Consumer Update 2011

Plenary Session

Hon. Mary Grace Diehl, Moderator
U.S. Bankruptcy Court (N.D. Ga.); Atlanta

Hon. David W. Houston, III
U.S. Bankruptcy Court (N.D. Miss.); Aberdeen

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CONSUMER LAW UPDATE

AMERICAN BANKRUPTCY INSTITUTE
SOUTHEAST BANKRUPTCY WORKSHOP
KIAWAH ISLAND, SC

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Appeals

District court's remand order was not final for appeal. The district court's remand order required the bankruptcy court to take significant further action; therefore, the remand order, although including the term "judgment," was not final for purposes of § 158(d)(1). When the bankruptcy court subsequently entered a final order that was not appealed to the district court, the circuit court lacked still lacked appellate jurisdiction. *Gomez v. Kamper Investments, LLC (In re Gomez),* 2010 WL 5093893 (5th Cir. Dec. 9, 2010), slip copy.

Chapter 7 debtor was not "party aggrieved" and lacked standing to appeal. The debtor had filed four unsuccessful Chapter 11 cases, the last of which was converted to Chapter 7. Prior to the conversion, a motion for stay relief had been filed as to nonresidential property, and the debtor admitted there was no equity in the property. The debtor had not appealed the order converting the case, and the bankruptcy appellate panel held that the Chapter 7 debtor was not a "party aggrieved," since her property interest had not been diminished, her burdens were not increased, and her rights were not impaired by the stay relief. "Generally, an insolvent chapter 7 debtor does not have standing to appeal," when the appeal could not result in any distribution to the debtor or affect the debtor's discharge. The debtor's legal and equitable interests in the property had passed to the bankruptcy estate. A consideration of the merits did not favor the debtor. *Aja v. Emigrant Funding Corp. (In re Aja),* 442 B.R. 857 (BAP 1st Cir. 2011).

Automatic Stay

Automatic stay did not go into effect under § 362(c)(4). Prior to filing the current Chapter 13 case, the debtor had two prior cases dismissed within the prior year, and the bankruptcy appellate panel rejected the debtor's argument that the language of § 362(c)(3) concerning "with respect to the debtor" should be read into § 362(c)(4). The latter Code section is unambiguous and courts have all held that when the debtor files a third case in a one-year period, with the two prior cases dismissed (and neither was refiled under a chapter other than chapter 7 after dismissal under § 707(b)), no automatic stay goes into effect. Section 362(c)(4) makes no exception for property of the bankruptcy estate. *Bates v. BAC Home Loans (In re Bates),* ___ B.R. ___, 2011 WL 1005188 (BAP 8th Cir. Mar. 23, 2011).

Postpetition garnishment did not violate stay that expired under § 362(c)(3)(A). The Chapter 13 debtor had one prior case pending and dismissed within the year before filing, and no motion was filed within the first thirty days to continue the automatic stay. The bankruptcy appellate panel adopted the position that the stay termination under § 362(c)(3)(A) was effective entirely as to the debtor, the debtor's property and property of the estate. The conflicting judicial views were reviewed. As a result of the complete termination of the stay, the postpetition garnishment issued by the debtor's former spouse could not violate the stay. *Reswick v. Reswick (In re Reswick),* ___ F.3d ___, 2011 WL 612728 (BAP 9th Cir. Feb. 4, 2011).

Chapter 7 debtors' prepetition law firm willfully violated stay. A law firm that represented the debtors prepetition in landlord-tenant litigation had sued for unpaid fees, and while the firm's dischargeability complaint was pending, the firm sent four invoices that were collection efforts in violation of § 362(a)(6), and the violations were willful since the firm had actual knowledge of

the bankruptcy filing. Notwithstanding the finding of willfulness, the debtors suffered no injury—"no fear; no apprehension; no anxiety; no nausea; no concerns; no monetary distress; no emotional distress; no harm." Without injury, no damages were recoverable. As to attorney fees, while recoverable even without other actual damages to the debtors, the fees must be reasonable and necessary. The firm unilaterally had ceased sending invoices, and the contempt litigation initiated by the debtors five months later was needless. "Debtors were litigating something that did not need litigating. No attorneys' fees were necessary; no attorney's fees are reasonable." *In re Miller,* ___ B.R. ___, 2011 WL 938379 (Bankr. E.D. Pa. Mar. 1, 2011).

Former spouse's attorney willfully violated stay. The attorney for the Chapter 13 debtor's former husband willfully violated the automatic stay by obtaining an order setting status hearing on enforcement of a marital settlement agreement that had established prepetition debt. The status hearing was a collection effort barred by the stay. The debtor's attorney had entered into a settlement agreement with the former spouse's attorney for payment of $5,000 damages, which the court found to be binding on the debtor, who also happened to be an attorney. *In re Hall-Walker,* ___ B.R. ___, 2011 WL 652461 (Bankr. N.D. Ill. Feb. 22, 2011).

Bankruptcy court has authority to order participation in loss mitigation program without violating stay remedies. Overruling the mortgage creditor's objection to participation in the court's loss mitigation program in this Chapter 7 case, the court reviewed the history of its implementation of the mediation program, which was intended to encourage consensual resolution involving residential property at risk of foreclosure. The court has authority under its inherent power to manage and control its calendar, and the program does not conflict with stay relief or with the retention options of § 521(a)(2). If agreement is reached between the parties, the debtor retains the home by consent; if agreement is not reached, the creditor still has its § 362(d) rights. *In re Sosa,* 443 B.R. 263 (Bankr. D. R.I. 2011).

Ride-through option was not eliminated but is limited. In the Chapter 7 debtor's statement of intention, she stated that she would "continue payments" on a vehicle, without stating whether she would redeem or reaffirm, and the creditor moved for stay relief. The court first concluded that § 521(a)(6) is not available to a creditor that did not file a proof of claim, since that section refers to "an allowed claim for the purchase price secured in whole or in part by an interest in. . .personal property." Here, the creditor had not filed a proof of claim and therefore did not hold an allowed claim. However, § 362(h) provides that the stay terminates and collateral is no longer property of the estate if the debtor fails to file and perform the statement of intention to either surrender, redeem, reaffirm, or assume an unexpired lease of personal property. The court concluded that BAPCPA's amendments to § 521(a)(2) did not eliminate the ride-through, but an attempt to retain the property by ride-through would trigger § 362(h). *In re Miller,* 443 B.R. 54 (Bankr. D. Del. 2011).

Discrimination

Private employer does not violate § 525(a) by denial of employment. Section 525(a) only prohibits governmental employers from denying employment because of bankruptcy, and private employers are not so restricted, agreeing with the Third Circuit. *Burnett v. Stewart Title, Inc. (In re Burnett),* ___ F.3d ___, 2011 WL 754152 (5th Cir. Mar. 4, 2011).

Exemptions

Debtor moving within 730 days was eligible for federal exemptions. A Chapter 7 debtor who moved from Florida to Texas within the 730 days before filing bankruptcy was not eligible for the Texas state-law exemptions and Florida's opt out was only applicable to Florida residents. The plain language of the Florida opt out states that "residents of the state" may not use the federal § 522(d) exemptions. Therefore, the debtor may use the § 522(d) exemptions in the Texas bankruptcy case, rejecting the trustee's argument that Florida law did not permit use of § 522(d). The Circuit court declined to reach corollary questions of whether the choice of law provisions of § 522(b)(3)(A) preempt state law restrictions on extraterritorial application of state-law exemptions or whether the savings clause of § 522(b) affects extraterritorial application of state-law exemptions. *Camp v. Ingalls (In re Camp),* 631 F.3d 757 (5th Cir. 2011).

Michigan bankruptcy-specific exemptions unconstitutional. Disagreeing with *In re Peveich,* 574 F.3d 248 (4th Cir. 2009) (holding West Virginia's bankruptcy-specific exemptions constitutional), the bankruptcy appellate panel held that bankruptcy-specific exemptions enacted by the Michigan Legislature were unconstitutional under the Bankruptcy Clause. The exemptions were more favorable to bankruptcy debtors than the state's nonbankruptcy exemptions ($34,450 homestead, and $51,560 if disabled, versus $3,500 homestead for nonbankruptcy Michigan residents), and Chapter 7 trustees objected to the debtors' claimed homestead exemptions, raising the constitutional issue. The opinion reviewed the history of exemptions in bankruptcy, discussed the effect of the opt out, and concluded that Congress did not give the states power to legislate exemptions that would be available only to debtors in bankruptcy. Nine states have such bankruptcy-specific exemptions. *In re Schafer and Jones,* 2011 WL 534752 (BAP 6th Cir. Feb. 17, 2011).

Inherited IRA is exempt. The district court followed judicial authority subsequent to the bankruptcy court's decision, holding that an inherited IRA is exempt under § 522(d)(12), adopting reasoning of *In re Nessa,* 426 B.R. 312 (BAP 8th Cir. 2010), and citing other authority in accord. Under § 522(d)(12), the exemption must constitute retirement funds that are exempt from taxation under the Internal Revenue Code, and the inherited IRA met both requirements. *Chilton v. Moser,* 2011 WL 938310 (E.D. Tex. Mar. 16, 2011), slip copy. *Accord In re Mathusa,* ___ B.R. ___, 2011 WL 1134680 (Bankr. M.D. Fla. Mar. 28, 2011) (adopting *Nessa*).

Debtors follow Supreme Court advice claiming exemption in 100% FMV. The Chapter 7 trustee objected to the debtor's claim of exemption in "100% FMV" of the assets claimed as exempt under § 522(d), but the court noted that this is exactly what the Supreme Court suggested that debtors do in *Schwab v. Reilly,* 130 S.Ct. 2652 (2010). The trustee argued that claiming exemptions in this manner was improper, but there was no gaming of the system, and the exemption claim did exactly what it should, by triggering the trustee's objection and setting up an evidentiary hearing on value of the exempt assets. However, as to other debtors' exemptions under Texas statutes, which refer to property itself and not to the debtor's interest in property, even if the debtor did not say "100% FMV," the trustee would be required to object timely to exemption claims within the Rule 4003 time limit. The trustee's objection was timely. *In re Moore,* 442 B.R. 865 (Bankr. N.D. Tex. 2010). *See also In re Winchell,* __ B.R. ___, 2010 WL 5338054 (Bankr. E.D. Wash. Dec. 20, 2010).

Debtor entitled to homestead exemption that increased subsequent to prior filing. Although the debtor had filed a prior Chapter 7 case and claimed the New York $10,000 homestead, in a subsequent Chapter 13 case, the debtor was entitled to claim the amended $50,000 homestead. Res judicata did not bar the increased exemption, because the two cases were separate, each governed by the exemptions in effect at the time of filing. Unlike § 362(c)(3) and (4), the Code's exemption scheme provides no qualifications for repeat filers. *In re Magee,* ___ B.R. ___, 2011 WL 482723 (Bankr. S.D. N.Y. Feb. 3, 2011).

Chapter 7 Issues

Conversion

Section 707(b) abuse test applies upon conversion from Chapter 13 to 7. The debtors are deemed to have filed Chapter 7 at the time of filing of a Chapter 13 for purposes of § 707(b); thus, the abuse test applies upon conversion. *Fokkena v. Chapman (In re Chapman),* __ B.R. ___, 2011 WL 832552 (BAP 8th Cir. Mar. 11, 2011).

Discharge and Objections

Assignee of judgment is real party in interest with standing under § 523(a). Under California law, a judgment creditor may assign the judgment to a third party, who acquires the rights of the assignor, and under federal law, an assignee has standing to prosecute discharge exceptions. However, the bankruptcy court properly required the assignee to produce the assignment agreement as a part of a pretrial scheduling order, and the party was warned that failure to comply would result in dismissal of the proceeding with prejudice. The bankruptcy court did not abuse its discretion in entering judgment in favor of the debtor. *Carter v. Brooms (In re Brooms),* ___ B.R. ___, 2011 WL 924036 (BAP 9th Cir. Jan. 18, 2011).

Bankruptcy court properly gave preclusive effect to administrative law judge findings. After finding that the automatic stay's § 362(b)(4) exception permitted a pending administrative hearing to continue, and following an eleven-day hearing, the administrative law judge found that the debtor, former officer of a home health agency, had knowingly presented false or fraudulent claims. The bankruptcy court granted extensions of time to file a dischargeability complaint, while awaiting an appeal of the administrative law judge's decision, which was affirmed by the Eighth Circuit. Under Supreme Court authority, common-law doctrines of collateral estoppel and res judicata are applied to final determinations of administrative agencies, when those agencies are acting in a judicial capacity, resolving factual issues over which the parties have had opportunity to litigate. The debt was excepted from discharge under §§ 523(a)(2)(A) and (a)(7). *United States v. Horras (In re Horras),* 443 B.R. 159 (BAP 8th Cir. 2011).

State tax report was sufficiently similar to a return for purposes of § 523(a)(1)(B). When the debtor failed to report to the Maryland tax authority the amount of changes to the federal adjusted income, the report was found to be sufficiently similar to a tax return to trigger § 523(a)(1)(B)'s failure to file exception. The exception from discharge was affirmed. *State of Maryland v. Ciotti (In re Ciotti),* ___ F.3d ___, 2011 WL 790309 (4th Cir. Mar. 8, 2011).

Failure to file returns and to pay for five years established willfulness. Under § 523(a)(1)(C), the debtor willfully attempted to evade or defeat income tax liability when he affirmatively failed to file tax returns for 1998 through 2002, and he also failed to pay taxes for those years. *United States v. Mitchell (In re Mitchell),* 633 F.3d 1319 (11th Cir. 2011).

Debtor lacked intent to deceive or defraud under § 523(a)(2)(A). The bankruptcy court properly determined that the debtor did not have the requisite intent to deceive or defraud. The parties had different understanding of what was included in a contract to renovate the creditor's home, and the bankruptcy court found that the debtor never intended to include the building of a porch in the contract. *Reeves v. Davis (In re Davis),* ___ F.3d ___, 2011 WL 855837 (7th Cir. Mar. 14, 2011).

Unsophisticated investor justifiably relied and bankruptcy court could liquidate debt and enter judgment under § 523(a)(2)(A). An investor who was unsophisticated in American stock investing justifiably relied on the debtor's false statements regarding profits, and the bankruptcy court had jurisdiction to find the debt nondischargeable, as well as to liquidate the debt and enter final judgment. The authorities agreeing on the court's entry of judgment are reviewed. *Islamov v. Ungar (In re Ungar),* 633 F.3d 675 (8th Cir. 2011).

Financial statements were not materially false. The bankruptcy court applied correct standards in determination that written financial statements were not materially false concerning ownership of gold coins and mutual funds, and a finding that the bank did not rely at all on the financial statements was not clearly erroneous. *Northland National Bank v. Lindsey (In re Lindsey),* 443 B.R. 808 (BAP 8th Cir. 2011).

Debtor acted in fiduciary capacity. Under § 523(a)(4), the debtor acted in a fiduciary capacity when he obtained loans for himself from a limited partnership, and defalcation was properly found for the debtor's willful violation of a duty to the partnership by failure to secure those loans. The partnership's entrustment to the debtor of management and his complete control over that management was sufficient to establish a fiduciary capacity. Defalcation was found, when the fiduciary was not permitted to put himself in a position of benefit that violated duty to the partnership. *FNFS, Ltd. v. Harwood (In re Harwood),* ___ F.3d ___, 2011 WL 1239810 (5th Cir. Apr. 5, 2011).

Debtor was not in fiduciary capacity to creditor of debtor's wholly owned corporation. Although Illinois law places a fiduciary duty on a corporate officer or director to an insolvent corporation, that fiduciary status does not extend to creditors of the insolvent corporation for purposes of § 523(a)(4). Discussing the conflicting judicial authority on the issue, the Circuit court declined, in the absence of fraud, "to stretch the section 523(a)(4) exception so far as to make officers and directors of insolvent corporations personally liable, without the ability to secure discharge in bankruptcy, for a wide range of corporate debts." The creditor also failed to show existence of an express trust, and there was no implied fiduciary status, when the client of the corporation stood in an ordinary principal-agent or buyer-seller relationship with the corporation. *Follett Higher Education Group, Inc. v. Berman (In re Berman),* 629 F.3d 761 (7th Cir. 2011).

Licensed real estate agent was not in fiduciary capacity, and state court judgment was not given preclusive effect. A state court jury verdict had been entered against the debtor for negligent and intentional breach of the debtor's fiduciary duty to a client in a failed real estate purchase, but that judgment was not entitled to preclusive effect, since the state's broad definition of fiduciary was not controlling under § 523(a)(4), which requires an express or technical trust. Reviewing prior appellate authority on whether real estate agents stand in a fiduciary capacity, under *In re Cantrell,* 329 F.3d 1119 (9th Cir. 2003), a California real estate licensee does not meet fiduciary requirements for § 523(a)(4), solely because of holding the license. The debtor never held property in trust for the client; there was no trust res. Preclusion did not attach to the state court verdict, since the jury did not necessarily find the actual fraud required for § 523(a)(4). *Honkanen v. Hopper (In re Honkanen),* ___ B.R. ___, 2011 WL 781831 (BAP 9th Cir. Feb. 16, 2011).

Attorney fees and collection costs incurred in § 523(a)(8) discharge litigation were contractual damages. First agreeing that loan funds were "educational" by looking to the purpose of the loan, the imposition of costs and attorney fees was permitted under the contract or loan, and such fees are allowable unless the Bankruptcy Code provides otherwise. Although § 523(a)(8) does not refer to fee recovery, the contract may so provides. *Busson-Sokolik v. Milwaukee School of Engineering (In re Busson-Sokolik),* ___F.3d ___, 2011 WL 455903 (7th Cir. Mar. 15, 2011).

Reckless disregard for truth supports § 727(a)(4) objection. When the debtor failed to disclose past business interests, property transfers and income, the reckless disregard for truthfulness supported a finding of intent, sufficient to deny the discharge. *Stamat v. Neary,* ___ F.3d ___, 2011 WL 1045839 (7th Cir. Mar. 24, 2011).

Discharge Injunction

Contempt proceeding for discharge injunction violation instituted by motion. The former Chapter 7 debtor filed an adversary proceeding alleging violation of the discharge injunction by the creditor's reporting of incorrect debt, but the Circuit court had previously held that no private right of action for damages existed under § 524. The remedy is for contempt under § 105, and an order for contempt must be sought by a motion in the bankruptcy case. An adversary proceeding is not an appropriate method, with the court applying Bankruptcy Rule 9020, which specifies that Rule 9014 governs a motion for an order of contempt. *Barrientos v. Wells Fargo Bank, N.A.,* 633 F.3d 1186 (9th Cir. 2011).

Debtors' attorney fees for defending state court action were properly awarded as sanction for discharge injunction violation. Although no private right of action exists under § 524, a finding of contempt may include damages as a sanction. The creditor intended to pressure the debtors into paying a discharged debt when it included the debtors as defendants to a fraudulent transfer action filed against the debtors' good friend. Actual attorney fees incurred by the debtors in defending the state court action were appropriately awarded as a sanction. *Badovick v. Greenspan (In re Greenspan),* 2011 WL 310703 (BAP 6th Cir. Feb. 2, 2011), slip copy.

Chapter 13 Issues

Business debtor

Business debtor not required to have bank account only in U.S. Trustee approved depository. Rejecting the Chapter 13 trustee's arguments, there is no statutory authority to require business debtor to use only a U.S. Trustee approved depository institution for bank accounts. Section 345(a) doesn't apply to Chapter 13 debtors, and there is no analogue to §§ 1107 or 1203 in the Chapter 13 Code. Although the court may address situations where the debtor deposited funds in an unsound bank, under § 1304(b), there is no bright line rule requiring what the trustee requested. The debtors had deposited funds in a federally insured credit union, and the debtors were required to write or rubber stamp the case number on each check as issued. If new checks were ordered, the case number would be printed on each check. *In re Seger,* 2011 WL 239551 (Bankr. D. Mass. Jan. 24, 2011) (slip opinion).

Confirmation Issues

Debtor may not deduct vehicle ownership costs when there is no debt or lease. By 8 to 1, the Court, in an opinion by Justice Kagan, held that an above-median income debtor may not deduct the IRS local standards transportation ownership costs for a vehicle that was owned free of any debt or lease obligation. *Ransom v. FIA Card Services,* ___ S.Ct.___, 2011 WL 66438 (Jan. 11, 2011).

Applicable commitment period is temporal term. Section 1325(b) imposes a temporal requirement for debtors with positive projected disposable income, as well as for debtors with negative or zero projected disposable income. The Sixth Circuit joined the Eighth, Ninth and Eleventh Circuits in holding that an objection to confirmation triggers the applicable commitment period requirement; when a plan does not propose to pay unsecured claim in full, all of the debtor's projected disposable income must be dedicated over the entire applicable commitment period. For debtors with negative or zero projected disposable income as of the confirmation date, the applicable commitment period also applies. *Baud v. Carroll,* 634 F.3d 327 (6th Cir. 2011). *See also Timothy v. Anderson (In re Timothy),* 442 B.R. 28 (BAP 10th Cir. 2010), holding that a debtor is not permitted to propose a plan that does contain a minimum term; in the case of an above-median income debtor, unless all of the unsecured claims were paid in full, the plan must include a five year term, even though the debtor had negative disposable income.

Social Security benefits are excluded from calculation of projected disposable income. The Sixth Circuit held that the definition of disposable income, which incorporates the definition of current monthly income, excluded Social Security benefits. By these definitions, Congress indicated that Social Security benefits are treated differently post-BAPCPA than they were treated by most courts pre-BAPCPA. *Baud v. Carroll,* 634 F.3d 327 (6th Cir. 2011). *Accord In re Burnett,* ___ B.R. ___, 2011 WL 204907 (Bankr. N.D. N.Y. Jan. 21, 2011) (Projected disposable income excludes Social Security benefits, unless the debtor voluntarily devotes that income to the plan.); *In re Miller,* ___ B.R. ___, 2011 WL 87174 (Bankr. D. S.C. Jan. 11, 2011) (Social Security Act prevents debtor from being forced to fund plan with benefits.). *Compare In*

re Herrmann, ___ B.R. ___, 2011 WL 576753 (Bankr. D. S.C. Feb. 9, 2011) (Although excluded from CMI, Social Security income must be allocated to living expenses to satisfy § 1325(a)(3) good faith.).

Ongoing mortgage payments are deducted under § 707(b)(2)(A)(iii) formula. The amounts "reasonably necessary" for ongoing mortgage payments are determined under the statutory formula, when the debtor at confirmation intends to retain the property. BACPA changed the prior discretion of bankruptcy courts to subjectively determine what amount was reasonably necessary. For above-median income debtors, the § 707(b)(2)(A)(iii) formula objectively establishes the amount. *Baud v. Carroll,* 634 F.3d 327 (6th Cir. 2011).

Railroad Retirement Act (RRA) benefits are part of CMI, but are not part of calculation of projected disposable income. These benefits, here for below-median income debtors, fall within the definition of current monthly income (CMI), which does not exclude RRA benefits. The express exclusion of Social Security Act (SSA) benefits from CMI does not extend to RRA benefits. The bankruptcy appellate panel distinguished the SSA's § 407's specific reference to protection from the operation of any bankruptcy or insolvency law; in contrast, the RRA's 45 U.S.C. § 231m(a), while an anti-garnishment and anti-alienation protection, does not specifically refer to protection from the Bankruptcy Code. "Unlike projected disposable income, CMI is a historical figure that typically takes into account income and income replacements received by debtors during the six-month period immediately before their bankruptcy filing. . . .Simply put, there is no anticipation of future payments in the calculation of CMI, so including RRA benefits [already received] in the CMI calculation does not contravene the RRA's antianticipation clause." Notwithstanding inclusion in CMI, the RRA benefits can not be included in the calculation of projected disposable income, since doing so would contravene the RRA's antianticipation clause, which provides that the payment of benefits may not be "anticipated." The term "projected disposable income" is forward-looking under *Hamilton v. Lanning,* which "necessarily means that the term anticipates future income of the debtor. As such, it falls squarely within § 231m's exclusion. . . .If Congress wanted bankruptcy courts to anticipate RRA Benefits as part of their calculation of projected disposable income, it would have needed to expressly limit the RRA's antianticipation clause to permit such anticipation. To hold otherwise would undermine the meaning of the phrase 'notwithstanding any other law of the United States' in § 231m(a)." *Meyer v. Scholz (In re Scholz),* ___ B.R. ___, 2011 WL _____, BAP No. EC-10-1153-MkZJu (BAP 9th Cir. Mar. 22, 2011).

Above-median income debtor's transportation expense is capped. If the above-median income debtor's actual transportation expense is greater than the IRS local standard, the rationale of *Ransom* limits the debtor to the IRS standard expense. The debtors claimed actual expenses in excess of the local standard on Schedule J. *In re Thiel,* ___ B.R. ___, 2011 WL 799779 (Bankr. D. Idaho Mar. 1, 2011).

Mortgage partially securing rental property subject to modification. The court discusses the split of authority on modification of a mortgage securing in part the debtor's residence and in part rental property. Rejecting a bright-line rule in favor of totality-of-circumstances, the court looked to the substance of the bargain at the time of the mortgage transaction, and where the mortgage documents did not require the debtor to occupy the property as a residence, the

"predominate character" of the transaction was a commercial loan, permitting the mortgage to be stripped down under § 1322(b)(2). *In re Zaldivar,* ___ B.R. ___, 2011 WL 222288 (Bankr. S.D. Fla. Jan. 25, 2011).

Debtor not eligible for discharge can not strip off wholly unsecured lien. Agreeing with *In re Fenn,* 428 B.R. 494 (Bankr. N.D. Ill. 2010), a debtor not eligible for discharge because of § 1328(f) can not strip off the wholly unsecured lien; the debtor must satisfy one of § 1325(a)(5)(B)'s lien retention requirements. The opinion is en banc. *In re Gerardin,* ___ B.R. ___, 2011 WL 672050 (Bankr. S.D. Fla. Feb. 17, 2011). *Contrast In re Pollard,* ___ B.R. ___, 2011 WL 576599 (Bankr. D. Md. Feb. 9, 2011) (Case filed within eight months of Chapter 7 discharge, for purpose of stripping off wholly unsecured lien, was not filed in bad faith; creditor did not object to stripping.).

Below-median income debtor may not use tax refunds to shorten plan term. The debtors were not permitted to use future tax refunds, that would result from over-payment of taxes, to pay secured creditors and shorten the plan term. The disposable income requirement for payment of unsecured claims would be violated. *In re Hilgendorf,* ___ B.R. ___, 2011 WL 353240 (Bankr. E.D. Wis. Feb. 2, 2011).

Effect of confirmation

Confirmation bound trustee. When the trustee was aware that the plan provided for secured status of the car lender, but was also aware that perfection was avoidable, the confirmation bound the trustee, preventing pursuit of an avoidance action. Even though the avoidance was still timely under § 546(a), the res judicata effect bound the trustee who was fully aware of the avoidable status of the secured claim prior to confirmation. *Hope v. Acorn Financial, Inc. (In re Fluellen),* ___ B.R. ___, 2011 WL 986342 (Bankr. M.D. Ga. Mar. 18, 2011).

Mortgage Issues

Mortgagee held prepetition claim for unpaid escrow cushion. As permitted by RESPA, 12 U.S.C. § 2601 et seq., when the mortgagee had required the borrower to pay into escrow an amount in excess of what was actually needed to cover currently due insurance and taxes, the mortgagee held a claim under § 101(5) for the unpaid cushion when the debtors filed Chapter 13. Applying *Johnson v. Home State Bank,* 501 U.S. 78 (1991), a claim is an enforceable obligation, and under the terms of the mortgage at issue, the borrowers' obligation to pay into the escrow account was an enforceable obligation, giving the lender a prepetition claim for the escrow shortfall. The Third Circuit found the analysis of the Fifth Circuit in *Campbell v. Countrywide Home Loans, Inc.,* 545 F.3d 348 (5th Cir. 2008), persuasive, rejecting the lender's argument that the escrow shortfall was not a debt. A contingency in the obligation did not relieve it from being a claim in the bankruptcy case. The real issue was whether Countrywide had violated the automatic stay by recalculating the postpetition escrow payments and taking into account the prepetition shortage. Since the lower courts had held that the escrow shortage was not a prepetition claim, the Circuit remanded for determination of whether Countrywide willfully violated the automatic stay. *In re Rodriguez,* 629 F.3d 136 (3d Cir. 2010).

Creditor committed tort of outrage in foreclosure and collection effort. Under Washington's Deed of Trust Act, a pro se creditor outrageously committed misdeeds in foreclosure, including conducting the foreclosure in a condominium parking lot, rather than a public place, and claiming new defaults, unjustifiably varying the amount of debt. The misdeeds constituted the tort of outrage, with monetary damages affirmed, but with the amount of attorney fees remanded for further determination. *Jared v. Keahey (In re Keahey),* 2011 WL 288966 (9th Cir. Jan. 31, 2011), slip copy.

Amended complaint fails to state claim. Applying *Ashcroft v. Iqbal,* 129 S.Ct. 1937 (2009), the district court properly denied the former Chapter 13 debtors' motion to amend a complaint against their mortgagee, when the amended complaint did not state a claim upon which relief could be granted. The plaintiffs were contesting the amount of attorney fees, including those awarded as part of a foreclosure judgment, "overlook[ing] the fact that they were involved in several years' worth of bankruptcy proceedings involving" the creditor, which had increased the amount of fees. *Martino v. Everhome Mortgage,* 2010 WL 5209325 (3d Cir. Dec. 23, 2010), slip copy.

Annual tax statement and payoff statement did not violate stay. The Chapter 13 debtor bore the burden of proving a RESPA violation, including proof that the loan was a federally related mortgage loan, and the loan servicer's mailing of a postpetition annual tax statement was an informative document that did not violate the stay. The servicer's sending of a payoff statement at the debtor's request also did not violate the stay. *In re Knowles,* 442 B.R. 150 (BAP 1st Cir. 2011).

Dismissal

Failure to make payments for three months was cause for dismissal with prejudice. The Chapter 13 debtor admitted failure to make three months of payments to the trustee, resulting in $19,000 delinquency, and even though the debtor stopped making payments to prevent the trustee's disbursements to a mortgage creditor that the debtor disputed holding valid chain of title, the decision was willful. Cause for dismissal with prejudice was found, but the 180-day bar to refiling was moot when the debtor's appeal had been pending for more than that time. The debtor had argued that dismissal with prejudice was a "bankruptcy death penalty sanction." *In re Mallory,* ___ B.R. ___, 2011 WL 338826 (S.D. Tex. Feb. 2, 2011).

Discharge

BAPCPA did not alter standards for determination of support. The bankruptcy court applied correct pre-BAPCPA standards for determination of whether state court ordered monthly payments and attorney fees were support in nature for purposes of §§ 101(14A) and 523(a)(5). Monthly payments over 48 months and attorneys fees payable by debtor were based on financial and earning disparity between parties and served function of maintenance and support, with those debts excepted from § 1328 discharge. *Phegley v. Phegley (In re Phegley),* 434 B.R. 154 (BAP 8th Cir. 2011).

County violated discharge injunction. Applying *United Student Aid Funds, Inc. v. Espinosa,* 130 S.Ct. 1367 (2010), county was bound by confirmed plan that provided for its property tax lien, and the payments under the plan had been made, with the county's lien terminating on completion of the plan and discharge. The county's assessment of interest and penalties, and its sale of the taxes at a tax sale, violated the discharge injunction. The county was ordered to pay the debtors' attorney fees. *In re Malec,* 442 B.R. 130 (Bankr. N.D. Ill. 2011).

Claims

Tolling of interest was within court's discretion. Although § 506(b) provides for interest on an oversecured creditor's claim, the bankruptcy court properly exercised its discretion when it tolled the accrual of interest on a creditor's claim due to the creditor's "purposeful delay of the proceedings." Such delay was fairly categorized as an abuse of process, which can be addressed under § 105(a). Property had been sold in the bankruptcy case, generating funds that paid a prepetition judgment in full, and the bankruptcy court had found that the creditor had improperly delayed a final hearing on the amount of postpetition interest. *In re Nixon,* 2010 WL 5141339 (3d Cir. Dec. 15, 2010), slip copy.

State taxes became payable at end of tax year and were prepetition tax claim. Michigan income taxes for tax year 2008 were prepetition taxes in a Chapter 13 case filed in March 2009; § 1305 did not apply and the debtors could file a claim on behalf of the state when it failed to file a proof of claim. *In re Senczyszyn,* ___ B.R. ___, 2011 WL 500060 (E.D. Mich. Feb. 11, 2011).

Equitable estoppel applied to proof of claim in first case. Wells Fargo Bank filed a proof of claim in the first Chapter 13 case, but its proof of claim in the second case was inconsistent, with the court applying judicial estoppel to the first proof of claim, preventing Wells Fargo from asserting charges that could have been included in the first claim. Estoppel did not apply to any charges accruing after the first proof of claim was filed, but arrearages and charges that could have been included in the prior claim were barred. The opinion reviews the requirements for applying judicial estoppel: the two proofs of claim were clearly inconsistent; the court had accepted the first proof of claim when it approved a plan modification based on that claim's arrearages; and Wells Fargo's "inconsistency was not inadvertent." The fact that the first case was dismissed did not prevent application of judicial estoppels. Section 349 restores property rights but "does not erase all history. . . .[N]othing in § 349 prevents the invocation of judicial estoppel with respect to positions taken in a dismissed bankruptcy." *In re Oparaji,* 2010 WL 5462456 (Bankr. S.D. Tex. Dec. 29, 2010), slip copy.

Debtor's schedules included debt, overcoming technical failures by assignee. When the Chapter 13 debtor scheduled the original creditor, a pending state court suit and the creditor's attorney, the admissions of the debt overcame the debtor's objections to the proof of claim filed by an assignee. Although the proof of claim did not technically comply with Rules 3001(c) and (f), and even if the proof of claim lacked prima facie validity, the objection did not state grounds for disallowance under § 502(b). In the face of the sworn statements in schedule F and statement of financial affairs, the court questioned the debtor's good faith and "counsel's judgment as guided by Rule 9011." *In re Willis,* 2010 WL 5463066 (Bankr. N.D. Ga. Dec. 26, 2010).

Contents

Bankruptcy Rules and Forms Changed December 1, 2010. Federal Bankruptcy Rules 1007(c), 1014, 1015, 1018, 1019, 4001, 4004, 5009, 5012, 7001, and 9001 were amended, effective December 1, 2010. Official Bankruptcy Forms 9A, 9C, 9I, 20A, and 20B were also amended to reflect the Rules amendments. Forms 22A, 22B, and 22C were changed to include instructions that only one joint filer is required to report payments by another person for household expenses, and the references to "household" and "household size" were changed to "number of persons" and "family size." Form 22A also requires separate forms only if one joint filer is entitled to the exclusions for veterans and non-consumer debtors.

Bankruptcy Technical Corrections Act of 2010. This Act was signed by the President on December 23, 2010, making technical corrections to the Bankruptcy Code, as it was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

Automatic Stay

Bankruptcy court properly denied motion to reopen to litigate stay violation. The bankruptcy court has broad discretion to reopen closed cases, and no abuse of discretion occurred when the debtor's motion was not timely. The mortgage creditor did not violate the stay by mailing a payoff letter, which was not a collection act. State court was the appropriate forum to litigate debtor's potential claims against a mortgage creditor and bankruptcy arguments were without merit; the debtor had filed a motion to reopen the bankruptcy case shortly before trial in state foreclosure action and four years after the bankruptcy case had been closed. "The passage of time weighs heavily against reopening. The longer a party waits to file a motion to reopen a closed bankruptcy case, the more compelling the reason to reopen must be. . . . In assessing whether a motion is timely, courts may consider the lack of diligence of the party seeking to reopen and the prejudice to the nonmoving party caused by the delay. . . . While the passage of time in itself does not constitute prejudice to the opposing party, a delay may be prejudicial when combined with other factors such as court costs and attorney's fees in state-court foreclosure proceedings." *Redmond v. Fifth Third Bank,* 624 F.3d 793 (7th Cir. 2010).

Domestic violence exception from stay applied. A state court action under Minnesota's Domestic Abuse Act against the Chapter 7 debtor, who was a tenant renting a room in a home, was covered by § 362(b)(2)(A)(v)'s exception for commencement or continuation of a civil action or proceeding concerning domestic violence. After the parties had argued, the homeowner obtained an ex parte order for protection, prohibiting the debtor from acts of abuse, having any contact with the homeowner, or entering the home. The BAP affirmed, construing the Minnesota statute as encompassing "domestic violence" within its term "domestic abuse," which was defined to include acts against a household member. *Marino v. Seeley (In re Marino),* 437 B.R. 676 (BAP 8th Cir. 2010).

Creditor waived § 362(e) 30-days by selecting hearing date beyond that time. The creditor was deemed to waive its right to hearing on its stay relief motion within thirty days, when it selected a hearing date outside that time period. The stay did not terminate automatically under § 362(e). *Bishop v. Connolly (In re Bishop),* 2010 WL 4456165 (BAP 10th Cir. Nov. 4,

2010) (Unpublished). *See also U.S. v. Rogan,* 2010 WL 3927489 (N.D. Ind. Sept. 30, 2010) (slip opinion), for similar holding.

Tax Court decides that stay doesn't apply. The Tax Court had before it the taxpayer's petition for redetermination of income tax deficiency, and the taxpayer had been a debtor in five bankruptcy cases, all but one dismissed. The Tax Court held that the automatic stay did not prevent it proceeding with the redetermination, since the stay did not come into effect in the pending case due to § 362(d)(4)(A)(i)—the debtor had been in two or more cases pending and dismissed within the preceding year, and in the last case, § 362(d)(3)(A) would also prevent the stay from remaining in effect more than 30 days as to the debtor. Discussing the conflicting authority on § 362(d)(3)(A)'s language "with respect to the debtor," the Court held that a Tax Court redetermination of tax deficiency is an in personam action, one that doesn't affect the bankruptcy estate or property. *Klein v. Commissioner of Internal Revenue,* 135 T.C. No. 7, 2010 WL 2942031 (U.S. Tax Court 2010).

Assignee of mortgage lacked standing to move for stay relief. Under New York law, without a transfer of mortgage debt, an assignment of the mortgage is a nullity, and the assignee failed to provide evidence that the note had been transferred to it or that it had possession of the original note. Without that evidence, the assignee lacked standing to move for stay relief, since the assignee would not be able to foreclose under New York law. *In re Williams,* 438 B.R. 52 (Bankr. S.D. N.Y. 2010).

Creditor did not violate stay by filing proof of claim for discharged debt. Roundup Funding did not violate the automatic stay when it filed a proof of claim in a Chapter 13 case for a debt that had been discharged in a prior Chapter 7 case, with the court holding that the automatic stay generally does not apply to actions taken in the court with jurisdiction over the bankruptcy case. Filing a proof of claim is not a collection effort against the debtor personally; rather, it is an act to obtain distribution from the bankruptcy estate. Remedies for objectionable claims exist under the Bankruptcy Code. *Clayton v. Roundup Funding, LLC,* 2010 WL 4008335 (Bankr. E.D. Wash. Oct. 12, 2010) (slip opinion).

Debt Relief Agency

Section 528 requires written fee agreement within five business days. On the objection of the Chapter 13 trustee, fees to the debtor's attorney were denied because the attorney failed to comply with § 528(a)(1)'s requirement for execution of a written fee agreement within five business days of the attorney providing any bankruptcy assistance services. Section 528 applies to debt relief agencies, and prior authority held that attorneys for consumer debtors fall within that description. Section 526(c)(1) provides that any contract for bankruptcy assistance that doesn't comply with material provisions of § 528 is "void" and unenforceable, and the bankruptcy court rejected the attorney's argument that § 330 permits a fee, despite the noncompliance, holding that such a "result would make the statutory prohibition on enforcing the fee agreement meaningless." *In re Humphries,* 2010 WL 5101036 (Bankr. E.D. Mich. Dec. 8, 2010) (slip opinion).

Discrimination

Section 525 doesn't prevent discrimination in hiring. Rejecting minority authority, the Second Circuit held that the plain language of § 525(a) applies only to a governmental unit, and § 525(b)'s provisions for private employers does not include denial of employment; therefore, a prospective private employer did not violate § 525(b) by denying employment based on the debtor's prior bankruptcy filing. *Rea v. Federated Investors,* ___ F.3d___, 2010 WL 5094250 (3d Cir. Dec. 15, 2010).

Property of Estate

Judicial estoppel continues to apply. The Ninth Circuit upheld the district court's application of judicial estoppel when the Chapter 13 debtor attempted to pursue claims undisclosed in the bankruptcy schedules. *Balthrope v. Sacramento County Department of Health and Human Services,* 2010 WL 3937427 (9th Cir. Oct. 5, 2010) (slip opinion).

Exemptions

State court determined property available for homestead. The Chapter 7 debtor was unable to avoid judgment liens on property claimed as homestead, when a Florida state court had determined prebankruptcy the 160 acres that were available for homestead, and the debtor attempted to claim a different 160 acres in the bankruptcy as exempt. The key to use of § 522(f) is which property is exempt under § 522(b), and state law can define the scope of the debtor's interest in property under § 522(b). Only the 160 acre parcel determined by the state court as available for homestead could be used for avoidance under § 522(f). *Schweizer v. Chambers, et al. (In re Schweizer),* 2010 WL 3910220 (11th Cir. Oct. 7, 2010) (per curiam).

Fifth Circuit certifies to Supreme Court of Texas question of homestead law. The Fifth Circuit certified the question whether an otherwise valid homestead exemption is foreclosed by equitable estoppel when the claimants had used the property surreptitiously, declaring when the contested lien was placed that they did not use the subject property as homestead, and the criteria for equitable estoppel was otherwise satisfied. *Villarreal v. Showalter (In re Villarreal),* 2010 WL 4560630 (5th Cir. Nov. 10, 2010) (unpublished).

Section 522(p) statutory cap doubled for joint filers. Despite the fact that the debtors' equity in their home may have increased due to reduction of the mortgage and improvements to the property, the statutory cap of § 522(p) would be available to each joint debtor, husband and wife. The BAP adopted the position that under § 522(m), each debtor is entitled to exemption and the cap of § 522(p) is essentially doubled for joint filers. As a result, even with an increase in equity, the total equity still fell below the § 522(p) cap for each debtor. *Dykstra Exterior, Inc. v. Nestlen (In re Nestlen),* ___ B.R. ___, 2010 WL 5162563 (BAP 10th Cir. Dec. 21, 2010).

Horse trailer is not mobile home or dwelling house. The Chapter 7 debtor's attempt to claim exemption in a horse trailer as his dwelling failed, with the BAP concluding that Missouri law did not include a horse trailer within the definition of a mobile home or dwelling

house. *Moon v. Hurd (In re Hurd),* ___ B.R. ____, 2010 WL 5093664 (BAP 8th Cir. Dec. 15, 2010).

Debtors entitled to federal exemptions. When the Chapter 7 debtor moved from Illinois to Wisconsin within the 730 days prepetition, and was disqualified from using either the Wisconsin (not a resident long enough) or Illinois (an opt out state requiring use of state exemptions by residents) exemptions, the debtor was able to use federal exemptions, under § 522(b)(3)(C)'s safe-harbor provision. *In re George,* ___ B.R. ___, 2010 WL 5153031 (Bankr. E.D. Wis. Dec. 17, 2010). *See also Zebley v. Karavias (In re Karavias),* 438 B.R. 86 (Bankr. W.D. Penn. 2010), in which the Chapter 7 debtor moved from Virginia to Pennsylvania within the 730 days. Virginia is an opt out state, and its exemptions are available only for its residents. The debtor was allowed to claim federal exemptions under the safe-harbor clause.

Idaho's homestead exemption doesn't apply extraterritorially. The Chapter 7 debtor had moved from Colorado to Idaho more than 730 days prior to bankruptcy filing, and was found to be domiciled in Utah for exemption purposes; however, the debtor attempted to claim Idaho's homestead on a home located in Colorado. The court found no Idaho appellate authority on the issue, holding that Idaho's homestead is not available for use on property located outside that state. The court also noted that the debtor could not use federal exemptions since the debtor was not ineligible for any exemption under Idaho law—the safe harbor of § 522(b)(3)(A) only kicks in if the debtor is "ineligible for all state exemptions in all potential states." Although the debtor had no available homestead under Idaho law, the debtor had claimed personal property exemptions under that state's law. *In re Capps,* 438 B.R. 668 (Bankr. D. Idaho 2010).

Debtor electing federal exemptions not entitled to another federal nonbankruptcy exemption. Although a Chapter 11 case, the holding is significant for all individual debtors. The debtor elected § 522(d) federal bankruptcy exemptions under § 522(b)(2), and the court held that such an election limits the debtor to exemptions under the exclusive list of § 522(d). In contrast, a debtor using state exemptions under § 522(b)(3) has available not only the applicable state exemptions, but the nonbankruptcy federal exemptions. Unless the "non-Title 11 law explicitly provides for protection of debtors in bankruptcy," the debtor claiming § 522(d) exemptions lost the benefit of other federal nonbankruptcy exemptions. This Chapter 11 debtor could not use the military retirement exemption available under 38 U.S.C. § 5301. The court also discussed the § 522(d)(10)(E) exemption, holding that the exemption is one for the "right to receive" benefits, and once the debtor has received them and commingled pension funds in an account, the funds lose their exempt status. The relevant federal statute on retirement benefits did not protect funds once they had been received. *In re Schena,* 439 B.R. 776 (Bankr. N. N.M. 2010).

Spendthrift trust provision did not trump security interest. Applying New York Uniform Commercial Code, a spendthrift trust clause in the debtor's employee welfare benefit plan did not prevent a secured creditor from pursuing its security interest in the Chapter 7 debtor's disability benefits. The creditor did not violate the discharge injunction by enforcing its security interest. The court construed ERISA, concluding that its anti-alienation provision for

pension plans did not apply to this welfare plan. *In re Johnson,* 439 B.R. 416 (Bankr. E.D. Mich. 2010).

Chapter 7 Issues

Redemption

Debtor timely performed intent by efforts to redeem with creditor. Discussing whether § 521(a)(2) or § 521(a)(6) applied to the Chapter 7 debtor's time for redemption of a vehicle and whether the automatic stay had expired, the court determined that the debtor's actions were timely within § 521(a)(2)'s thirty-day period after the first date set for the meeting of creditors. The debtor repeatedly attempted to discuss redemption terms with the creditor, which never assigned anyone to talk with the debtor. The creditor waited for time to run and moved for determination that the stay had expired. "In effect, whether or not intended, Ford strung Debtor along. Debtor was thereby misled, at least insofar as he thought Ford would at some point discuss the redemption with him." Further hearing was required to value the vehicle and determine if the debtor could pay that value. *In re Molnar,* ___ B.R. ___, 2010 WL 5136038 (Bankr. N.D. Ill. Dec. 15, 2010).

Discharge objections and exceptions

Preclusion barred litigation of § 523(a)(2)(A) exception. Under Minnesota's law of preclusion, the prebankruptcy stipulation of a restitution judgment for the debtor's violation of the state's Consumer Fraud Act was excepted from discharge, and the debtor was barred from collaterally attacking that judgment. The debtor's failure to provide a transcript of the bankruptcy court's hearing on summary judgment was an independent ground for affirming. *State of Minnesota v. Moretto (In re Moretto),* ___ B.R.___, 2010 WL 4978783 (BAP 8th Cir. Dec. 9, 2010).

Section 523(a)(7) is self executing exception. After the debtor's Chapter 7 discharge, the State of Colorado pursued criminal charges for securities fraud, and the restitution requirement as a part of the criminal sentence was automatically excepted from the prior discharge. The post-discharge entry of the restitution order did not violate the discharge injunction, and the creditor (who was acting primarily to collect a debt) did not violate the discharge injunction by reporting the crime of securities fraud to the prosecutor. Although there may be instances in which pursuing criminal prosecution is in bad faith, "after a debtor has been convicted of a crime, the motivation the creditor had in bringing the crime to the attention of the prosecuting authority is no longer relevant." *Williams v. Meyer (In re Williams),* 438 B.R. 679 (BAP 10th Cir. 2010).

Debtor below poverty income failed to prove undue hardship. The BAP affirmed a finding that a 42 year old Chapter 7 debtor failed to prove undue hardship for § 523(a)(8), when the debtor was voluntarily under-employed and the debtor's boyfriend had paid more than one half of their shared household expenses. The boyfriend's financial contribution, debtor's under-employment, and the fact that the student loans were eligible for ICRP treatment were all

factors relevant to the determination. *Sederlund v. Educational Credit Management Corp. (In re Sederlund),* ___ B.R. ___, 2010 WL 4273243 (BAP 8th Cir. Nov. 1, 2010).

Failure to disclose assets and transfers to relative are grounds for denial of discharge. When the Chapter 13 debtor filed (case was later converted to Chapter 7), she failed to disclose all assets and prepetition transactions, including transfers to her husband, occurring within weeks before filing bankruptcy, and the pattern of behavior justified a finding of fraudulent intent under § 727(a)(2)(A). *Herman v. Jackson (In re Herman),* 2010 WL 3824246 (5th Cir. Sept. 24, 2010) (unpublished).

Lack of transcript requires affirming denial of discharge. The Chapter 7 debtor's failure to provide the BAP with a transcript of the trial leads the BAP to conclude that the bankruptcy court did not clearly err in its findings supporting denial of discharge under §§ 727(a)(2) and (a)(4)(A). The debtor made fraudulent prepetition transfers outside the 12 months before filing bankruptcy, but engaged in continued concealment, and the transfers included gratuitous transfers to relatives. The transfers were fraudulent under Minnesota law, justifying a limitation under that law of the debtor's homestead exemption. The trustee was also allowed to recover fraudulent transfers. *Georgen-Running v. Grimlie (In re Grimlie),* 439 B.R. 710 (BAP 8th Cir. 2010).

Discharge Injunction

In personam action discharged. Affirming its BAP, the Circuit Court held that § 524(a)(2) prevented post-discharge action against the former Chapter 7 debtor, when the creditor had not obtained a lien against property and otherwise did not have an in rem claim to pursue. The creditor's argument that it had a constructive trust claim was rejected. "Constructive trusts are not substantive rights that confer a cause of action; they are remedial devices employed by courts once liability is found and where equity requires. . . .[The creditor] cannot transform a request for a remedy in rem into a cause of action in rem." *Parker v. Handy (In re Handy),* 624 F.3d 19 (1st Cir. 2010).

District court refers alleged contempt for violation of discharge injunction. Although it could decide the Chapter 7 debtors' claims that credit unions violated discharge injunction by reporting of discharged debts to credit reporting agencies, the court referred the proceeding to the bankruptcy court. *Maddox v. Auburn Univ. Federal Credit Union, et al.,* ___ B.R. ___, 2010 WL 4867983 (M.D. Ala. Dec. 1, 2010).

Unscheduled creditor willfully violated discharge injunction. The assignee of a credit card debt was not scheduled but was informed of the debtor's bankruptcy, and the creditor could have filed a complaint under § 523(a)(3)(B) to determine if the debt was discharged. In light of the creditor's knowledge of § 523(a)(3)(B) and its knowledge of the bankruptcy filing, the creditor's actions in suing in state court and attempting collection of the debt were found to be willful violations of the discharge injunction. Although the court lacked authority to award punitive damages and the debtor failed to proof damages for emotional distress, the debtor was entitled to attorney fees and costs. *In re Feagins,* 439 B.R. 165 (Bankr. D. Hawaii 2010).

Revocation of Discharge

Payments channeled through limited liability companies justified revocation of discharge. The Chapter 7 trustee proved a prima facie case for revocation and the burden shifted to the debtor, who was found to not be credible. The debtor fraudulently failed to deliver property of the estate to the trustee, when the debtor used limited liability companies controlled by him to channel payments of a note to him, for his personal use. *Doeling v. Coating Specialties, LLC, et al. (In re Toftness),* 439 B.R. 499 (BAP 8th Cir. 2010).

Chapter 13 Issues

Confirmation Issues

Section 1322(e) strictly applied. Applying plain language of § 1322(e), the undersecured mortgage creditor is entitled to reasonable attorney fees and expenses under its contract, and in order to cure defaults, the debtor must pay all amounts required under § 1322(e). If there is a conflict with § 506(b), the specific language of § 1322(e) controls. *Duetsche Bank National Trust Co. v. Tucker,* 621 F.3d 460 (6th Cir. 2010).

Above-median income debtor's plan must have minimum term. Agreeing with the Eighth and Eleventh Circuits, the BAP held that "the applicable commitment period for an above-median income debtor is a minimum of five years, unless all unsecured creditors are paid in full prior thereto." The minimum term applied even though these debtors' income was from Social Security benefits. *Timothy v. Anderson (In re Timothy),* ___ B.R. ___, 2010 WL 5383897 (BAP 10th Cir. Dec. 29, 2010).

Debtor can't deduct secured debt when surrender will end secured obligation. Relying on *Hamilton v. Lanning,* the BAP held that the debtor with current monthly income greater than applicable median family income is unable to deduct secured contractual payments, when the debtor intends to surrender the collateral in the plan. The disappearance of the secured debt is a known change in circumstances. *Zeman v. Liehr (In re Liehr),* 439 B.R. 179 (BAP 10th Cir. 2010). *See also In re May,* ___ B.R. ___, 2010 WL 4702384 (Bankr. E.D. Wis. Nov. 12, 2010) (Debtors were unable to deduct contractual mortgage payment when it was wholly unsecured and would be stripped off in plan.).

Debtor can deduct IRS vehicle ownership expense when vehicle is owned without debt. Concluding that legislative history indicates Congressional intent to for the IRS Local Standards to be a fixed deduction amount in the calculation of projected disposable income for above-median income debtors, the debtor may deduct the Local Standard amount for ownership of a vehicle. "The Debtor owns and operates a vehicle and, therefore, incurs expenses related to it. The fact that those expenses may be less than the amount Congress fixed for inclusion in the means test analysis does not mean that courts have the discretion to disallow the expense in that analysis." *Coffin v. Ecast Settlement Corp. (In re Coffin),* 435 B.R. 780 (BAP 1st Cir. 2010).

Security interest in "easements" did not destroy anti-modification protection. A mortgage including "all improvements. . ., and all easements" was protected from modification by § 1322(b)(2), concluding that under California law an easement is an interest in real property and not a personal property interest. *In re Lopez,* 2010 WL 4875884 (Bankr. N.D. Cal. Nov. 24, 2010) (slip opinion).

Plan must provide that wholly unsecured lien is retained until full payment of discharge. The court concluded that "allowed secured claim" as used in § 1325(a)(5) must be interpreted the same way as the Supreme Court did for purposes of § 506(d) in *Dewsnup v. Timm,* 502 U.S. 410, 416, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992). In order for § 1322(b)(2) and § 1325(a)(5) "to be sensibly read. . ., the 'secured claim' referenced in § 1322 relates to § 506(a), which focuses on the term 'secured;' and the 'allowed secured claim' referenced in § 1325 is similar to that of § 506(d), which focuses on the term 'allowed' as utilized under § 502. . . Thus, a claim must receive the treatment required under § 1325(a)(5) if it has been allowed under § 502 and is 'secured by a lien with recourse to underlying collateral.' *Dewsnup,* 502 U.S. at 415, 112 S.Ct. 773." Since the mortgage creditor had filed a proof of claim, to which no objection was filed, the claim was allowed under § 502, and the allowed secured claim must conform to § 1325(a)(5)'s requirement that the lien be retrained until the debtor either made full payment or received a discharge. The plan must contain such language, but the wholly unsecured lien may be avoided "upon receipt of a discharge at the completion of the plan." *In re Woolsey,* 438 B.R. 432 (Bankr. D. Utah). *See also In re Trujillo,* ___ B.R. ___, 2010 WL 4669095 (Bankr. M.D. Fla. Nov. 10, 2010) (Debtor ineligible for discharge was unable to strip down mortgage permanently.).

A review of unfair discrimination regarding student loans. Reviewing the authority on whether a debtor may separately classify and propose to pay a student loan creditor more favorably than other unsecured creditors, the court examined three debtors' plans, finding that two plans did not unfairly discriminate. In one case, the interest accruing on the nondischargeable student loan during the pendency of the case would "render their bankruptcy filing meaningless," and under the totality of circumstances, allowing the debtors to maintain $325 monthly payments to the student loan creditor was not unfair discrimination, even though other unsecured creditors would receive nothing. In a second case, the same result, but in the third case, if payments proposed to the student loan creditor were allocated among all unsecured creditors, the percentage to each non-student loan creditor would be 80%, and to allow favorable treatment of the student loan creditor would unfairly discriminate. The court also adopted the approach of *In re Harding,* 423 B.R. 568 (Bankr. S.D. Fla. 2010), concluding that the automatic stay prevented the student loan creditors from assessing penalties for payment shortfalls occurring while the Chapter 13 cases were pending. *In re Boscaccy,* ___B.R. ___, 2010 WL 4193074 (Bankr. N.D. Miss. Oct. 20, 2010).

Loan subject to modification could not be paid for longer term than plan. Although a loan was not protected by § 1322(b)(2) from modification, it may not be crammed down and also paid over a period extending beyond the plan's term. A modified mortgage must be paid within the life of the plan. *In re Valdes,* 2010 WL 3956814 (Bankr. S.D. Fla. Oct. 4, 2010) (slip opinion).

Social Security income not included in CMI. Pointing out the split of authority on the issue, the court held that Social Security income is not included in current monthly income or disposable income, and it was not bad faith for the debtors to not dedicate their Social Security benefits to the plan. *In re Welsh,* ___ B.R. ___, 2010 WL 4735994 (Bankr. D. Mont. Nov. 16, 2010).

Interest Rate

Third party buyer of ad valorem taxes is protected by § 511. Section 511's interest rate protection extends to purchasers of the debtor's ad valorem taxes. The statute refers to "creditor" and not merely to governmental claimants. *Tax Ease Funding, L.P. v. Thompson (In re Kizzee-Jorden),*626 F.3d 239 (5th Cir. 2010).

910 Vehicle Loans

910-day period tolled. The debtors filed a first case within the 910-day period for purchase of a vehicle, and a plan was confirmed, treating the vehicle creditor as fully secured, but that case was quickly dismissed, with a second case filed outside of the 910-day period. Although good faith had been found in the second filing, the court concluded that the 910-day period was equitably tolled, and that the debtors were required to treat the claim as fully secured. Authority on both sides of the issue are cited, but the court applied equitable tolling as found in *Young v. U.S.,* 535 U.S. 43, 122 S.Ct. 1036, 152 L.Ed.2d 79 (2002). *In re Hingiss,* ___ B.R. ___, 2010 WL 4941622 (Bankr. E.D. Wis. Dec. 2, 2010).

Effect of Confirmation

Proof of claim outweighed by confirmation. A car lender with notice of the plan was bound by confirmation, although its terms for bifurcation of the debt differed from the creditor's timely proof of claim. *Nissan Motor Acceptance Corp. v. Smith,* 2010 WL 4005056 (E.D. Wis. Oct. 12, 2010).

Modification

Section 1325(b) doesn't apply to postconfirmation modification. Citing and discussing authority on both sides of the issue, the bankruptcy court concluded that "the only relevant requirements for approval of a [debtor's] motion to modify [a confirmed plan] are set out in § 1325(a)," and § 1325(b) doesn't apply. The trustee had objected to the debtor's motion to modify to reduce monthly payments and reduce the plan term from 60 to 36 months. The debtor had lost income and separated from her husband, and the court found three reasons why § 1325(b) doesn't come into play: (1) § 1325(b)'s language provides it applies only when a party objects to confirmation, and there is only one confirmation—a modification is not a separate confirmation; (2) § 1329 includes § 1325(a) requirements in a postconfirmation modification consideration, but it does not mention § 1325(b); and (3) there is no absurd result from not applying § 1325(b) to such modifications—here the court stressed that good faith remains a factor to protect from abusive modifications. *In re Davis,* ___ B.R. ___, 2010 WL

5136037 (Bankr. N.D. Ill. Dec. 16. 2010). *Contrast In re King,* 439 B.R. 129 (Bankr. S.D. Ill. 2010) (holding that § 1329(b) does apply to a post-confirmation modification).

Dismissal

Lack of prosecution, without showing of prejudice, was not cause for case dismissal under § 1307(c). Although lack of prosecution of a case by the debtors may constitute delay prejudicial to creditors and fall under that cause for dismissal, the bankruptcy court erred when it dismissed the case for the debtors' lack of prosecution without considering whether it had caused prejudicial delay. The debtors had participated in the case for 14 months, making $20,000 in payments, while filing an avoidance complaint and four amended plans. *DeVito v. Pees (In re DeVito),* 2010 WL 4269384 (BAP 6th Cir. Oct. 14, 2010) (slip opinion).

Section 109(g)(2) has exception from strict application. Reviewing four approaches to interpretation of § 109(g)(2), the mandatory application, the equitable/discretionary approach, the causal connection approach, and the pending motion approach, the court adopted a combination of the discretionary and pending motion approaches. When the debtor voluntarily dismissed the case after the filing of a motion for stay relief, the case will be dismissed only if the stay relief motion is pending or unresolved at the time of voluntary dismissal, allowing the court to address abusive dismissals but avoiding a mechanical application of the Code section. The court found support for a non-mechanical approach in the Supreme Court's *Hamilton v. Lanning. In re Richter,* 2010 WL 4272915 (Bankr. N.D. Iowa Oct. 22, 2010) (slip opinion).

Mortgage Issues

Mortgage securing property partially rental is subject to modification. Reviewing reported authority, the court adopted the position that the date of the mortgage transaction controls for § 1322(b)(2) purposes. Here, the evidence established that at the time of the mortgage, the debtors lived on one portion of the property but rented the other portion (the two portions had different addresses). The property had never been solely the debtors' principal residence within the meaning of § 1322(b)(2), having always included some income-producing rental property. During the closing process on the mortgage, the lender became aware of the two parcels and their different status, but the loan was closed. The debtors could modify the unprotected mortgage. *In re Moore,* 2010 WL 4791833 (Bankr. N.D. N.Y. Nov. 18, 2010) (slip opinion).

Class action certification denied for lack of typicality and lack of adequacy of representation. Class certification in a proceeding involving non-disclosure of postpetition fees and expenses by a mortgage creditor was denied, with the court finding that the typicality requirement of Rule 23(a)(3) was not satisfied, and debtors' counsel failed to prove adequacy of counsel; while prior class experience of the attorney was argued, there was no evidence to support it. Moreover, the particular debtors did not establish adequacy as class representatives. There was also expert testimony in the hearing concerning lack of uniformity in procedures concerning disclosure of postpetition fees and expenses. *Sandlin v. Ameriquest Mortgage Co., Inc. (In re Sandlin),* 2010 WL 4260030 (Bankr. N.D. Ala. Oct. 21, 2010) (slip opinion).

Mortgage provisions not appropriately included in plan. In an analysis of eight paragraphs of mortgage provisions that the debtor proposed to include in a plan, the court found some inappropriate and some inconsistent with the Bankruptcy Code. Provisions that restate §§ 1322(b)(2) and (5) curing and hypothetically deeming the mortgage current are unnecessary, and if they don't accurately restate the Code, those provisions are inconsistent with the Code. Requiring the mortgage creditor to perform an annual escrow analysis was consistent with RESPA, but going beyond the creditor's duties of RESPA is inappropriate—the debtor has available remedies under RESPA, adversary proceeding or contested matter if the debtor needs information from the creditor during the case. A provision suggesting that plan payment shortfalls would be suffered by non-mortgage creditors violates Code provisions for other secured and adequate protection creditors. Requiring the creditor to file notice with the court before making protective advances, such as for taxes and insurance, was inappropriate, if it resulted in taking away the secured creditor's rights under the contract. Under Eleventh Circuit authority, a secured creditor is not required to file a proof of claim to preserve its security interest in property of the bankruptcy estate, and requiring the filing of an annual notice of postpetition fees and costs is tantamount to a proof of claim. A provision that a discharge is a determination that all pre- and postpetition defaults have been cured and that the mortgage is current is an improper expansion of the discharge resulting in Chapter 13—such declaratory relief would require an adversary proceeding. Allowing each debtor to formulate plan provisions for mortgage creditors would encourage non-uniformity. The court noted that proposed amended Bankruptcy Rule 3001 and new Rule 3002.1 address many of the concerns that this debtor expressed, and adoption of those Rules would foster uniformity in practice. The opinion quotes the debtor's proposed eight provisions, as well as the "best practices" encouraged by the NACTT and other organizations. *In re Carlton,* 437 B.R. 412 (Bankr. N.D. Ala. 2010).

Mortgage creditor did not violate § 362(a)(3) by posting of charges. Posting of postpetition charges and mailing a default notice did not violate the automatic stay, when there was no actual collection activity. Postpetition bookkeeping entries do not violate § 362(a)(3). *Guevara v. Wells Fargo Bank, N.A. (In re Guevara),* 2010 WL 4102274 (Bankr. S.D. Tex. Oct. 12, 2010) (slip opinion).

Claims

Proof of claim errors don't supply FDCPA cause of action. Adding to the bankruptcy courts holding that errors in the filing of proofs of claim don't support Fair Debt Collection Practices Act violations, the Second Circuit held that the creditor's inflation of its proof of claim did not form a basis for a claim under the FDCPA. In a putative class action, debtors had sued Roundup Funding, LLC and its attorneys for filing inflated proofs of claim, and the district court had granted the defendants' dismissal motion. The Second Circuit commented that "[t]he FDCPA is designed to protect defenseless debtors and to give them remedies against abuse by creditors. There is no need to protect debtors who are already under the protection of the bankruptcy court, and there is no need to supplement the remedies afforded by bankruptcy itself." The Circuit vacated an award of attorney fees to the defendants, because the question of law had been undecided in the Second Circuit prior to this opinion, but noted that the debtors were "careless" in pursuing the district court action; as a result, the Circuit court

awarded reasonable costs of the appeal in favor of the defendants. *Simmons v. Roundup Funding, LLC,* 622 F.3d 93 (2d Cir. 2010). *See also Kline v. Mortgage Elec. Security System,* 2010 WL 3786584 (Sept. 28, 2010) (slip opinion) (The court held that actions under the FDCPA, TILA and Ohio's Consumer Sales Protection Act were pre-empted by the Bankruptcy Code, when the debtor's causes of action arose from a creditor's filing of a proof of claim.); *In re McMillen,* ___ B.R. ___, 2010 WL 5115880 (Bankr. N.D. Ga. Nov. 15, 2010) (Filing duplicative proof of claim was not abusive collection practice actionable under FDCPA, applying rationale of *Simmons v. Roundup Funding, LLC.*).

Estranged spouse had standing to pursue equitable distribution claim. The Chapter 13 debtor appealed denial of his motion to expunge his estranged wife's proof of claim. He had argued that judicial estoppel should bar her claim since she didn't fully disclose the claim in her prior Chapter 7 case. The Circuit Court discussed its prior authority on judicial estoppel, noting that it was "not intended to eliminate all inconsistencies no matter how slight or inadvertent they may be." There was no reason to conclude that the district court erred in its finding that "Ms. Kane's proof of claim in her husband's bankruptcy proceeding was not irreconcilably inconsistent with her disclosures in her bankruptcy proceeding, or a bad faith change in position manifesting an intent to play fast and loose with the courts." Under § 541(a), Ms. Kane's Chapter 7 bankruptcy estate "included an 'equitable interest in property,' the possibility that the Family Court would, at some point in the future, award her equitable distribution of marital assets, *or* that she and Mr. Kane would arrive at a property settlement that transferred the legal title of marital assets to her. Ms. Kane disclosed such a contingency by disclosing the divorce action. . .on her financial statement." Her Chapter 7 trustee found that disclosure to be adequate, sufficient to lead to abandonment by the trustee of the equitable distribution claim upon Ms. Kane's Chapter 7 discharge. As a result, she had standing to pursue her equitable distribution claim in Mr. Kane's Chapter 13 case. *In re Kane,* ___ F.3d ___, 2010 WL 5157162 (3d Cir. Dec. 21, 2010).

Assignee unable to rely of Bankruptcy Rule to support prima facie validity. The Chapter 13 debtors objected to a proof of claim filed by the assignee of credit card debt, based on lack of documentation to support the validity and amount of the debt, as well as the assignee's status. Discussing the issues that typically arise in contests concerning proofs of claims filed by assignees, the court held that to satisfy Rule 3001(c) and enjoy prima facie validity, a proof of claim filed by an assignee must have an attached "written assignment or set forth a summary of the assignment," and this proof of claim had neither. The court then discussed conflicting authority on whether there are ways, other than compliance with Rule 3001, to obtain prima facie validity, concluding "that compliance with Rule 3001(f) is not the sole vehicle for a proof of claim to achieve prima facie status." The issue is whether the "non-conforming" proof of claim shifts the burden of production to the objecting party, on which a case-by-case determination is required, considering, for example, the debtor's schedules and whether the debt is listed in the same approximate amount as the proof of claim. Although these debtors' schedules did include this debt in an amount correlating to the proof of claim, there was nothing in the record to support the assignee status of the claimant, and the proof of claim was disallowed. *In re O'Brien,* ___ B.R. ___, 2010 WL 3894420 (Bankr. E.D. Pa. Oct. 1, 2010). *See also, In re O'Brien,* ___ B.R.___, 2010 WL 3835637 (Bankr. E.D. Pa. Sept. 30, 2010).

Mortgage note not properly endorsed to transferee and not in transferee's possession did not support proof of claim. Defects in the assignment and transfer of a mortgage note made the note unenforceable under New Jersey's UCC, and the debtor's objection to the proof of claim was sustained. The opinion discusses "holder" and "nonholder," both "in possession" and "not in possession." *In re Kemp,* 2010 WL 4777625 (Bankr. D. N.J. Nov. 16, 2010) (slip opinion).

Interest accruing on unpaid DSO is also DSO priority claim. Denying the debtor's objection to proof of claim, under the definition of domestic support obligation in § 101(14A), interest accruing on unpaid child support is part of the domestic support obligation. The proof of claim's attachment of a court order payment summary, showing the arrearage and accrued interest, provided prima facie validity for the claim. *In re Wright,* 438 B.R. 550 (Bankr. M.D. N.C. 2010).

Arbitration denied in dispute over amount of claim. The creditor's motion to compel arbitration was denied, when the dispute involved the amount of the proof of claim, with the court holding that an inherent conflict existed between enforcing the parties' arbitration agreement and the remedies and purposes of the Bankruptcy Code. *Yarbrough v. Green Tree Servicing, LLC (In re Yarbrough),* 2010 WL 3885046 (Bankr. M.D. Ala. Sept. 29, 2010) (slip opinion). *See also Rushing v. Green Tree Servicing, LLC (In re Rushing),* 2010 WL 3943962 (Bankr. E.D. Tex. Oct. 6, 2010) (slip opinion) (discussing arbitration in an adversary proceeding and not compelling it when the dispute involved automatic stay violations and damages).

Professional Fees

Bankruptcy court had discretion to deny fee application for untimeliness. Although the debtors' attorney was only six days late in filing a fee application, under an order setting a deadline, the bankruptcy court did not abuse its discretion in denying completely the application; the attorney also failed to comply with a term of the confirmation order requiring the attorney to file a memorandum detailing why the case had been pending one year before confirmation. *In re Alda,* 2010 WL 4924615 (BAP 6th Cir. Dec. 2, 2010).

Nondisclosure of fees for amendment of schedules required disgorgement. The Chapter 7 debtor's attorney collected a fee for amending schedules but never amended the Rule 2016(b) disclosure of fees; as a result, the court ordered some disgorgement, but gave the attorney credit for value of services provided. *In re Chez,* ___ B.R. ___, 2010 WL 5095791 (Bankr. D. Conn. Dec. 9, 2010).

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Credit Counseling

Filing by debtor who failed to satisfy credit counseling requirement commences case and triggers automatic stay. The United States Trustee had standing to appeal bankruptcy court orders striking the petitions of debtors who had not obtained the pre-bankruptcy credit counseling. "Although an individual may be ineligible to be a debtor under the Bankruptcy Code for failure to satisfy the strictures of § 109(h), the language of § 301 does not bar that debtor from *commencing* a case by filing a petition; it only bars the case from being maintained as a proper voluntary case under the chapter specified in the petition." The commencement of the case triggers the automatic stay, and to hold otherwise would make BAPCPA's addition of § 362(b)(21)(A) a nullity. Notwithstanding the holding, the Circuit did not reach the issue of whether the bankruptcy court could, under its § 105(a) power, strike a petition rather than dismiss the case. Remand was ordered to permit the bankruptcy court to consider whether striking was appropriate in light of the Circuit's holding that a case was commenced. *Adams v. Zarnel (In re Zarnel),* ___ F.3d ____, 2010 WL 3341428 (2d Cir. Aug. 26, 2010).

Automatic Stay

Bank, when not protecting setoff rights, violated automatic stay by freeze. When the bank froze the Chapter 7 debtor's accounts, and the bank was not acting to protect any setoff right, the *Strumpf* concept of administrative hold on the accounts did not apply. The accounts were property of the bankruptcy estate, in which the debtor claimed a partial exemption, but the bank refused to turnover the accounts. Remand was required to determine if the freeze and refusal to turnover was a willful violation of the stay, and if so, what damages were appropriate. *Mwangi v. Wells Fargo Bank, N.A. (In re Mwangi),* 432 B.R. 812 (BAP 9th Cir. 2010).

Mortgage servicer didn't violate stay with notice of new escrow payment. The automatic stay doesn't prevent all communication between a creditor and debtor, and when the mortgage servicer mailed an informational notice to the Chapter 13 debtor prior to confirmation, advising of a new escrow payment, resulting from a recent escrow analysis, that did not violate the automatic stay. The notice was not mailed with a payment demand, and the servicer took no action to collect the debt outside of the bankruptcy case. The debtor had a need for this escrow information. Also, the receipt of mortgage payments, including the increased escrow amount, from the trustee did not violate the stay under § 362(a)(6). *Zotow v. Johnson (In re Zotow),* 432 B.R. 252 (BAP 9th Cir. 2010).

Avoiding Powers and Turnover

Trustee could not avoid bank's lien perfected postpetition. Applying Colorado's UCC, a bank had priority over other rights that arose between the

attachment of the bank's security interest and the perfection by filing, and the Chapter 7 trustee, acting as a hypothetical lien creditor, could not avoid the bank's lien. In addition, the bank's perfection of a purchase money security interest by filing postpetition did not violate the automatic stay, because of § 362(b)(3)'s exception. *Sovereign Bank v. Hepner (In re Roser),* 613 F.3d 1240 (10th Cir. 2010).

Tax purchaser's interest is perfected on recording of tax deed. Under Illinois law concerning purchase of real property by paying delinquent property taxes, a tax purchaser is not perfected until the tax deed is recorded. Although the debtor's period of redemption had expired, the purchase was not perfected absent recordation of the deed; therefore, the Chapter 13 debtors could pursue their § 548 fraudulent transfer claim, when the tax deed was recorded within the two-year look-back for avoidance. *Smith v. SIPI, LLC (In re Smith),* ___ F.3d ___, 2010 WL 2899118 (7th Cir. July 27, 2010).

Prepetition tax refund subject to limited turnover. The debtors' interest in a 2006 tax refund, which had been applied prepetition to 2007 taxes, was not subject to turnover to the Chapter 7 trustee, except to the extent that there would be a refund of 2007 taxes attributable to prepetition earnings. The debtors elected to apply a $3,000 refund for 2006 to their 2007 taxes, and that election is irrevocable under the IRS Code. The Chapter 7 trustee attempted to obtain turnover of the 2006 refund, but the trustee succeeded to only those rights that the debtors had in the refund. Since the debtors had applied the refund to 2007 taxes, in the event they were entitled to a 2007 refund attributable to the 2006 payment, that amount would be subject to turnover. *Weinman v. Graves (In re Graves),* 609 F.3d 1153 (10th Cir. 2010).

Chapter 7 trustee's proposed settlement of fraudulent conveyance actions triggered Code's sale provisions. The Chapter 7 trustee moved to approve compromise of adversary proceedings against the debtor, debtor's spouse and alter ego companies, which causes of action presented, in part, questions of Texas fraudulent conveyance law. The actions were property of the bankruptcy estate, and the trustee's proposed settlement was met with a higher bid by a judgment creditor. As a result, the settlement involved disposition of property of the estate, triggering § 363, and the bankruptcy court must consider whether an auction or other sale process was appropriate to obtain the maximum value for the estate. *The Cadle Co. v. Mims (In re Moore),* 608 F.3d 253 (5th Cir. 2010).

Second, unrecorded mortgage was not novation of first mortgage. Applying Massachusetts law, in the absence of evidence that the parties intended a novation, the execution of a second note and mortgage did not act as a novation of the first note and mortgage, and although the second mortgage was not recorded (and might be unenforceable against the trustee), the first recorded mortgage could not be avoided, since it remained effective when the Chapter 7

bankruptcy was filed. *Ostrander v. Andre (In re Motta),* ___ B.R. ___, 2010 WL 3155798 (BAP 1st Cir. Aug. 10, 2010).

Debtor could avoid judgment lien on one-half interest in homestead. The Chapter 7 debtor owned her homestead jointly with a daughter, and the debtor could claim a Massachusetts homestead exemption in her one-half interest and could avoid a judgment lien against that one-half interest. In calculating the avoidance, the court arrived at the debtor's equity after deducting from value the two mortgages, and then dividing the equity in half. The sum of the mortgage liens, plus the amount of exemption that the debtor could claim, exceeded the debtor's equity interest; thus, the judgment lien was avoidable under § 522(f)(2)(A). *Premier Capital, Inc. v. Pagnini (In re Pagnini),* 433 B.R. 455 (BAP 1st Cir. 2010).

Property of Estate

Judicial estoppel bars debtor's sexual harassment claim. In another application of judicial estoppel, the Sixth Circuit held that the Chapter 13 debtor's failure to schedule her sexual harassment claim against an employer triggered judicial estoppel, when the debtor amended her bankruptcy filings after the defendant moved the district court for dismissal of the complaint. Despite the fact that the debtor attempted to correct the omission, the attempts were "limited and ineffective." Dissenting Judge Clay pointed to the "absurdity of the result," noting that a recovery of the claim would benefit creditors of the bankruptcy estate, and that the defendant suffered no prejudice from the plaintiff's failure to initially disclose the cause of action in the bankruptcy case. *White v. Wyndham Vacation Ownership, Inc.,* ___ F.3d ___, 2010 WL 3155161 (6th Cir. Aug. 11, 2010). *Compare Moses v. Howard Univ. Hospital,* 606 F.3d 789 (D.C. Cir. 2010) (Although district court had applied judicial estoppel to prevent former Chapter 7 debtor from pursuing Title VII cause of action, but not to prevent trustee's pursuit, when the trustee abandoned the cause of action, it passed back to the debtor, who was estopped due to omission of the cause of action from both Chapter 13 and 7 schedules. Debtor's argument that he cured the omission by reopening the Chapter 7 bankruptcy and amending schedules was rejected; "allowing such a debtor to 'back-up, re-open the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing potential assets only if he is caught concealing them.'").

Allocation of postpetition tax refunds. The bankruptcy court properly applied the pro-rata-by-days method to allocation of postpetition tax returns, in its determination of how much should be turned over to the Chapter 7 trustee. The debtor filed Chapter 7 at a point in time approximately 73% of the tax year, and using the pro-rata-by-days method, 73% of a tax refund for that tax year was allocated as prepetition property of the estate, with a portion claimed as exempt under state law. While this method will not work in all cases, the Chapter 7

trustee established a prima facie case for the pro-rata-by-days method here. *In re Meyers,* ___ F.3d ___, 2010 WL 2990826 (7th Cir. Aug. 2, 2010).

Exemptions

Trustee can sell home that appreciates in value. Chapter 7 debtors filed for bankruptcy when the equity values of their homes were less than amounts available for homestead exemptions, but the values increased during the administration of the cases (note that the cases remained open for two and three years after discharges), with the equities increasing beyond available exemptions. The Ninth Circuit held that the trustees could force sales of the homes to realize the excess equity for creditors. The debtors had continued to reside in their homes, with one debtor even refinancing the home after receiving a discharge. In the other case, two years after the case was filed, the mortgage creditor moved for stay relief, but the trustee objected, saying that the home now had increased equity. In consolidated appeals, the Circuit panel first held that the trustees' failure to object to the claimed homestead exemptions did not prevent sales, in light of *Schwab v. Reilly*, 130 S.Ct. 2652 (2010), since the homestead claims were for specific dollar amounts, under § 522(d)(1) in one case and under Arizona law in the other case. The assets remained in the bankruptcy estates, with only the debtors' exempt interests removed, with the exemptions fixed by the dollar limits at the time of the bankruptcy filings. Bottom line lesson of the opinion is: "A Chapter 7 debtor will not be certain about the status of a homestead property until the case is closed (something that may not happen for several years after bankruptcy filing) or the trustee abandons the property." Although not deciding if estoppel against the trustee would ever apply, it didn't apply here. *Gebhart v. Gaughan (In re Gebhart) and Chappell v. Klein (In re Chappell),* ___ F.3d ___, 2010 WL 3547641 (9th Cir. Sept. 14, 2010).

Social Security income excluded from estate. Affirming its BAP, the Eighth Circuit held that the anti-assignment provisions in the Social Security Act prevents inclusion of Social Security proceeds in the bankruptcy estate. The Chapter 7 debtor had received a lump sum disability payment before filing bankruptcy, and he claimed those benefits as exempt under 42 U.S.C. § 407. The trustee objected, arguing that the benefits were part of the bankruptcy estate. Section 407 "operates as a complete bar to the forced inclusion of past and future social security proceeds in the bankruptcy estate," rather than an exemption. *Carpenter v. Ries (In re Carpenter),* ___ F.3d ___, 2010 WL 2977388 (8th Cir. July 30, 2010). *See also Fink v. Thompson (In re Thompson),* ____ B.R. ____, 2010 WL 3583400 (BAP 8th Cir. Sept. 16, 2010) (Citing *Carpenter* and holding that the Chapter 13 debtors' retention of Social Security benefits from plan payments was not bad faith), *but contrast In re Westing,* WL 2774829 (Bankr. D. Idaho July 13, 2010) (Chapter 13 plan was not proposed in good faith when Social Security income was excluded from projected disposable income. Although deductible from current monthly income under § 101(10A)(B), when good faith is at issue, debtors must demonstrate why Social Security

income was not available for the plan.). *Fink* and *Westing* are summarized under Chapter 13 Issues.

Bad faith, as grounds for objection to exemptions, must be proven by preponderance of evidence. In matter of first impression, the Ninth Circuit Bankruptcy Appellate Panel held that a trustee or creditor objecting to the debtor's claimed exemption must prove the debtor's bad faith by preponderance of the evidence. The Chapter 7 debtor claimed an exemption in his interest in shares of stock, and both the trustee and a creditor objected timely. The debtor had originally claimed the stock to have no value, but the schedules were amended after the trustee determined value; the shares were sold for $25,949, subject to the debtor's claimed exemption in sale proceeds. Recognizing that bankruptcy courts may disallow an exemption claim based on bad faith, as found in prior Ninth Circuit precedent, the BAP panel noted that neither the Code nor Rules specify "the burden of persuasion for disallowing a claim of exemption." After reviewing authority in other contexts on the burden, the panel adopted the preponderance of evidence standard, rather than a clear and convincing standard. A remand was ordered for the bankruptcy court to consider the objections in light of the correct proof standard. *Tyner v. Nicholson (In re Nicholson),* ___ B.R. ___, 2010 WL 3312590 (BAP 9th Cir. July 29, 2010).

Debtor could not exempt life insurance proceeds on husband's life. Under Ohio's statutes, contracts of life insurance or annuities on the life of a person are free from the claims of creditors of the insured person or annuitant. Ohio's exemption differs from the language of § 522(d)(7), and the Chapter 7 debtor was required to use Ohio's exemptions under the opt out. The debtor claimed exemption in life insurance proceeds paid to her after her husband's postpetition death, but Ohio's statute did not permit exemption of life insurance proceeds by the beneficiary. *Menninger v. Schramm (In re Schramm),* 431 B.R. 397 (BAP 6th Cir. 2010).

Chapter 7 Issues

Discharge Exceptions and Objections

Debtor's hardship not issue in § 523(a)(1)(A) exception. Nondischargeability of tax debt under § 523(a)(1)(A) was not influenced by the debtor's argument that payment of the debt would be a hardship for the debtor and family. The bankruptcy court has no authority to consider hardship in this determination. *Maali v. U.S. (In re Maali),* 432 B.R. 348 (BAP 1st Cir. 2010).

State court judgment given preclusive effect for § 523(a)(6) damages and liability. Although the bankruptcy court properly determined the dischargeability issue, it also properly gave preclusive effect to the state court's judgment for damages and liability of the debtor wife, who pursued a rape charge against the defendant/creditor. The defendant/creditor was acquitted of the rape and then

sued both debtors for abuse of process, intentional infliction of emotional distress, civil conspiracy and concert of action, obtaining a default judgment against both. The bankruptcy court found that the state judgments were preclusive only as to the issues of damages and liability, but that the judgment against the husband debtor was dischargeable. As to the wife debtor, the judgment was nondischargeable as a willful and malicious injury. The bankruptcy court's findings that no rape occurred and that the wife's pursuit of the rape charge was willful and malicious conduct were affirmed. Since the husband prevailed in the bankruptcy court, he had no standing to appeal. *Phillips v. Weissert (In re Phillips),* ___ B.R. ___, 2010 WL 3271562 (BAP 6th Cir. Aug. 20, 2010).

Contempt of state court was willful and malicious injury. Two shareholders of law firm that received $1 million fee for representation of plaintiffs were sued in state court by another attorney for a referral fee, and the defendants were found guilty of contempt of that court for failure to escrow part of their fee. The state court's escrow order made it clear that injury to the plaintiff was substantially certain if the defendants violated the order; therefore, a finding of contempt was sufficient to support the § 523(a)(6) exception from discharge for a willful and malicious injury. *Musilli v. Droomers (In re Musilli),* 2010 WL 2222806 (6th Cir. June 3, 2010) (unpublished).

Totality of circumstances test adopted, rather than *Brunner*. The First Circuit Bankruptcy Appellate Panel has adopted the totality of the circumstances test for undue hardship determination, rather than the *Brunner* test, saying that most bankruptcy courts in the Circuit had done so. Although the distinctions between the two tests are "modest," the *Brunner* second prong "place[s] dispositive weight on the debtor's ability to demonstrate 'additional extraordinary circumstances' that establish a 'certainty of hopelessness.'. . .Requiring the debtor to present additional evidence of 'unique' or 'extraordinary' circumstances amounting to a 'certainty of hopelessness' is not supported by the text of § 523(a)(8). The debtor need only demonstrate 'undue hardship.'" The panel also held that the debtor's eligibility for ICRP participation is a factor under the totality of circumstances test, "but it is not determinative." *Bronsdon v. Educational Credit Management Corp. (In re Bronsdon),* __B.R. ____, 2010 WL 3655972 (BAP 1st Cir. Sept. 21, 2010).

Debtor transferred funds with intent to hinder, delay or defraud for purposes of § 727(a)(2)(A). When the debtor admitted that she transferred funds into a friend's name to protect them from a creditor, the creditor established the necessary elements for § 727(a)(2)(A). Good faith reliance on advice of counsel is not a valid defense when the debtor knew the purpose of her transfers. *Adeli v. Sachs (In re Adeli),* 2010 WL 2464872 (9th Cir. June 17, 2010) (slip opinion).

Dismissal

Debtor's motion to dismiss for failure to file payment advices was properly denied. The Sixth Circuit Bankruptcy Appellate Panel agreed with interpretations of § 521(i) by the First and Ninth Circuits, holding that bankruptcy courts have discretionary authority to waive payment advice filings "if enforcing those requirements would create an abuse of the bankruptcy process." The Chapter 7 debtor did not raise his failure to file payment advices for ten months after filing, and only raised it when the trustee pursued sale of assets. *Simon v. Amir (In re Amir),* ___ B.R.___, 2010 WL 3057573 (BAP 6th Cir. Aug. 5, 2010).

Dismissal under § 707(b)(3) requires proof of abuse by preponderance of evidence. Applying the totality of circumstances test on the U.S. Trustee's motion to dismiss for abuse under § 707(b)(3), BAPCPA codified pre-BAPCPA concepts of abuse, and the court may consider the debtor's financial circumstances at the time the dismissal motion is filed, not just at the time of the Chapter 7 filing. *In re Roppo,* ___ B.R.___, 2010 WL 3602473 (Bankr. N.D. Ill. Sept. 16, 2010).

Reaffirmation and Discharge Injunction

Violation of discharge injunction—recovery of fees limited by Internal Revenue Code. The IRS had been found to have willfully violated the discharge injunction by attempting to collect discharged taxes, and the Chapter 7 debtor pursued recovery of attorney fees and costs, which were the debtor's only damages. The Seventh Circuit held that 26 U.S.C. § 7433 "is the exclusive remedy for the harm suffered by [the debtor]," and most of her claim was not timely filed within that statute's two-year period after the right of action accrued. A cause of action under § 7433 accrues "when the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action." 26 C.F.R. § 301.7443-1(g). As to the claim that was not timely filed, the bankruptcy court lacked jurisdiction over the debtor's fee and costs claim, but remand was required as to another claim that was timely, to determine damages. *Kovacs v. U.S.,* ___ F.3d ___, 2010 WL 2944048 (7th Cir. July 29, 2010).

Creditor holding reaffirmed debt did not violate discharge injunction. Dismissing the Chapter 7 debtors' complaint alleging violation of the discharge injunction, the court examined when a reaffirmation agreement is "made," under § 524(c)(1). "'Made' as used in § 524(c)(1). . .is not synonymous with 'filed' as used in § 524(c)(3), with the two requirements existing independently of the other. . . .At the latest, . . .a reaffirmation agreement will be considered 'made'. . .when the agreement is formally executed by all of the necessary parties." When the debtor entered into a second reaffirmation agreement with the creditor, the debtor had not effectively rescinded reaffirmation, and the creditor did not violate the discharge injunction by suing in state court on the reaffirmed debt. *Pickerel*

v. Household Realty Corp. (In re Pickerel), 2010 WL 2301190 (Bankr. N.D. Ohio June 8, 2010) (slip opinion).

Reaffirmation and Deferral of Discharge

Bankruptcy court has discretion to defer discharge to permit debtor and mortgage creditor to agree on modification of mortgage. In a Chapter 7 case, the debtors moved to defer discharge under Bankruptcy Rule 4004(c)(2), to permit time for the debtor and a mortgage creditor to reach agreement on reaffirmation of a modified mortgage. The debtors wanted to avoid the expiration of the automatic stay under § 362(c)(2)(C) by entry of discharge, and they were making a good faith effort to negotiate agreement on a modified mortgage. "The ability of debtors to request deferral of discharge is a procedural corollary to the provision in Bankruptcy Code § 524(c) that reaffirmations are not enforceable against debtors unless made before the discharge is entered." The court noted that mortgage modification is a form of reaffirmation, "to the extent that it affects a debtor's personal liability." The court then concluded that Rule 4002(c)(2) did not limit discretionary authority to defer discharge for longer than the 30 days mentioned in the Rule, or for multiple deferrals to dates certain. The opinion includes an examination of the effect of Rule 9006(b)(1) on Rule 4002(c)(2). So long as the debtors were acting in good faith, for example setting aside funds to pay the mortgage when agreement was reached, deferral of discharge may be appropriate, but "it cannot be used to run roughshod over security interests generally. Nor can it be used as a device for indefinite delay of the inevitable." Deferral keeps the stay in effect while the parties engage in reaffirmation negotiation, preventing the debtor from being caught by stay expiration. *In re Roderick,* 425 B.R. 556 (Bankr. E.D. Cal. 2010).

Chapter 13 Issues

Eligibility

Wholly unsecured junior mortgage debt must be included in unsecured for § 109(e) eligibility. Concluding that *Scovis v. Henrichsen (In re Scovis),* 249 F.3d 975 (9th Cir. 2001), was binding precedent, claims of wholly unsecured junior lienholders must be treated as unsecured debt under § 506(a). As a result, debtors in a declining real estate market were ineligible for Chapter 13 relief. *Smith v. Rojas (In re Smith),* ___ B.R.___, 2010 WL 3096573 (BAP 9th Cir. July 8, 2010). *Accord In re Bernick,* 2010 WL 3521722 (Bankr. E.D. Va. Sept. 7, 2010) (slip opinion); *In re Claro-Lopez,* 236 B.R. 271 (Bankr. S.D. Fla. 2010).

Confirmation Issues

Projected Disposable Income

***Lanning* forward-looking approach applied to both income and expenses.** Applying *Hamilton v. Lanning,* 130 S.Ct. 2464 (2010), when the debtor had significant income reduction in the pre-filing six-month period but had a new job that was a known event at the time of confirmation, the bankruptcy court could take that change into account. Although *Lanning* focused on the income side, the Supreme Court's holding also applied to changes in expenses that were known or certain; "*Lanning* also governs the bankruptcy court's determination on the deduction for mortgage payments," when the debtors intended to surrender property. The reduction in expenses should be taken into account in calculating projected disposable income. *Darrohn v. Hildebrand (In re Darrohn),* ___ F.3d ___, 2010 WL 2852251 (6th Cir. July 22, 2010). *See also In re Collier,* ___ B.R. ___, 2010 WL 2643542 (Bankr. M.D. Ala. June 29, 2010) (Debtors' deduction of $68 monthly for 4-wheeler was not "unreasonable" for the family's recreation purposes.).

Bankruptcy court properly deducted workers compensation payments, which had ceased, from projected disposable income. Applying *Hamilton v. Lanning,* 130 S.Ct. 2464 (2010), the Seventh Circuit affirmed the bankruptcy court's exclusion of workers compensation payments that the debtor had received during the six-month prebankruptcy period, when those payments had ceased. The change in income was known and that lost income was not part of the projected disposable income for purposes of plan confirmation. *In re Johnson,* 2010 WL 2594334 (7th Cir. June 21, 2010) (slip opinion).

Postpetition income after payment of 401(k) loan must be applied to plan. Although BAPCPA's amendments permit debtors to repay 401(k) loans and to continue to contribute to 401(k) plans, only those "401(k) contributions which are being made at the commencement of the case are excluded from property of the estate under § 541(b)(7)." The absence of reference in § 1306 to 401(k) contributions is significant, leading to the conclusion that "Congress did not intend for income which becomes available post-petition to be excluded from property of the chapter 13 estate or from the calculation of projected disposable income." Therefore, the debtor not making contributions to a 401(k) at the time of filing the Chapter 13, but who is paying a 401(k) loan, must dedicate the income after payment of that loan to future plan payments, as a part of projected disposable income. The panel applied the *Lanning* forward-looking approach to projected disposable income. *Burden v. Seafort (In re Seafort),* ___ B.R. ___, 2010 WL 3564709 (BAP 6th Cir. Sept. 14, 2010).

Exclusion of Social Security income is not part of good faith analysis. The Eighth Circuit Bankruptcy Appellate Panel held that § 101(10A)'s definition of current monthly income excludes Social Security benefits, and § 1325(b)(2)'s definition of disposable income incorporates the § 101(10A) definition. When the debtors excluded Social Security benefits from their proposed plan payments and there was no change in income or expenses for consideration, the trustee's objection to confirmation on the basis of bad faith was rejected. "Considering the

Debtors' exclusion of their Social Security income from their plan payments as part of the good faith analysis would improperly render section 1325(b)'s ability to pay test meaningless. . . .It simply was not bad faith for the Debtors to follow the requirements of the Bankruptcy Code and, in doing so, obtain a benefit provided therein." Even if retention of the Social Security benefits could be a part of the good faith analysis, that alone would not prevent the debtors from showing good faith for confirmation, applying the totality-of-circumstances approach. The panel also cited the recent Eighth Circuit decision, *In re Carpenter,* ___ F.3d ___, 2010 WL 2977388 (8th Cir. July 30, 2010), to conclude that "it would be inconsistent to say that the Debtors acted in bad faith simply by failing to devote to the plan money that was never property of their estate in the first instance." *Fink v. Thompson (In re Thompson),* ____ B.R. ____, 2010 WL 3583400 (BAP 8th Cir. Sept. 16, 2010). *Contrast In re Crammer,* 433 B.R. 391 (Bankr. D. Utah 2010) (Applying *Hamilton v. Lanning,* 130 S.Ct. 2464 (2010), notwithstanding the exclusion of Social Security income from § 101(10A)'s and § 1325(b)(2)'s definitions, that income comes back into play for purposes of calculation of projected disposable income, under *Lanning*'s forward-looking approach.); *In re Westing,* WL 2774829 (Bankr. D. Idaho July 13, 2010) (Chapter 13 plan was not proposed in good faith when Social Security income was excluded from projected disposable income.).

Applicable Commitment Period

Above-median income debtor must remain in 5-year plan or pay unsecured claims in full. The Eleventh Circuit has held that a plain meaning of § 1325(b)(4)'s applicable commitment period is a temporal term, "derived from § 1325(b)(4) and independent of § 1325(b)(1)," with the statute's text being clear, unambiguous and not resulting in absurd consequences. The Circuit concluded that the Supreme Court's *Lanning* decision supported a temporal interpretation of "applicable commitment period," by its holding that § 1325(b) "is not a strict mechanical formula existing in a vacuum." The only exception from the 5-year term for above-median income debtors is to pay unsecured claims in full, under § 1325(b)(4)(B). *Whaley v. Tennyson (In re Tennyson),* 611 F.3d 873 (11th Cir. 2010).

Current monthly income of both spouses used to calculate applicable commitment period. Under §§ 1325(b)(1)(B) and (b)(4), a debtor must "include his or her spouse's current monthly income when calculating the applicable commitment period. . .The statute provides no exception for married debtors who maintain separate households." And, under § 101(10A)(A), in a joint case, current monthly income "includes the income that a debtor *and* the debtor's spouse received during the prescribed period." Married debtors filing a joint petition "should file a single Form B22C regardless of whether they maintain separate households." *Harman v. Fink (In re Harman),* ___ B.R. ___, 2010 WL 3447772 (BAP 8th Cir. Sept. 3, 2010).

Negative Equity

Ninth Circuit disagrees with other circuits on negative equity. The Ninth Circuit affirmed its BAP, holding that the negative equity financed as part of a trade-in vehicle was not part of the "price" for purposes of a UCC purchase money security interest in the new vehicle. "However one structures or describes the transaction, the negative equity is antecedent debt. A seller or lender can obtain a purchase money security interest only for new value, and closely related costs. Old value simply does not fit within that rubric." *Americredit Fin. Servs., Inc. v. Penrod (In re Penrod),* 611 F.3d 1158 (9th Cir. 2010).

Mortgage Issues

Section 1322(e) applied to undersecured creditor. An undersecured mortgage creditor is entitled to payment of its fees, expenses and escrow advances that are permitted under the note, mortgage and applicable nonbankruptcy law, with the Sixth Circuit applying the plain language of § 1322(e), which includes "notwithstanding. . .section 506(b)." *Deutsche Bank National Trust Co. v. Tucker,* ___ F.3d ___, 2010 WL 3565185 (6th Cir. Sept. 15, 2010).

Class certified for injunctive relief only. Applying *Wilborn v. Wells Fargo Bank, N.A. (In re Wilborn),* 609 F.3d 748 (5th Cir. 2010), class was not certified for damage issues, under Fed. R. Civ. P. 23(b)(3), when "individualized issues begin to predominate as the Court must consider the harm suffered by each class member on a case-by-case basis," but the class was certified under Fed. R. Civ. P. 23(b)(2) for injunctive relief. Issue involved Countrywide Home Loans's fee collection practices in bankruptcy cases. *Rodriguez v. Countrywide Home Loans, Inc. (In re Rodriguez),* 432 B.R. 671 (Bankr. S.D. Tex. 2010).

Debtor ineligible for discharge may strip wholly unsecured junior mortgage, unless bad faith is found. Although debtors who were ineligible for discharge may strip off a wholly unsecured junior mortgage, if the only reason for filing Chapter 13 is to strip off the lien that was not avoidable in a prior Chapter 7 case, the Chapter 13 filing would be in bad faith. *In re Tran,* 431 B.R. 230 (Bankr. N.D. Cal. 2010).

Violation of due on sale clause, enforceable under state law, would be impermissible modification of mortgage. Due on sale clauses in mortgages are enforceable under Texas law. To allow the debtor to retain property in violation of such a clause would be an impermissible mortgage modification, in violation of § 1322(b)(2). *In re Mullin,* 433 B.R. 1 (Bankr. S.D. Tex. 2010).

Modified mortgage must be paid within plan term. When the debtor proposed to modify a nonresidential mortgage, splitting the claim into secured and unsecured portions, and lowering the interest rate, under § 1322(d) the

debtor must pay the modified mortgage in full within the 5-year plan life. A modified mortgage may not be reamortized over a longer term. *In re Russell,* ___ B.R. ___, 2010 WL 2671496 (Bankr. E.D. Va. June 30, 2010).

Effect of Confirmation

Denial of objection to confirmation was not final for appeal. A property tax purchaser objected to a plan that provided for the debtor to redeem the property in the plan, and the denial of that objection was not sufficiently final for appellate purposes, when confirmation had been continued to determine the amount of the purchaser's secured claim and interest rate. *Salta Group, Inc. v. McKinney (In re McKinney),* 610 F.3d 399 (7th Cir. 2010).

Discharge

Judicial estoppel bars debtor from contesting dischargeability under § 1328(a)(4). The future Chapter 13 debtor had stipulated in a prior state court suit that a judgment would be nondischargeable in bankruptcy because of the willful and malicious injury to the plaintiff. Ten years later when the Chapter 13 was filed, the debtor was barred by the judicial estoppel effect of the stipulated judgment, which admitted that the defendant's actions were willful and malicious, causing personal injury to the plaintiff. *Montonati v. Wettstein (In re Wettstein),* ___ B.R. ___, 2010 WL 2772628 (Bankr. E.D. Wis. July 13, 2010).

Section 523(a)(16) doesn't apply in Chapter 13, but homeowners' association dues survive discharge. Although finding that § 523(a)(16) is not an exception from the § 1328(a) discharge, under Washington law, the HOA dues are part of the owner's covenant that runs with the land, and the debtor's personal liability for those dues "continues postpetition as long as he maintains his legal, equitable or possessory interest in the property and is unaffected by his discharge." *Foster v. Double R Ranch Assoc. (In re Foster),* ___ B.R. ____, 2010 WL 3504166 (BAP 9th Cir. July 19, 2010).

Dismissal

Debtor satisfied payment advice requirement. A creditor's motion to confirm automatic dismissal of the case was properly denied, with the Second Circuit stating that § 521(a)(1)(B)(IV) was "not a model of syntactical clarity. At least two grammatically valid readings of the statute are possible, each of which would place a different requirement on the debtor." Finding it unclear from the statute how the term "received" functions in context, the Court decided on a "payment-focused interpretation," rather than a "document-focused interpretation." The debtors filed the last payment advice that had been received within the 60-day period before filing the petition, which was for a one-week pay period but also included year-to-date earnings and deductions, and the debtors also filed a "sales earnings report," showing gross earnings for several months. The creditor

argued that the filings did not include each payment advice received during the 60-day period, but the Circuit panel held that what the debtors filed "created a very clear picture as to the amount of income. . .received in the sixty days prepetition." *Community Bank, N.A. v. Riffle,* ___F.3d ___, 2010 WL 3079307 (2d Cir. Aug. 9, 2010).

Debtor's right to voluntarily dismiss was not absolute, with disagreement by a bankruptcy court. In last quarter's summaries, the Fifth Circuit's decision in *Jacobsen* was included. It is mentioned again here, as a background for a recent opinion going the other way. In *Jacobsen*, the Fifth Circuit held that the Chapter 13 debtor's right to voluntarily dismiss the case was qualified by the bankruptcy court's authority to deny dismissal when bad faith was found, the bankruptcy court properly denied dismissal and granted the trustee's motion to convert to Chapter 7. Acknowledging a split of judicial authority, the Fifth Circuit considered the Supreme Court's *Marrama* holding that § 706(a) conversion from Chapter 7 to 13 was subject to a determination of the debtor's good faith, and reviewed post-*Marrama* decisions discussing that decision's effect on § 1307(b) dismissal. The Fifth Circuit agreed with the Ninth Circuit's *Rosson* decision, rejecting "a construction of the statute that would afford an abusive debtor an escape hatch." The bankruptcy court has discretion to grant the trustee's motion for conversion for bad faith cause, and to deny the debtor's motion to voluntarily dismiss the case. *Jacobsen v. Moser (In re Jacobsen),*609 F.3d 647 (5th Cir. June 16, 2010). *Contra, In re Williams,* ___ B.R.____, 2010 WL 3282597 (Bankr. N.D. Ill. Aug. 18, 2010), where that court held that the language of § 1307(b) places no statutory limit on the debtor's right to dismiss, when the case has not previously been converted. The *Williams* court distinguished *Marrama,* which addressed the debtor's ineligibility for Chapter 13 relief due to bad faith; in contrast, § 1307(b) gives an unlimited right to dismiss the unconverted Chapter 13 case, without regard to eligibility.

Claims

Claim allowance order is not executable judgment. Former domestic partner of deceased Chapter 7 debtor obtained an order allowing claim for two promissory notes and collected $160,000 from the bankruptcy estate on that claim, and the creditor now attempted to execute on assets of a revocable trust for what the trust allegedly owed the former debtor. The Eleventh Circuit distinguished a claims allowance order from a final money judgment. To execute under Fed. R. Civ. P. 69, the creditor must obtain a money judgment, and a claims allowance order "bears little resemblance to a money judgment." *Zino v. Baker,* 613 F.3d 1326 (11th Cir. 2010).

Attorney's administrative expense claim in prior Chapter 13 became prepetition claim in second case. When the Chapter 13 debtor's attorney was not fully paid for work in that case, the administrative priority for the fees became a prepetition claim in a second case filed by debtor, and the unpaid expense lost

its priority in the second case. The bankruptcy court properly fixed the amount of the allowable fees, but it could not elevate the unpaid fees to a priority in the second case, when there were other priority claims in the second case. *Texa Comptroller of Public Accounts v. Zars (In re Zars),* ___ B.R. ____, 2010 WL 2991063 (W.D. Tex. July 27, 2010).

Bankruptcy Code permits garnishment of funds held by Chapter 13 trustee post dismissal. Citing split of judicial authority on creditor's garnishment of funds held by a trustee on dismissal, the court "adopts the reasoning of the courts that allow garnishment. In short, there is nothing special about funds the Chapter 13 trustee holds that should prevent a creditor from proceeding with garnishment after dismissal of a Chapter 13 case. If the trustee is holding funds that belong to the debtor, viz-a-viz a third party creditor with a writ of garnishment, the trustee is just like any other 'debtor of the debtor,' and a creditor should not be prevented from garnishing such funds. Moreover, nothing in the Bankruptcy Code prevents garnishment. Though some courts find that the plain language of Bankruptcy Code § 1326(a)(2) mandates return to the debtor of all funds held by the trustee, that section simply states that the 'trustee shall return' to the debtor any payments made in accordance with an unconfirmed plan. But there is no difference between this situation and a typical wage garnishment in which an employee is entitled to any wages earned, *except* when a creditor has a valid writ of garnishment allowing it to garnish wages held by the employer." *In re Fischer*, 432 B.R. 863 (Bankr. M.D. Fla. 2010).

Review of claims objection based on lack of documentation and limitations bar. Rejecting the debtors' objections to claims by Roundup Funding, based on lack of documentation and statutory bar to collection, the court reviewed the statutory and Rules grounds for claims objection, adopting the position that a claims objection must be grounded on § 502(b); objections asserting lack of documentation may deprive the claim of prima facie validity, but the objector has the burden to present "evidence of equally probative value." The court's conclusion is a primer on claims objection and burdens of the objector. *Falwell v. Roundup Funding, LLC (In re Falwell),* ___ B.R. ___, 2009 WL 6750628 (Bankr. W.D. Va. Dec. 4, 2009).

Professional Fees

Attorney fee-only cases were not in good faith, resulting in no fee. Chapter 13 cases filed for purpose of paying debtors' attorney fees were not in good faith when the debtors were eligible for Chapter 7 relief. All fees to the attorney were denied, and disgorgement required. *In re Buck,* 432 B.R. 13 (Bankr. D. Mass. 2010).