall state that in the opinion of the attorney the debtor is able to make the payment.

C. **No hearing to approve reaffirmation is required:** if, after a review the court determines that the presumption of hardship has been overcome by the debtors written statements and the attorney certification.

**IV. When the Debtor is not Represented by Counsel**

A. **If an attorney does not represent the debtor during the reaffirmation process:** the bankruptcy court must hold a hearing and independently scrutinize the agreement. §§ 524(d) and 524 (C)(6)(A).

**B. The statute assumes that debtor’s counsel will make the required certification:** there is no provision dealing with the circumstance where the attorney is unable to sign the certification.

**V. Local Rules**—Some districts, including the Southern District of Florida in Local Rule 4008-1(c), have adopted local rules setting forth a procedure to follow for reaffirmations and the presumption of hardship.

**VI. Debtor’s counsel is caught in a squeeze.** Counsel must insure that debtors fully understand the consequences of entering into these agreements and must also fully explain the alternatives. What happens when the debtor is in a hardship situation?

**VIII. Resolution**

**A. Debtor signs the reaffirmation agreement:** explains why she thinks she can overcome the presumption of hardship.

**B. Debtor’s counsel does not sign certification:** he cannot, in good faith, state that it is not a hardship for the agreement to be approved.

**C. The agreement is filed:** a hearing is scheduled because there is an undue hardship and no certification has been filed by debtor’s counsel.

**D. The debtor attempts to rebut the presumption of hardship:** she testifies that she needs the vehicle; she wishes to continue to make payments on it; and that she is concerned that if the agreement is not approved that the creditor will repossess the vehicle because of the *ipso facto* clause in the contract.

**E. At the hearing:** debtor’s counsel advises the court why the certification was not signed.

**F. The court enters an order:** either approving or disapproving the agreement.

**G. On these facts:** the court in *In re Husain*, 364 B.R. 211, 218-19 (Bankr. E.D. Va. 2007) did not approve the proposed reaffirmation agreement and found that the debtors fully and timely performed their duties under 11 U.S.C § 521(a) and under 11 U.S.C § 362(h) in filing the statement of intention and in signing and filing the reaffirmation agreement and sending the executed agreement to the applicable creditors within the prescribed time limits.

As the Court found that the debtors fully complied with all of the requirements of § 362(h) and § 521(a) of the Bankruptcy Code, any *ipso facto* clause contained in the original loan documents between the debtors and the creditors cannot be enforced by the newly-created provisions of § 521(d) of the Bankruptcy Code.

The bankruptcy filing does not in and of itself trigger an automatic default in the underlying loan documents. . . . Once the discharge is granted, the creditors may not repossess the vehicles without violating the discharge injunction unless there is a subsequent payment or insurance default. . . . *See also, In re Baker*, 390 B.R. 524, 527-30 (Bankr. D. Del. 2008); *In re Chim*, 381 B.R. 191, 198 (Bankr. D. Md. 2008); *In re Moustafi*, 371 B.R. 434, 438-39 (Bankr. D. Ariz. 2007); *In re Blakeley*, 363 B.R. 225, 228, 232 (Bankr. D. Utah 2007) *In re Riggs*, No. 06-60346, 2006 Bankr. LEXIS 2732, 2006 WL 2990218 *In re Quintero*, 2006 Bankr. LEXIS 906, 2006 WL 1351623.

The court in *In re Jones*, 397 B.R. 775 (S.D.W. Va. 2008) wrote “these cases held that substantial compliance with § 521(a)(2), § 521(a)(6), and § 362(h) was sufficient. The fact that the bankruptcy court thereafter refused to approve the reaffirmation agreement in those cases did not alter the fact of the debtor’s substantial compliance. The debtor’s compliance is essential to the possibility of carving out a continued existence of the "ride through" option as a so-called "backdoor ride-through.”

**IX. Does it make any difference?**

- A. Once the stay is lifted § 521(a)(6) permits the creditor to take whatever action as to such property as is permitted by applicable non bankruptcy law.
- B. Many states have adopted the UCCC or similar provisions.
- C. 37-5-109 of the South Carolina Consumer Protection Code is modeled after the UCCC and provides as follows:

Default - An agreement of the parties to a consumer credit transaction with respect to default on the part of the consumer is enforceable only to the extent that:

- (1) the consumer fails to make a payment as required by agreement; provided, with respect to a consumer rental purchase agreement, a lessee defaults when he fails to renew an agreement and fails to return the rented property or make arrangements for its return as provided for by the agreement; or
- (2) the prospect of payment, performance, or realization of collateral is significantly impaired; the burden of establishing the prospect of significant impairment is on the creditor.

The court in, 2006 Bankr. LEXIS 2732 (Bankr. W.D. Mo. Oct. 12, 2006) held: Thus, if a debtor is current on its payments, even if the contract contains an *ipso facto* clause, such clause is enforceable only if the lender can establish that its prospect of payment, performance, or ability to realize upon the collateral is "significantly impaired."

If the debtor is current on payments, and the only existing default is that the debtor filed for bankruptcy protection, it may well be difficult for a lender to establish that its prospects of payment and performance are significantly impaired.

*But see*, 397 B.R. 775 (S.D. W. Va. 2008) where the district court reversed the bankruptcy court and reached opposite result on similar statute.

## EXEMPTIONS

### MICHAEL J. COX AND NEIL C. GORDON

#### I. 11 USC 522(p)

Under new § 522(p), a debtor cannot exempt any amount in excess of \$125,000 of the interest that was acquired in the homestead if that interest was acquired within 1,215 days of the filing of the petition. The cap does not apply where the interest was transferred from a debtor's principal residence acquired prior to the 1,215-day time frame if the debtor's previous and current residences are located in the same state. Refer also to the new definitions of "debtor's principal residence" and "incidental property" in 11 U.S.C.A. §§ 101(13A) and 101(27B). This new limitation on exemptions was designed to halt a perceived abuse by debtors in financial trouble who move to high homestead exemption states and reestablish residency there. *See In re Hodes*, 402 F.3d 1005 (10th Cir. 2005) (discussing Kansas' expansive homestead exemption.) However, it applies to all debtors, including those with no such motive in moving to a new state.

Many courts have issued rulings interpreting this provision, including: (a) *In re McNabb*, 326 B.R. 785 (Bankr. D. Ariz. 2005) (held new limitation applies only in the few election states); *contra*: *In re Kane*, 336 B.R. 477 (Bankr. D. Nev. 2006); *In re Landahl*, 338 B.R. 920 (Bankr. M.D. Fla. 2006); *In re Buonopane*, 344 B.R. 675 (Bankr. M.D. Fla. 2006); *In re Summers*, 344 B.R. 108 (Bankr. D. Ariz. 2006); *See also*, *In re Kaplan*, 331 B.R. 483 (Bankr. S.D. Fla. 2005); *In re Virissimo*, 332 B.R. 201 (Bankr. D. Nev. 2005); *In re Wayrynen*, 332 B.R. 479 (Bankr. S.D. Fla. 2005) (all of which held that § 522(p)(2) applies in their respective states); (b) *In re Sainlar*, 344 B.R. 669 (Bankr. M.D. Fla. 2006) (held that the \$125,000 exemption cap applies only to real property purchased or otherwise acquired by a debtor within 1,215 days of the petition date, not the increase in equity that occurred during that time period); (c) *In re Leung*, 356 B.R. 317 (Bankr. D. Mass. 2006) (limitation applies where debtor "acquired" his interest when his spouse gratuitously deeded to her and debtor as tenants by the entirety—tenancy by entirety issues not addressed); (d) *In re Chouinard*, 358 B.R. 814 (Bankr. M.D. Fla. 2006) (the equity passively resulting from market appreciation is not to be counted against the \$125,000 limit); (e) *In re Blair*, 334 B.R. 374 (Bankr. N.D. Tex. 2005) (limitation does not apply to property owned for 1,215 days where passive increase and appreciation in payments on secured debt increased the value); (f) *In re Rasmussen*, 349 B.R. 747 (Bank. M.D. Fla. 2006) (appreciation that occurs within the 1,215 does not count toward the \$125,000, plus joint debtors can double the amount to \$250,000 under §522(m)); (g) *In re Rogers*, 354 B.R. 792 (Bankr. N.D. Tex. 2006) (limitation does not apply to a debtor who inherited property outside the 1,215-day period, even if they did

not occupy the property until a time within that period); (h) *In re Lyons*, 2006 WL 3392619 (Bankr. D. Mass. 2006) (limitation not applicable to “homestead declaration” filed within 1,215-day period if purchased outside that period); (i) possible end-runaround limitation was presented in *In re Schwartz*, 362 B.R. 532 (Bankr. S.D. Fla. 2007) and *In re Buonopane*, 359 B.R. 346 (Bankr. M.D. Fla. 2007) (where full exemption allowed to new resident as entireties property under state law pursuant to §522(b)(3)(B)).

### II. District Court Analyzes Florida Exemption Law

Mr. Smith filed a voluntary chapter 7 case in November 2007, claiming exempt as a tenancy by the entireties his principal residence owned with his non-debtor spouse. He listed the total value at \$325,000 with total liens of \$811,403.15 and declared his intent to surrender the property. Debtor did not oppose Countrywide’s stay relief motion the next month which resulted in an order granting stay relief in January 2008. Debtor and his spouse vacated the property in March 2008. In April 2008, debtor amended his exemptions to delete his claim of exemption in the residence. He never asserted an exemption claim under the Florida constitutional homestead provision.

Thereafter, debtor sought a personal property exemption of \$4,000 under Fla. Stat. § 222.25(4), and the trustee objected. The bankruptcy court overruled the objection and the trustee appealed. The district court affirmed. *Osborne v. Smith*, 398 B.R. 355 (S.D. Fla. 2008). Effective July 2007, the Florida legislature had amended that code section to increase certain personal property exemptions to \$4,000, if the debtor does not *claim or receive* the benefits of a homestead exemption under Section 4, Article X of the State Constitution. The trustee argued that the debtor received the benefits of a homestead exemption within the meaning of that state statute if at any time debtor owned homestead property, in reliance on *In re Franzese*, 383 B.R. 197, 205 (Bankr. M.D. Fla. 2008), or alternatively that debtor would not be entitled to the increased personal property exemption unless debtor had never (1) claimed the property as exempt, and (2) timely and properly shown a clear and unambiguous attempt to abandon the property as stated in *In re Magelitz*, 386 B.R. 879, 884 (Bankr. N.D. Fla. 2008).

The trustee finally argued that the failure to meet either criterion would be fatal in reliance on *In re Morales*, 381 B.R. 917, 922 (Bankr. S.D. Fla. 2008). The trustee contended that debtor did receive the benefit of the initially claimed homestead exemption by living in the property for several months without making any mortgage payments. The district court found the trustee’s argument properly supported but felt that the better reasoned case law was *In re Hernandez*, 2008 WL1711528 (Bankr. S.D. Fla. 2008), in which Judge Mark noted that the statute was not written to exclude all individuals owning homes “eligible” for the constitutional exemption. Instead, it excluded only those who “received the benefits of the constitutional exemption.” Here, the district court found that the debtor indicated his intention to surrender the property early on and never changed his intention, deleted his claim of exemption under a tenancy by the entireties, did not oppose Countrywide’s motion for relief from the stay, and moved out of the property.

Additionally, debtor’s spouse also moved out of the property with debtor and never contested the foreclosure, essentially waiving her right to homestead protection. On this basis,

the district court believed that the debtor did not receive the benefit of the homestead exemption. The district court also distinguished *In re Guididas*, 393 B.R. 251 (Bankr. N.D. Fla. 2008), where the debtor had listed the property as exempt homestead on his schedules, indicated an intent to reaffirm, received a discharge, and only amended thereafter when the trustee had filed a motion for turnover. The district court also rejected the trustee's attempt to use legislative history because of the statute's plain language. Accordingly, the objection was overruled and the case closed.

### III. Personal Injury and Payment for Loss of Future Earnings: Federal and South Carolina Exemptions

#### 1. The Personal Injury Federal Exemption: 522(d)(11)(D)

A. **522(d)(11)(D)**- provides an exemption for the debtor's right to receive property that is traceable to a "payment, not to exceed \$18,450, *on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss*, of the debtor or an individual of whom the debtor is a dependent." (Emphasis added.) Although approximately three dozen states have opted out of the federal bankruptcy exemptions, many include the exact wording of this federal exemption provision, except for a different dollar amount. On close examination, **the terms employed by the statute seem to negate each other by excluding every possible element of a personal injury recovery**, seemingly rendering the exemption useless. A review of the legislative history does not provide much assistance. House Report 95-595 states the following:

This provision in subparagraph (11)(D) is designed to cover payments and compensation of actual bodily injury, such as the loss of a limb, and is not intended to include the attendant cost that accompanies such a loss, such as medical payments, pain and suffering, or loss of earnings.

As might be predicted, cases addressing the issue of what is covered by the exemption have been inconsistent in both their approaches taken and ultimate conclusions reached.

**B. Case Law Application** –Prior to the "plain meaning" standard of statutory interpretation, bankruptcy courts struggled to make sense of the PI exemption. *See, e.g., In re Lynn*, 13 B.R. 361 (Bankr. W.D. Wis. 1981) (personal injury awards are composed of three types of losses: time losses (involving the value of lost time or earning capacity), expenses (such as medical costs), and pain and suffering, all of which are excluded from the exemption); *In re Ford Motor Credit Co. v. Territo*, 36 B.R. 667, 6670 (Bankr. E.D. N.Y. 1984) (if read literally, "there exists no meaningful exemption for personal injuries"); *In re Sidebotham*, 77 B.R. 504 (Bankr. E.D. Pa. 1987) (the literal statute appears to have no meaning). Later cases, struggling to make a literal application of the statute, have issued divergent opinions, largely on how the recovery is to be allocated and who has the burden of proof.

**C. Scope and Burden of Proof** –In order to conform to the literal requirements of the statute, there must be an allocation made between the exempt portions of a verdict or settlement and the non-exempt portions, but courts have differed on whether the trustee or the debtor has the burden of proof where there has been no allocation made in the verdict or settlement. (a) *In re Herrington*, 306 B.R. 172 (Bankr. E.D. Tex. 2003) (trustee had burden of proving the portion of the recovery that was non-exempt); (b) *In re Kelin*, 341 B.R. 521 (Bankr. W.D. Pa. 2006) (debtor had burden of proof on the allocation issue and it was not necessary for the trustee to object within the 30-day period to an exemption properly claimed in order to have determined the allocation of what portion of the exemption applied to the recovery); (c) *In re Buscano*, 2006 WL 3247118 (Bankr. D. Alaska) (although not the trustee’s burden of proof, trustee had sufficiently established an allocation of 70% to pain and suffering which could not be exempted, and 30% to actual bodily injuries to which the claimed exemption would apply); (d) *In re Rochester*, 308 B.R. 596 (Bankr. N.D. Ga. 2004) (no exemption for amounts received on account of pain and suffering or actual pecuniary loss, so amounts awarded in payment of medical bills would remain available for payment to creditors); (e) *In re Sanchez*, 2007 WL 445959 (Bankr. W.D. Mich.) (awards for pain and suffering or lost earnings not covered by the federal exemption statute); (f) *In re Scotti*, 245 B.R. 17 (Bankr. D. N.J. 2000) and *In re Claude*, 206 B.R. 374 (Bankr. W.D. Pa. 1997) (a claim for mere pain and suffering without some appreciable or cognizable physical injury is not exemptible); (g) *In re Ciotta*, 222 B.R. 626 (Bankr. C.D. Cal. 1998) (exemption for sexual harassment cause of action not permitted unless debtor could show a tangible physical injury was suffered). Courts have also differed on whether the physical injuries must be permanent. Compare *In re Marcus*, 172 B.R. 502 (Bankr. D. Conn. 1994), to *In re Lawton*, 324 B.R. 20 (Bankr. D. Conn. 2005); *In re Barner*, 239 Bankr. W.D. Ky. 1999); and *In re Romagno*, 159 B.R. 439 (Bankr. S.D. N.Y. 1993).

**D. Stacking and Pro-ration Issues** –Courts also differ on whether the debtor is limited to one exemption for all of his/her personal injury claims or may claim the full exemption with respect to each such claim. Compare *In re Christo*, 192 F.3d 36 (1<sup>st</sup> Cir. 1999) (debtor not allowed to claim the personal injury exemptions on each of her three personal injury actions, but only a total exemption of \$15,000 for all of her claims) with *In re Comeaux*, 305 B.R. 802 (Bankr. E.D. Tex. 2003); and *In re Daly*, 344 B.R. 304 (Bankr. M.D. Pa. 2005) (debtor allowed to “stack” the exemptions on each claim of personal injury). Compare *In re Herrington*, 306 B.R. 172 (Bankr. E.D. Tex. 2003) (no allocation permitted of any portion of the PI attorney’s fees to reduce the debtor’s allowable exemptions) to *In re Rauser*, 312 B.R. 461 (Bankr. D. Conn. 2004) (debtor’s exemption portion reduced by pro-ration where collection problems left a recovery otherwise sufficient to only pay the debtor’s exemption).

**2. Payment for Loss of Future Earnings Federal Exemption: 522(d)(11)(E)**

A. **(11)** The debtor's right to receive, or property that is traceable to— (E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

B. Loss of future earnings only - not past earnings *Matter of Williams* 197 B.R. 398 (M.D. Ga 1996)

C. Entire annuity exempt where it was show to be reasonably necessary and compensation for lost future wages *In re Kobaly*, 142 B.R. 743 (Bankr. W. D. Pa. 1992)

**3. South Carolina Bodily Injury Statute SC Code 15-41-30(12)(b):**

A. The debtor's right to receive, or property that is traceable to: (b) a payment on account of the bodily injury of the debtor or of the wrongful death or bodily injury of another individual of whom the debtor was or is a dependent.

B. This exemption is clearly written and there are no reported cases interpreting it. It exempts all aspects of a bodily injury claim including the loss of future earnings.

C. A trustee would almost certainly challenge an exemption to that portion of the bodily injury payment that was based upon an award of punitive damages.

**4. Conclusion:** The South Carolina exemption is easy to apply. For states that use the federal exemptions or use language modeled on the federal exemptions a more detailed examination by trustees and creditors of any exemption dealing to the bodily injury is warranted.

**BANK-TO-BANK TRANSFERS – PREFERENCE OR GOOD FORTUNE**

**Hon. Laurel M. Isicoff**  
**Bankruptcy Judge, Southern District of Florida**

“Transfer your high interest rate credit card debt to THIS card and you will not pay any interest for six months.” How often do credit card holders get that offer? But what happens when a borrower accepts that offer, and either transfers a credit card balance by phone call or by convenience check, and then files bankruptcy within 90 days after the transfer? The bankruptcy trustees call that a preference; the banks (the ones whose balances are paid) call it good fortune.

As we all know, a trustee may recover, for the benefit of the estate –

any transfer of an interest of the debtor in property –

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made –
  - (A) on or within 90 days before the date of the filing of the petition; or
  - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of the transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if –
  - (A) the case were a case under chapter 7 of this title;
  - (B) the transfer had not been made; and
  - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

The issue that has been debated in the courts is whether, and under what circumstances, a credit card balance transfer is either insulated by the “earmarking” doctrine, or constitutes the “transfer of an interest of the debtor in property.” Banks seeking to keep their fortunate payoff argue the funds transferred are either protected by the earmarking doctrine, or do not constitute property of the debtor because the debtor never actually has the funds in his or her possession, and therefore the transfer never diminishes the debtor’s estate – it merely turns one debt into another. Trustees, and the majority of courts that have addressed this issue, disagree.

Earmarking is a judicially created exception to the general rule that certain transfers are recoverable as preferences by a bankruptcy trustee. There are three different methodologies applied by courts in determining whether a transfer is insulated by the earmarking doctrine. The first methodology is set forth in the three-part test used by the Eighth Circuit in *McCuskey v. National Bank of Waterloo (In re Bohlen Enter., Ltd.)*, 859 F. 2d 561 (8th Cir. 1988). This three part test requires the transfer be (1) evidence of an agreement between the new lender and the

debtor that the new funds will be used to pay a specific antecedent debt; (2) that the agreement is performed in accordance with its terms; and (3) the transaction viewed as a whole does not result in diminution of the estate. The second method focuses on the control of the debtor over the transfer – (1) did the “new” creditor restrict the use of the funds; (2) did the debtor have physical control of the funds; or (3) did the debtor have the ability to direct to whom the funds would be paid. *Manchester v. First Bank & Trust Co. (In re Moses)*, 256 B.R. 641 (10th Cir. BAP 2000). The third, and most liberal, test, looks at whether the estate has been diminished by the transfer. *See Coral Petroleum, Inc. v. Banque Paribas-London*, 797 F. 2d 1351 (5th Cir. 1986).

Property of the estate is defined in 11 U.S.C. §541. The property of the estate debate centers on whether the funds used by the debtor are ever “really” the debtor’s money. After all, in a bank-to-bank transfer, the debtor never has actual custody of the money so how can the money ever be property of the debtor?

Two circuits have written on these issues, and a third circuit is expected to release an opinion shortly; in fact, the opinion may be released by the time you read this. In two recent cases the Sixth Circuit rejected the earmarking defense and found transfers to involve property of the debtor both in the convenience check and bank-to-bank transfer scenario. In *MBNA v. Meoli (In re Wells)*, 561 F. 2d 633 (6th Cir. 2009), the Sixth Circuit affirmed the bankruptcy court and BAP decisions holding that prepetition payments made by a debtor to one credit card company using convenience checks issued by another credit card company, were recoverable as preferences. The court held that because the debtor exercised control over the disposition of the funds, the debtor had an interest sufficient to trigger section 547. The court also rejected the credit card company’s earmarking argument, noting that the original bank did not restrict the debtor’s use of the convenience check – “the checks could have been used to ‘[t]ransfer balances, pay bills, make a purchase [or] get extra cash.’” 561 F. 3d at 635. *See also Yoppolo v. MBNA America Bank, N.A. (In re Dilworth)*, 560 F.3d 562 (6th Cir. 2009)(a bank-to-bank transfer was a transfer of the debtor’s property because the substance of the transaction was the same as if the debtor withdrew money and went to the other bank and deposited it, and was not protected by the earmarking doctrine because only the debtor decided how the funds were to be used).

In *Parks v. FIA Card Services, N.A. (In re Marshall)*, 550 F. 3d 1251 (10th Cir. 2008), the Circuit reversed the decisions of the bankruptcy court and the district court, following, with reference to Kansas law, what it identified as the majority view on the property of the debtor issue – that is, if the debtor exercises control over the disposition of the funds, the funds constitute property of the debtor, even if the debtor never actually had physical possession of the funds. The court also rejected the bank’s earmarking argument, noting that the credit card company “placed no conditions on Debtors’ use of the funds, it only honored their instructions.” 550 F. 3d at 1257. A petition for *writ of certiorari* has been filed.

This issue is before the Eleventh Circuit in the case *Mukamal v. Bank of America (In re Egidi)*, 386 B.R. 884 (Bankr. S.D. Fla. 2008). In *Mukamal*, the court held that, under Eleventh Circuit law, the debtor’s control of the funds was sufficient to cause the bank to bank and convenience check transfers to constitute transfers of property of the debtor. Moreover, the court found earmarking did not apply to the transfers because the new lender never directed the manner in which the debtor was required to dispose of the borrowed funds. The bankruptcy

court was affirmed by the district court. The Eleventh Circuit heard oral argument at the beginning of May.

There are no circuit courts that have ruled in favor of the credit card lenders. Those few cases that have been decided in favor of the credit card companies have held that a bank to bank transfer is merely a transfer of credit from one institution to another and does not involve property of the debtor. *See, e.g., Loveridge v. Ark of Little Cottonwood, Inc., (In re Perry)*, 343 B.R. 685 (Bankr. D. Utah 2005), *overruled by In re Marshall*, 550 F. 3d 1251. However, even the *Perry* case declined to accept the credit card company's earmarking argument.

As noted, FIA Card Services has filed a *petition for writ of certiorari* of the *Marshall* case to the United States Supreme Court. The basis of the petition is that the Tenth Circuit's *Marshall* decision conflicts with the Supreme Court decision in *Begier v. IRS*, 496 U.S. 53 (1990), and with the Fifth Circuit decision in *Coral Petroleum*. The petitioner cites the statement in *Begier* that "property of the debtor subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of the bankruptcy proceedings" and argues that property transferred from bank to bank could never have been part of a debtor's estate.

The petitioner also argues that the "control" concept of property adopted by the Tenth Circuit is contrary to *Begier* and moreover, is in conflict with the Fifth Circuit's *Coral Petroleum* decision that holds that there is no "transfer of property of a debtor" when one creditor is merely substituted for another. *Coral Petroleum's* holding finds such a substitution earmarking under the most liberal application of the theory.

It will be interesting to see whether the Supreme Court accepts *certiorari*. It is a big gamble for the credit card companies but at this juncture, and with the current trend in the courts, it may seem to them that they have nothing to lose.

**PAYMENT ON CLAIMS SECURED BY SURRENDERED COLLATERAL**

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**I. BACKGROUND**

The Bankruptcy Abuse and Consumer Protection Act (“BAPCPA”) was enacted to address certain perceived abuses of the bankruptcy system, including “easy access to chapter 7 liquidation proceedings by consumer debtors who, if required to file under chapter 13, could afford to pay some dividend to their unsecured creditors.” *In re Hardacre*, 338 B.R. 718, 720 (Bankr. N.D.Tex. 2006). Section 707(b)(2) provides a mathematical formula for the court to objectively assess the debtor’s ability to repay her debts from disposable income over a 60-month period following the date of the filing of the petition. Under the means test, the court calculates the debtor’s current monthly income, reduces that figure by certain living expenses, and multiplies the difference by 60. If that figure is greater than \$10,000, the court must presume that the debtor’s case is abusive.

One of the first issues that arose under section 707(b)(2) was whether debtors could deduct, on line 42, payments on debts secured by property they were surrendering. Section 707(b)(2)(A)(iii) provides:

[t]he debtor’s average monthly payments on account of secured debts shall be calculated as the sum of –

- (I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition; and
- (II) additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor’s primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor’s dependents, that serves as collateral for secured debts; divided by 60.

The United States Trustee contends that the means test was not intended to include amounts that the debtor will never pay to secured creditors during the 60 month period.

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<sup>1</sup>This paper reflects the individual views of the authors and does not constitute an official statement of the views of the United States Trustee Program or of the United States Department of Justice.

Therefore, a debtor is not entitled to take deduction on her means test form for obligations associated with property she intends to surrender in connection with her chapter 7 case.

## II. ANALYSIS OF STATUTE AND SELECTED CASES

### A. “Amounts Scheduled as Contractually Due”

The first published opinion analyzing the “surrender” issue was *In re Walker*, 2006 WL 1314125 (Bankr. N.D.Ga. 2006). Applying a dictionary definition of the word “scheduled,” the court determined that payments that are “scheduled as contractually due” are those payments that the debtor is legally obligated to make on certain dates in the future under the terms of the contract. *Id.* at \*3. The court noted that “nothing the debtor does or does not do changes the fact that scheduled payments remain contractually due” *Id.* at \*4. The court concluded that under the means test the debtors could deduct payments on secured debts they were not reaffirming.

Several courts have rejected the court’s approach and conclusion in *Walker*. See, e.g., *In re Skaggs*, 349 B.R. 594 (Bankr. E.D.Mo. 2006), *In re Harris*, 353 B.R. 304 (Bankr. E.D.Okla. 2006), and *In re Ray*, 362 B.R. 680 (Bankr. D.S.C. 2007). “Congress used the phrase ‘scheduled as’ several times in the Bankruptcy Code to refer not to the common dictionary meaning of the word schedule (*i.e.*, ‘to plan for a certain date’), but to whether a debt is identified on a debtor’s bankruptcy schedules.” *In re Skaggs*, 349 B.R. at 599.

### B. “Due in Each of the Sixty Months”

The *Walker* court concluded that expenses under the means test are to be based on historical figures. The United States Trustee asserts that when section 707(b)(2)(A)(iii) is read in its entirety, it requires, as a prerequisite to allowing the deduction, that those debts be due “in each month of the 60 months following the date of the petition.” “To focus on the single term ‘contractually due’ without due consideration of the import of the term ‘scheduled’ and the phrase ‘in each of the 60 months following the date of the petition’ will miss the actual meaning and the intent § 707(b)(2).” *In re Skaggs*, *Id.* at 600.

Although the means test requires the debtor to disclose historical income data, it permits the debtor to include ongoing and future expenses. For example, section 707(b)(2)(A)(ii)(II) provides that:

...the debtor’s monthly expense may include, if applicable, the continuation of actual expenses paid by the debtor that are reasonable and necessary for care and support of an elderly, chronically ill, or disabled household member or member of the debtor’s immediate family...

### C. Snapshot Approach

As the Sixth Circuit Bankruptcy Appellate panel noted, “(T)he majority of the cases which have addressed the issue in the chapter 7 context have found that the means test calculation under § 707(b)(2)(A) is a mechanical formula that provides a snapshot of the debtor's

finances on the date the petition was filed. Secured debt payments may be deducted if they are owed on the petition date without regard to the future intent of the debtor. Courts addressing the surrender issue under chapter 7 have overwhelmingly held that the plain language of the statute compels a conclusion that the postpetition surrender of secured collateral does not prevent the debtor from deducting the secured debt expense on the means test.” *In re Thomas*, 395 B.R. 914, 920 (6<sup>th</sup> Cir. BAP 2008). See also, *In re Rudler*, 388 B.R. 433 (1st Cir. BAP 2008).

#### **D. The Chapter 13 Difference**

The court in *In re Nockerts* concluded that “the situation presented by a section 1325(b) objection in a chapter 13 case is materially different because the timing of the application of section 707(b)(2)(A) and (B) is different in the chapter 13 case.” *In re Nockerts*, 357 B.R. 497, 504 (Bankr. E.D.Wis. 2006) “Section 1325 does not... statutorily bind this Court to ignore financial reality and allow an above-median income debtor to deduct an expense amount from her disposable income which admittedly will not be incurred in the future and therefore will not be reasonably necessary to be expended for the maintenance or support of the debtor.” *In re Long*, 390 B.R. 581 (Bankr. E.D.Tex. 2008). See also, *In re Marchionna*, 393 B.R. 512 (Bankr. E.D. Ohio 2008), *In re Koch*, 391 B.R. Bankr. N.D.N.Y. 2008), *In re Gonzalez*, 388 B.R. 292 (Bankr. S.D.Tex. 2008), and *In re Vernon*, 385 B.R. 342 (Bankr. M.D. Fla. 2008).

#### **E. Timing of Surrender**

Section 521(a)(2)(A) of the Bankruptcy Code requires a debtor to file a statement of intention within 30 days of the earlier of the petition date and the date of the meeting of creditors and section 521(a)(2)(B) requires that a debtor perform that expressed intention within 30 days after filing the statement of intention. *In re Singletary*, 354 B.R. 455 (Bankr. S.D. Tex. 2006), holds that if property intended to be surrendered is actually surrendered at the time a secured debt repayment expense is challenged, a debtor is not entitled to claim the secured payments on her means test form.

**SELECT CLAIM OBJECTION ISSUES IN CHAPTER 7**

**Neil C. Gordon**

**I. APPLICABLE STATUTES AND RULES**

**A. TIMELY AND TARDY CLAIMS**

1. Rule 3002(c)(5) sets forth the typical 90-day deadline for a creditor to file a claim. § 501(a) and (c) provide that if the creditor does not timely do so, the debtor or the trustee has 30 days to file proof of such claim.
2. § 726(a)(3) provides for payment of claims filed tardily under section 501(a) after priority and timely filed unsecured claims have been paid. See also § 502(b)(9).

**B. ALLOWANCE AND OBJECTIONS TO CLAIMS**

1. § 502(a) provides that a proof of claim is deemed allowed, unless a party in interest objects. § 704(a)(5) requires the trustee to “examine proofs of claims and object to the allowance of any claim that is improper.”
2. § 502(b) provides for the grounds for claim objections and sets forth that the court is to determine the amount of such objected-to claim after notice and a hearing. These grounds include where “such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law...” See also § 558 which allows the estate the benefit of any defense available to the debtor including statutes of limitations and other personal defenses
3. Under new § 502(k)(1), the court, on the motion of the debtor and after a hearing, may reduce a claim filed under this section based in whole on an unsecured consumer debt by not more than 20% of the claim, if the claim was filed by a creditor who unreasonably refused to negotiate a reasonable alternative repayment schedule proposed on behalf of the debtor by an approved non-profit budget and credit counseling agency after an offer was made by the debtor at least 60 days before the petition date that provided for payment of at least 60% of the amount of the debt over a period not to exceed the repayment period of the loan, or a reasonable extension thereof, on a debt that is dischargeable.
4. Rule 3001 provides (a) that a “proof of claim shall conform substantially to the appropriate Official Form,” (see also Rule 9009); (c) if based on a writing, “the original or a duplicate “shall be filed with it, and (d) if secured, it “shall be accompanied by evidence that the security interest has been perfected.”

5. Rule 3001(f) provides: "A proof of claim executed and filed in accordance with these rules shall constitute *prima facie* evidence of the validity and amount of the claim."
6. Rule 3007 provides for objections to claims to be in writing with at least 30 days notice prior to the hearing thereon. Rule 3006 provides that after a creditor has filed a proof of claim and an objection is filed thereto, "the creditor may not withdraw the claim except on order of the court after a hearing on notice to the trustee."
7. Rule 3001(e) provides the rules relating to transferred claims.
8. Official Form 10 provides the most common form for usage for a proof of claim in a Chapter 7 case.

## II. SELECT CASES ADDRESSING CLAIM OBJECTIONS

1. **Informal proof of claim denied.** The creditor/surety failed to file a formal proof of claim before the bar date. It subsequently moved to file an amended claim based on a prior informal claim, arguing that its notice of appearance, participation in the 341 meeting, Rule 2004 examination, and negotiating settlement of bond claims on the debtor's behalf, taken together, were sufficient to establish an informal proof of claim. *In re Elleco, Inc.*, 295 B.R. 797 (Bankr. D. S.C. 2002). Judge Waites noted that the Fourth Circuit had adopted a liberal view which allowed an amendment of an informal claim "if there is anything in the bankruptcy case's record that establishes a claim, ...when substantial justice will be done by allowing the amendment." *Fyne v. Atlas Supply Co.*, 245 F.2d 107 (4th Cir. 1957). Here, the court found that none of the writings in the court file could be viewed as an assertion of a claim and were insufficient to alert other parties to the claim and desire to be paid from the estate.

2. **Late claims not treated as timely.** (A) Objection filed to the trustee's final report by a creditor who missed the claims bar deadline by approximately three years, **allegedly as a result of not receiving notice.** The court denied the objection, *In re Schemper*, 303 B.R. 385 (Bankr. N.D. Iowa 2003), noting that §726(a)(2)(C) allows tardily filed claims to be treated equally with timely filed claims where the creditor "did not have notice or actual knowledge of the case in time for timely filing a proof of claim." Here the bar notice was properly served at an address reasonably calculated to reach the creditor who had been at all times aware of the bankruptcy case. Relying on *Hagner v. United States*, 285 U.S. 427, 430 (1932) and Rule 9006(e), the court found a strong presumption at law that mail handled by the U.S. Postal Service that was properly addressed and stamped was in fact received by the addressee. Further relying on *In re Bucknum*, 951 F.2d 204, 206-7 (9th Cir. 1991) and *In re Coastal Alaska Lines, Inc.*, 920 F.2d 1428 (9th Cir. 1990), the court found that if a party were permitted to defeat the presumption of receipt of notice resulting from the certificate of mailing by a simple affidavit to the contrary, the "scheme of deadlines and bar dates under the Bankruptcy Code would become unraveled." (B) Claim filed one day late. 81 days later, the claimant moved for judicial relief to have the claim held timely under the "excusable neglect" standard of *Pioneer Investments Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). *In re Kmart Corp.*,

**381 F.3d 709 (7th Cir. 2004).** The circuit court held the Bankruptcy Court did not abuse its discretion when it failed to allow the claim.

**3. Trustee files late claims for creditors.** The debtor objected to eight proofs of claim filed by the chapter 7 trustee on behalf of creditors who failed to file their claims prior to the deadline set by the court. Relying on *In re Nettles*, 251 B.R. 899 (Bankr. M.D. Fla. 2000), the debtor argued that the trustee's motive in filing claims may be a basis for disallowance; and noted that trustee compensation would increase, and surplus to the debtor would decrease if the claims were allowed. The trustee relied on §501(c), which provides for trustee filing of proofs of claim when a creditor fails to timely do so, and further argued that Rule 3004 specifically authorizes a trustee to file such claims within 30 days after the bar date, as was done in this case. ***In re Schmidt*, 333 B.R. 868 (Bankr. N.D. Fla. 2005).** In ruling for the trustee, Judge Killian stated: "The statute is clear and unambiguous and, as such, any inquiry into its meaning and intent must begin and end with its language.... The Court's sole duty is to enforce it according to its terms."

**4. Untimely claims filed by trustee not entitled to distribution.** The trustee settled Debtor's Fen-Phen litigation but no creditor claims were filed prior to the bar date. Over six months later, the trustee filed proofs of claim for 11 creditors and the debtor moved for payment of all the money held, as surplus funds, arguing that the claims filed by the trustee were untimely and not entitled to any distribution. The trustee countered that even if the claims were untimely, under §726(a)(3) they were to be fully satisfied before funds were returned to the Debtor. ***In re Rothman*, 373 B.R. 785 (Bankr.S.D.Ga. 2006).** Judge Davis concluded that the claims filed by the trustee were not timely filed nor entitled to any distribution as late-filed because § 726(a)(3) referred only to claims "tardily filed under §501(a)," whereas, the trustee's authority to file claims for creditors was derived from § 501(c).

**5. Only trustee had standing to object to claims.** The chapter 7 trustee had filed and was prosecuting certain claim objections. Other creditors sought to intervene and assert their own, similar objections to those claims. The trustee challenged their standing to do so, and the bankruptcy court agreed with the trustee. ***In re Trusted Net Media Holdings, LLC*, 334 B.R. 470 (Bankr. N.D. Ga. 2005).** Judge Mullins analyzed the issue and determined that only where the trustee had declined to file claim objections would a creditor have standing to object. Otherwise, it would clearly hinder the orderly and efficient administration of the estate.

**6. Attorney fees allowed in claim.** Creditor's proof of claim included post-petition attorney fees and costs. The creditor was stipulated as over-secured and nobody contested the reasonableness of those fees and costs. However, the trustee objected on the basis that Georgia law only authorized collection of attorney's fees if a "10-day" letter was issued and the time lapsed without payment of the debt prior to seeking collection of such fees and costs. No such letter was issued in this case. ***In re Amron Technologies, Inc.*, 376 B.R. 49 (Bankr. M.D. Ga. 2007).** Judge Walker disagreed with the trustee finding persuasive similar cases from two other circuits: *First West Bank & Trust v. Drewes (In re Schriock)*, 104 F.3d 200 (8<sup>th</sup> Cir. 1997), and *Unsecured Creditors' Committee v. Walter E. Heller Company Southeast, Inc. (In re K.H. Stephenson Supply Co.)*, 768 F.2d 580 (4<sup>th</sup> Cir. 1985). Like those cases, Judge Walker noted that

§ 506(b) required only that the fees be provided for by contract and that they be reasonable. It did not require them to be enforceable under state law.

7. **Supporting documents not required for IRS claim.** The objection to the IRS's proof of claim, alleged that it lacked documentation required under Bankruptcy Rule 3001(c). Upon denial of the objection by the bankruptcy court, the debtor appealed. *In re Carlisle*, 320 B.R. 796 (M.D.Pa. 2004). The district court noted that Rule 3001(c) requires "the original or a duplicate" when a claim is based on a writing. Finding the IRS claim to instead be based on a statute, the court held that documentation was not required, and the proof of claim was valid.

8. **Administrative expense claim denied.** Pre-petition the IRS obtained a continuing contempt order against the debtor for failure to produce documents as part of a tax investigation. After the debtor filed bankruptcy, the IRS argued that the continuing contempt should be given administrative expense status. The bankruptcy court denied the motion, and the district court affirmed, *In re Chris-Marine, U.S.A., Inc.*, 321 B.R. 63 (M.D. Fla. 2004), noting that while the 11<sup>th</sup> Cir. had created a new category of administrative expenses under § 503(b) for punitive civil penalties assessed post-petition for post-petition violations of state mining regulations, *In re N.P. Mining Co., Inc.*, 963 F.2d 1449 (11<sup>th</sup> Cir. 1992), the sanctions order here occurred pre-petition and, thus, would not fall within this narrow category.

9. **Claims unenforceable against the debtor.** 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. § 502(b)(1). 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 (Bankr.D.Mass. 2005). (See § 558 as well).

10. **Trustee allowed to apply strong-arm power as defense to claim.** After the two-year avoidance action limitation period had expired under §546(a), the trustee objected to secured proofs of claim filed by certain creditors. The objections alleged that the security interests were not perfected pre-petition, and were therefore not effective against the trustee under §544(a)(1). The creditors countered that the trustee's failure to avoid the security interests precluded a subsequent claim objection based on §544. *In re American Pie, Inc.*, 361 B.R. 318 (Bankr.D.Mass. 2007). Judge Feeney first found that the creditors had the ultimate burden to prove that their claims were secured. Based on the trustee's proof that UCC continuation statements had not been filed, the burden shifted to the creditors to show how the security interest remained perfected, after expiration of the initial UCC filings. Thus, §546(a) was found inapplicable, enabling the use of §544(a)(1) to assert lack of perfection.

11. **Overreaching mortgage claims.** In a 40-page opinion, the bankruptcy court sanctioned Wells Fargo (WF) and ordered it to audit every proof of claim filed in that district in cases pending on April 13, 2007, and thereafter (the "Audit"). A complete loan history on every account was also ordered. *In re Stewart*, 391 B.R. 327 (Bankr.E.D.La. 2008). Judge Magner's

holding presents an incredible in-depth look at the methodology and decision-making employed by a national mortgage lender, which administers and/or services 7.7 million home mortgage loans. The reconciliation of the debtor's account took WF four months to research, and showed numerous violations by WF of its own loan documents. The mortgage required funds to be applied first to outstanding escrow, next to accrued interest, and then to principal; but WF paid late charges and inspection fees first. After one payment was missed, even if all subsequent payments were made, a late fee was charged every month thereafter. Of nine broker price opinions charged to the debtor's account, three were duplicates and two were never performed. All contained hidden fees disguised as costs. The court denied seven valuations, and disallowed 43 property inspections, while allowing only ten of the 49 late charges. The disallowed inspections and late fees were imposed while the debtor was making regular monthly payments and were not properly noticed. "The calculation of debtor's monthly escrow was almost incomprehensible and virtually incorrect in every instance." This caused WF to demand substantially erroneous and increased payments from debtor. Also: "Charges for NSF fees, tax searches, property preservation fees, and unapproved bankruptcy fees appeared on the proofs of claim filed in this and previous cases without explanation or substantiation. Further, these charges never appeared as entries on the account history." The court assessed damages and sanctions and ordered WF to perform the Audit. *Accord, In re Workman*, 392 B.R. 189 (Bankr.D.S.C. 2007), where on similar egregious misconduct, Judge Waites found GMAC Mortgage to be in contempt and ordered \$9,000 in compensatory damages, \$7,641.50 in legal fees, and \$1,182.65 for injury to debtor's credit and lost opportunity to refinance the home. As an additional equitable remedy, GMAC was denied late fees, attorney fees, and other charges. Punitive damages of \$13,400 were also assessed.

12. **Claim objections where "trustee did not administer the collateral."** *In re Taylor*, 289 B.R. 379 (Bankr.N.D.Ind. 2003) where the bankruptcy court held this kind of objection is not allowed. Other courts require any such objection to state that, in the absence of the secured creditor filing a deficiency claim within 30 days of the claim objection, the claim will be stricken.

### III. CREDIT CARD CLAIM OBJECTIONS FOR INSUFFICIENT DOCUMENTATION

1. *In re Plourde*, 397 B.R. 207 (Bankr. D.N.H. 2008). Trustee objected to two claims. The AmEx claim was unscheduled by the debtor and had attached only a single-page copy of an account statement, but did not indicate whether the claim included interest or other charges and no itemization of such interest or charges was attached. The eCast claim was filed for \$6,813.06 compared to the debtor's scheduled amount of \$6,309.75. Likewise, it included a single-page computer generated summary of the account, which provided minimal account information and did not indicate whether the claim included interest or other charges and no itemization of such was attached. The chapter 7 trustee sought to have both claims disallowed. The bankruptcy court disallowed the AmEx claim and reduced the eCast claim to the amount scheduled by the debtor. Judge Deasy noted (a) that § 502 provides the substantive grounds for objections to claims, (b) Rule 3001 was a procedural rule prescribed by the United States Supreme Court under a delegation of authority from Congress, 28 U.S.C. § 2075, (c) the rules could not supersede substantive rights nor could the official forms promulgated by the Judicial Conference of the United States under a delegation from the Supreme Court, (d) the significance of Rule

3001(f) is that a proof of claim “executed and filed in accordance with these rules *shall constitute prima facie evidence of the validity and amount of the claim,*” and (d) the burden shifts to the objecting party where compliance with the rule has been met.

The court determined that where debtor’s schedules did not list a claim at all, the creditor has the burden of establishing its claim with more than a bare bones summary of its records, and where the claim is for more than the scheduled amount, it must present evidence explaining the difference. At a minimum, the court held that in order to establish the *prima facie* case validity of a credit card claim, a proof of claim should include “(i) a sufficient number of monthly account statements to show how the total amount asserted has been calculated, and (ii) a copy of the agreement authorizing charges and fees included in the claim.” Additionally, if an assignee files the claim, evidence of the assignment or other evidence establishing ownership of the claim must be provided. Thus, a proof of claim supported by a summary, or a copy of a computer printout, which simply contains a balance due, account number, debtor’s name and the like is not sufficient to establish the *prima facie* validity of the claim and to receive the benefits of Rule 3001(f). Although, absent a proper objection, such claim would still be allowed under § 502. The court holds that when the objecting party is the trustee, the schedules are not admissible as an admission against the trustee, but are admissible under the residual exception in FRE 807.

Finally, Judge Deasy looks at the Bankruptcy Code’s subordination/distribution scheme under § 726 where fines and penalties are subordinated to payment of general unsecured claims to the extent they do not represent compensation for actual pecuniary loss. The one-page account summaries here do not contain sufficient information for the court to determine whether such charges amounted to a penalty. “[T]he unilateral rights, which credit card issuers reserve to themselves under the terms of agreements drafted by them, provide the opportunity for them to impose charges, fees and interest thereon which, although enforceable under non-bankruptcy law, could be penalties subject to subordination under §§ 726(a)(4) ... So long as credit card issuers wish to maintain sole discretion to vary the terms of their agreement with the consumer at any time, and from time to time, they must accept the legal consequences of that business model ... [and] may need to provide details of the charges and interest imposed by them in response to a proper objection to a proof of claim in a bankruptcy proceeding.”

2. eCast filed proofs of claim as assignee of GE Private Label/Sam’s Club, Chase Manhattan Bank, U.S.A., N.A., and NB&A America Bank, N.A. None of the claims nor the attachments provided adequate documentation according to the bankruptcy court. ***In re Sandifer, 318 B.R. 609 (Bankr.M.D.Fla. 2004)***. Judge Briskman found that eCast had left blank the box on Official Form 10 regarding whether the claims neither included interest or other charges above the principal amount nor was the summary attached reflective of those items. Additionally, eCast had altered paragraph 8 of the Official Form. The court found that the proofs of claim initially filed did not enable determination of the accuracy of the claim based on such failure to provide documentation of charges, payments, fees, and interest. Accordingly, to the extent that proper documentation was not provided, the claims were to be disallowed.

In a second similar case, a chapter 13 debtor had objected on the basis of insufficient documentation. In that case, however, the court found that the claims were merely deprived of their *prima facie* validity under Bankruptcy Rule 3001(f). The debtor was required to come

forward with some additional evidence that the claims were invalid. *In re Mazzoni*, 318 B.R. 576 (Bankr.D.Kan. 2004). Judge Berger noted that the analysis would be different if it was a chapter 7 or 11 trustee objecting for lack of sufficient documentation because the trustee would have no personal or firsthand knowledge of the debtor's debts. "As a result, a Chapter 7 or 11 trustee's objection to a proof of claim on the ground that no documents were attached supporting the claim likely mandates a different analysis and conclusion." *Accord. In re Jorczak*, 314 B.R. 474 (Bankr.D.Conn. 2004)(Debtors' scheduling of the debt would estop debtors but not be binding on a Chapter 7 trustee).

3. *In re Cluff*, 313 B.R. 323 (Bankr. D. Utah 2004). Chapter 13 debtors objected to claims they had scheduled, based on insufficient documentation in the proofs of claim filed by the creditors. Judge Boulden first determined what must be filed in order for the claim to be *prima facie* valid under Rule 3001(f). For credit card debts the proof of claim should 1) include amount of debts; 2) indicate the name and account number of the debtor; 3) be in the form of a business record or other reliable format; and 4) include a breakdown of any charges such as interest, late fees, and attorney fees. The court further found, however, that failure to include these elements in the proof of claim was not a basis for claim disallowance. Rather, it shifted the initial burden of proving claim existence and amount to the creditor; so the debtor was still required to rebut the evidence in the proof of claim, even if it was not *prima facie* valid. Finally, as to properly filed proofs of claim, the debtor's formal objection as to sufficiency of documentation could not overcome *prima facie* validity, especially where the debtors had originally scheduled the debt as uncontested, liquidated, and non-contingent. But *see, contra, In re Henry*, 311 B.R. 813 (Bankr. N.D. Wash. 2004), where the bankruptcy court sustained objections by a chapter 13 debtor to claims lacking sufficient documentation. This court found Rule 3001(c) to require submission of a copy of a credit card agreement or promissory note as proof of a claim's existence. Claims of creditors who either failed to respond to the debtor's objection, or amended their claims without adequate documentation were denied.