Today's Chapter 13 (in Three Installments)

Concurrent Session

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Clark & Washington, PC; Atlanta

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U.S. Bankruptcy Court (D. S.C.)
Spartanburg

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Chapter 13 Outline

Means Testing: Lanning & Ransom

Mortgages: Plan Language, the Anti-modification Clause, and Espinosa

Generic Chapter 13 Issues: Extending the Stay

Submitted by

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U.S. Bankruptcy Court

District of South Carolina

CHILD SUPPORT ISSUES

The Automatic Stay –

11 U.S.C. Section 362(b)(2)(B) –

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—
(2) under subsection (a)—
(C) the collection of a domestic support obligation from property that is not property of the estate,

In re Schroeder, 2009 WL 3526504 (Bkrtcy.D.Neb.)(The debtor's confirmed plan expressly provided that the property of the estate, including his current and future earnings, would not vest in the debtor until a discharge is issued. The state agency's letters attempting to collect its pre-petition child support debt, therefore, violated the stay. Further, it violated the terms of the debtor's confirmed chapter 13 plan which specifically provided for the payment of the claim.)

In re Bloch, 2010 WL 3824125 (E.D.N.Y.)(chapter 7 case)(In denying the creditor's motion for relief from the stay, "the Bankruptcy Court did not address the existence of domestic support obligations, the availability of non-estate assets, or whether there is income of the bankruptcy estate or the debtor's property that may be withheld for payment of domestic support obligations. Thus, the Bankruptcy Court did not provide findings of fact or law "sufficient to permit meaningful appellate review," and its decision must be "vacate[d] and remand[ed]."")

11 U.S.C.Section 362(b)(2)(C) –

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—
(2) under subsection (a)—
(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

In re Rodriguez, 367 Fed.Appx. 25, 2010 WL 597224 (C.A.11 (Fla.))(State was in contempt of bankruptcy court's order when it sent collection letters to Chapter 13 debtor during pendency of his bankruptcy, even though the state did not violate the automatic stay provisions, as such provisions contained an exception for collection of child support, where state's actions violated the terms of debtor's confirmed plan.)

In re Powers, 2010 WL 942166 (Bkrtcy.S.D.Ind.)(The ex-wife of a chapter 13 debtor did not violate the automatic stay by pursuing a state court action to collect a pre-petition domestic support obligation. No chapter 13 plan had been confirmed, so the ex-wife did not violate Section 1327(a).)

In re Peterson, 410 B.R. 133 (Bankr. D.Conn. 2009)(Individual Chapter 11 debtor's estranged spouse, without violating automatic stay, could commence cause of action or proceeding for establishment of order for domestic support obligations with respect to withholding of income from debtor; support order did not have to be in place pre-petition in order for wife to seek withholding of debtor's income. But the automatic stay did prevent estranged wife from seeking an order awarding her exclusive possession of marital residence, as act to obtain possession of, or to exercise control over, property of the estate.)

11 U.S.C. Section 362(b)(2)(D) –

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—
(2) under subsection (a)—
(D of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(6) of the Social Security Act;

In e Cobb, 2006 L 6591596 (Bkrtcy.N.D.Ga.)(Although the state agency did not violate the automatic stay by not releasing the suspension of the chapter 13 debtor's license, the court could invoke its powers under Section 105 to order the release of the suspension. "Under the facts of this case, the exception to the automatic stay has served its purpose. OCSS has been permitted to continue its collection efforts, such as the continued suspension of the Debtor's driver's license, up until the time the Debtor's Chapter 13 plan was confirmed. OCSS's right to payment of pre-petition child support arrears is protected by the Debtor's confirmed plan, which requires the Debtor to pay these arrears in full prior to payment of his priority tax debt and unsecured claim.")

11 U.S.C. Section 362(b)(2)(F) –

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—
(2) under subsection (a)—
(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law;

In re McGrahan, 2011 WL 1518877 (Bkrtcy.D.N.H.)("Prior to confirmation of a plan, the automatic stay did not prevent DHHS from intercepting tax refunds under the exception in § 362(b)(2)(F). DHHS did not breach the terms of the original confirmation order when it intercepted the Debtor's tax refunds in April and November of 2010 because the confirmed plan in effect at the time permitted the interception of tax refunds. However, once the order approving the Modified Plan became final on December 15, 2010, DHHS was prohibited from intercepting tax refunds to satisfy the Debtor's prepetition domestic support obligation because the Modified Plan provided that DHHS's prepetition claim would be paid through plan payments. DHHS was bound by the provisions of the Modified Plan and was obligated to accept distributions from the chapter 13 trustee in satisfaction of its allowed prepetition domestic support claim.")

In re Worland, 2009 WL 1707512 (State agency attempting to intercept chapter 13 debtor-husband's tax refund to collect a past-due child support obligation did not violate the automatic stay, but did violate the terms of the debtors' confirmed chapter 13 plan.)

Is a Claim for Past-Due Child Support Property of the Estate?

In re Green, 423 B.R. 867, 869 (Bankr. W.D. Ark. 2010)("State courts differ whether the payment of child support arrearages are property of the parent/debtor and, therefore, property of the debtor's bankruptcy estate, or property of the child. The courts' holdings are based on an analysis of the applicable state law and whether that state considers payment of child support arrearages to be a property right of the parent or of the child. In determining which state's law is applicable, courts examine several factors, including the state that issued the judgment or decree and where the parties reside.")(internal cites omitted)

In re Perry, 2009 WL 367079 (Bkrtcy.D.S.D.)(chapter 7 case)(Under state law, the debtor held the child support payments as trustee for her children. She did not have an equitable interest in the child support arrearage; thus, the arrearage is not property of the bankruptcy estate)(citing *Begier v. Internal Revenue Service,* 496 U.S. 53, 59 (1990))

II U.S.C. Section 1302(d)

> 11 U.S.C Section 1302(b) The trustee shall—
>
> (6) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (d).
>
> 11 U.S.C. Section 3102(d) (d)
>
> (1) In a case described in subsection (b)(6) to which subsection (b)(6) applies, the trustee shall—
>
> (A)
>
> (i) provide written notice to the holder of the claim described in subsection (b)(6) of such claim and of the right of such holder to use the services of the State child support

enforcement agency established under sections 464 and 466 of the Social Security Act for the State in which such holder resides, for assistance in collecting child support during and after the case under this title; and
(ii) include in the notice provided under clause (i) the address and telephone number of such State child support enforcement agency;

(B)
(i) provide written notice to such State child support enforcement agency of such claim; and
(ii) include in the notice provided under clause (i) the name, address, and telephone number of such holder; and

(C) at such time as the debtor is granted a discharge under section 1328, provide written notice to such holder and to such State child support enforcement agency of—
(i) the granting of the discharge;
(ii) the last recent known address of the debtor;
(iii) the last recent known name and address of the debtor's employer; and
(iv) the name of each creditor that holds a claim that—
(I) is not discharged under paragraph (2) or (4) of section 523 (a); or
(II) was reaffirmed by the debtor under section 524 (c).

(2)
(A) The holder of a claim described in subsection (b)(6) or the State child support enforcement agency of the State in which such holder resides may request from a creditor described in paragraph (1)(C)(iv) the last known address of the debtor.
(B) Notwithstanding any other provision of law, a creditor that makes a disclosure of a last known address of a debtor in connection with a request made under subparagraph (A) shall not be liable by reason of making that disclosure.

In re Mallory, 444 B.R. 553 (S.D.Tex. 2011)(The debtor's failure to provide to the trustee with information relating to his domestic support obligation as required by 11 U.S.C. Section 1302(d) was one factor justifying dismissal of the debtor's chapter 13 case with prejudice.)

In re Shelton, 2009 WL 3031262 (Bkrtcy.E.D.N.C.)(A plain reading of Section 1302(b)(6) and (d) permits the trustee to provide the notice to the state child support agency with directions for the agency to forward the notice to individual child support creditor. This supports the policy of the agency not to provide contact information for a recipient of a domestic support obligation to the payer of the obligation or to other parties.)

11 U.S.C. Section 1322(a)(2)

(a) The plan shall--

> (2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim;

In re Burnett, 408 B.R. 233 (8th Cir. B.A.P. (Ark.) 2009)(Where confirmed Chapter 13 plan, based on an agreement reached by the parties, dealt only with the principal amount of the support obligation arrearage that was owed by debtor to his former wife on the petition date, and specifically reserved the right of former wife to return to state court after completion of the bankruptcy plan to litigate the issue of accrued interest on the arrearage, the bankruptcy court erred in finding that the plan limited former wife's right to collection of any amount found to be due to her for accrued interest.)

In re Trupp, 2009 WL 480083 (Bkrtcy.S.D.Ill.)(Individual child support creditor's failure to object to the confirmation of the plan was not deemed an acceptance of the plan's failure to pay the claim in full. "[I]t is well established that the provisions of § 1332(a)(2) are mandatory and any plan that fails to provide for full payment of priority claims "cannot be confirmed without the claim holder's consent." *See also Matter of Escabedo,* 28 F.3d 34, 35 (7th Cir.1994). A domestic support creditor's failure to object to the plan does not constitute "consent" for purposes of § 1322(a)(2) ")

11 U.S.C. Section 1322(a)(4)

(a) The plan shall—

> (4) notwithstanding any other provision of this section, a plan may provide for less than full payment of all amounts owed for a claim entitled to priority under section 507(a)(1)(B) only if the plan provides that all of the debtor's projected disposable income for a 5-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

In re Penaran, 424 B.R. 868 (Bankr. D.Kan. 2010)(If a domestic support obligation (DSO) claim has been involuntarily assigned to, or is owed directly to or is recoverable by, a governmental entity, it is given second support priority under Section 507(a)(1)(B) and may be paid less than in full during a Chapter 13 plan. A domestic support obligation (DSO) claim that has been voluntarily assigned to a governmental unit for the purpose of collecting child support is a first support priority claim under Section 507(a)(1)(A).)

In re Edwards, 2010 WL 318304 (Bkrtcy.E.D.Va. 2010)("The issue, then, boils down to who has the burden of proof as to whether an assigned child support claim was or was not voluntarily assigned for collection? Since the general rule is that assigned claims have the lower priority, and since the exception for claims voluntarily assigned for collection is grammatically a proviso, the court is inclined to place the burden of proof on the objecting party, here the trustee. Since the arrearage claim quite clearly has been assigned, and since the trustee has produced no evidence that it was voluntarily assigned by the mother for the purpose of collection, the court concludes that the plan is not unconfirmable simply because it does not pay the support arrears in full").

11 U.S.C. Section 1328(a)(2) – Domestic Support vs. Property Settlement

> (a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—
>
> > (2) of the kind specified in section 507 (a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523 (a);

> 11 U.S.C. Section 507(a). A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –
>
> > (5) for a domestic support obligation; …
> > (15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit;

In re Pagels, 2011 WL 577337 (Bkrtcy.E.D.Va.)(In an adversay complaint to determine the dishargeability of a domestic-relations debt under Section 1328(a)(2), the plaintiff has the burden of proving that the debt falls under 11 U.S.C. Section 523(a)(5) (which is nondischargeable), rather than Section 523(a)(15)(which is dischargeable).)

In re McCollum, 415 B.R. 625 (Bankr. M.D.Ga. 2009)("A Chapter 13 debtor is entitled to a discharge of most debts after completion of all plan payments. 11 U.S.C. §

1328(a). Debts excepted from discharge include those "of the kind specified ... in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a) [.]" *Id.* § 1328(a)(2) (commonly referred to as the "superdischarge"). Thus, while a Chapter 13 debtor cannot discharge debts described in § 523(a)(5), nothing in the Chapter 13 discharge provision prevents him from discharging debts that fall within the scope of its companion provision, § 523(a)(15)." Factors relevant to determining whether divorce-based debt constituted nondischargeable support or dischargeable property division in Chapter 13 case include the following: (1) the language of the divorce agreement, (2) the relative financial positions of the parties at the time of the agreement, (3) the amount of property division, (4) whether the obligation terminates on the death or remarriage of the beneficiary, (5) the number and frequency of payments, (6) whether the agreement includes a waiver of support rights, (7) whether the obligation can be modified or enforced in state court, and (8) whether the obligation is treated as support for tax purposes.)

11 U.S.C. Section 362(b)(1) - Civil vs. Criminal Contempt

> 11 U.S.C. Section 362(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay -
>
> (1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

In re Bryner, 2009 WL 1872681 (Bkrtcy.D.Utah 2009)("The central issue before this Court is whether the Defendant's appearance at the September 25, 2007 contempt hearing, or her failure to affirmatively withdraw any request for fees made to the state court at the March 22, 2007 hearing, violated the automatic stay. Section 362(a)(1) operates as a stay of "the commencement or continuation ... of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title....' In resolving the issue, some courts focus upon the nature of the contempt proceeding by examining whether the contempt is civil or criminal. Those courts have found that criminal contempt proceedings are excepted from the automatic stay provisions of § 362(a)(1).Other courts have looked beyond the labels given to the contempt proceeding itself by focusing instead upon whether the proceedings are aimed at punishing the debtor for flouting prior court orders, or whether the contempt proceedings are veiled attempts to assist a creditor in collecting a debt or judgment If the proceeding is the former, courts often find that the contempt proceeding, if it is meant to uphold the dignity of the court, is not stayed."

In re Gresham, 2008 WL 3484318 (Bkrcty.N.D.Ga.)(Murphy, J)("The automatic stay of 11 U.S.C. § 362(a) does not operate to preclude incarceration pursuant to a state court order for criminal contempt. *In re Moloney,* 204 B.R. 671 (Bankr.E.D.N.Y.1996). The automatic stay *does* bar state court contempt proceedings, and incarceration thereunder that is intended to compel a debtor to pay a domestic support obligation or any other obligation arising from a divorce decree. *In re Moon,* 201 B.R. 79 (Bankr.S.D.N.Y.1996).")(

In re Caffey, 384 B.r. 297 (Bankr. S.D.Ala. 2008)(Ex-wife's and her attorney's pursuit of the debtor's incarceration via civil contempt in state court for non-payment of child support arrearage was willful violation of the automatic stay which was subject to sanctions.)

In re Repine, 536 F.3d 512 (C.a.5 (Tex.) 2008)(Where judgment creditor, an attorney who had represented Chapter 13 debtor's ex-wife in a child support enforcement action against him, willfully violated the automatic stay by continuing with her efforts to collect her fees postpetition, which had the effect of extending debtor's period of incarceration for civil contempt and preventing him from attending his father's funeral, "appropriate circumstances" existed for an award of punitive damages.)

In re Lincoln, 264 B.R. 370 (Bankr. E.D.Pa. 2001)(In deciding whether automatic stay applies to state court contempt proceeding, it may be appropriate for bankruptcy court to look beyond label applied to proceeding, as either a "civil" or "criminal" proceeding, and to analyze true nature of the contempt.)

In re Gruntz, 202 F. 3d 1074 (C.A. 9 (Cal.) 2000)(Automatic stay does not enjoin state criminal prosecutions, even if underlying purpose of the criminal proceedings is collection of a debt (past-due child support); overruling *Hucke v. Oregon*, 992 F.2d 950 (9th Cir.1993). Bankr.Code, 11 U.S.C.A. § 362(b)(1).)

Certification that All Domestic Support Obligations are Current

> 11 U.S.C. Section 1328 (a). Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, ….

In re Fort, 412 B.R. 840 (Bankr. W.D.Va. 2009)("Should the Debtors complete their payment obligations, they will be entitled to a discharge upon satisfying all other statutory requirements as provided in § 1328. One of those requirements is a certification that all domestic support obligations incurred up to the time of the certification have been paid, "including amounts due before the petition was filed, but only to the extent provided for by the plan[.]" 11 U.S.C. § 1328(a). Although a chapter 13 debtor is not required to certify payment of pre-petition domestic support obligations not provided for in the plan, any such amounts will be excepted from discharge by § 1328(a)(2).")

Chapter 13 Outline: Mortgages:

Plan Language, the Anti-modification Clause, and Espinosa

***United Student Aid Funds, Inc. v. Espinosa*, 130 S.Ct. 1367 (March 23, 2010)**

Issue: Whether the Bankruptcy Court's order confirming Espinosa's plan, which included discharge of a portion of his student loan debt, was "void" under Federal Rule of Civil Procedure 60(b)(4) because the Bankruptcy Court confirmed the plan without complying with § 523(a)(8) (requiring a finding of "undue hardship" in order for student loan debt to be discharged, and Federal Bankruptcy Rules that require the determination of "undue hardship" to be made in an adversary proceeding, *see* Fed. R. Bankr. P. 7001(6), that is initiated with a summons and complaint served on the adverse party). *See* Fed. R. Bankr. P. 7003, 7004, 7008.

A chapter 13 plan that proposes a discharge of student loan debt without the required determination of undue hardship violates §§ 1328(a)(2) and 523(a)(8) and this should prevent confirmation. However, the Court unanimously held that the Bankruptcy Court's confirmation order was not void under Rule 60(b)(4) because it did not violate creditor's due process rights.

The Court first found that creditor was not able to seek relief under Rule 60(b)(4) because the error alleged did not fall under the types allowed under this Rule. "Rule 60(b)(4) . . . authorizes the court to relieve a party from a final judgment if 'the judgment is void.'" *Id.* at 1376. A judgment is not void simply because it was erroneous, "[i]nstead, Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or opportunity to be heard." *Id.* at 1377. Creditor did not contend that this was a jurisdictional error, but rather that the Bankruptcy Court's decision is void because it violated creditor's due process rights by confirming the plan despite Espinosa's failure to serve the summons and complaint, as required by the Bankruptcy Rules. The Court found that, "Espinosa's failure to serve United [creditor] with a summons and complaint deprived United of a right granted by a procedural rule." *Id.* at 1378. However, creditor could have timely objected to this and appealed an adverse ruling on the objection. Creditor's due process rights were not violated because "[d]ue process requires notice 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* (citations omitted). Creditor received actual notice of the plan and its contents, which "more than satisfied United's due process rights," precluding United from relief under Rule 60(b)(4).

Creditor also argued that "the Bankruptcy Court's confirmation order is void because the court lacked statutory authority to confirm Espinosa's plan absent a finding of undue hardship." *Id.* Creditor claimed that the language of § 523(a)(8), stating that student loan debts are not dischargeable "*unless*" a court finds undue hardship, "imposes a 'self-executing' limitation on the effect of a discharge order that renders the order legally unenforceable, and thus void [under

Rule 60(b)(4)] if not satisfied." *Id.* However, the Court was "not persuaded that a failure to find undue hardship in accordance with § 523(a)98) is on par with the jurisdictional and notice failings that define void judgments that qualify for relief under Rule 60(b)(4)." *Id.* at 1379. Although the requirement under § 523(a)(8) is self-executing, that only means the courts " must make an undue hardship finding even if the creditor does not request one; it does not mean that a bankruptcy court's failure to make the finding renders its subsequent confirmation order void for purposes of Rule 60(b)(4)." *Id.* A failure to find undue hardship under § 523(a)(8) prior to confirmation does not deprive creditor of jurisdiction or due process, as required under Rule 60(b)(4); rather, it was a legal error and the bankruptcy court's order "remains enforceable and binding on United because United had notice of the error and failed to object or timely appeal." *Id.* at 1380. "Rule 60(b)(4) does not provide a license for litigants to sleep on their rights." *Id.* In the instant case, the Court concluded that"

> Where . . . a party is notified of a plan's contents and fails to object to confirmation of the plan before the time for appeal expires, that party has been afforded a full and fair opportunity to litigate, and the party's failure to avail itself of that opportunity will not justify Rule 60(b)(4) relief.

Id. Therefore, the Court held that the Bankruptcy Court's confirmation order was not void under Rule 60(b)(4).

The Court curtailed the Ninth Circuit's holding that "bankruptcy courts *must* confirm a plan proposing the discharge of a student loan debt without a determination of undue hardship in an adversary proceeding unless the creditor timely raises a specific objection." *Id.* The Court found this holding went too far because a chapter 13 plan proposing to discharge a student loan debt without a determination of undue hardship violates §§ 1328(a)(2) and 523(a)(8). Section § 1325(a) requires bankruptcy courts to only confirm plans that it finds comply with the applicable provisions of the Code. Therefore, "[f]ailure to comply with this self-executing requirement should prevent confirmation of the plan even if the creditor fails to object or appear in the proceeding at all." *Id.* at 1381. However, the Code and Rules do not prevent the debtor and creditor from stipulating to the underlying facts of undue hardship, or prevent the creditor from waiving service of summons and complaint. *Id.* In this event, however, in order to comply with § 523(a)(8), the "bankruptcy court must make an independent determination of undue hardship before a plan is confirmed, even if the creditor fails to object or appear in the adversary proceeding." *Id.*

Selected cases citing Espinosa

In re Martin, 444 B.R. 538 (Bankr. M.D.N.C. Jan. 26, 2011):

Mortgagee filed a proof of claim for the principal balance of the loan as well as pre-petition arrearage. *Id.* at 541. Chapter 13 debtors did not object to this claim and filed a plan that

modified the terms of the mortgage; however, mortgagee did not file an objection to the plan and did not appear at the confirmation hearing. *Id.* at 542. The primary issue before the court was:

> whether the Debtor's proposed plan complies with the requirements of § 1325 even though the plan proposes to modify the terms of the Debtors' mortgage by decreasing the principal of the original loan, instituting a fixed interest rate that is significantly lower that the *Till* interest rate in place of the original adjustable interest rate, and re-amortizing any existing arrearage claim over the life of the new modified loan.

Id.

When read together, § 1322(b)(2) and (5) "allow a debtor to bifurcate a 'secured creditor's claim into a secured and unsecured portions if the amount of the claim exceeds the value of the collateral securing the claim.'" *Id.* at 543 (quoting *In re Bradsher*, 427 B.R. 386, 388 (Bankr. M.D.N.C. 2010)). However, pursuant to § 1322(b)(2), the bifurcation is not allowed if the secured creditor's claim is secured only by real property that is the debtor's principal residence. *Id.* Relying on the *Bradsher* opinion, the court concluded that the anti-modification provisions of § 1322(b)(2) did not apply to the mortgagee's claim because it "is secured by a deed of trust on the real property and the Debtors' interest in an escrow account." *Id.* Therefore, the claim was not secured solely by real property that is the Debtors' primary residence.

Even though the restrictions of § 1322(b)(2) did not apply to the instant case, the court held that the Debtors were able to modify the mortgagee's claim within the constraints of § 1322(b)(5). Under § 1322(b)(5), "in order for a debtor to make payment on secured and unsecured claims after all scheduled Chapter 13 plan payments have been made, the plan must provide for the curing of any default within a reasonable time and [provide for the] maintenance of payments while the case is pending." *Id.* at 544 (quotation marks and citations omitted). This provision has been interpreted to mean that the Debtors may make payments on the secured portion of a bifurcated claim beyond the life of the plan only if they cure any pre-petition default during the life of the plan and continue to make payments at the rate indicated in the mortgage note. *Id.*

However, if the Debtors choose to modify the mortgage note's original terms, they must comply with § 1322(d), the "cram-down" provision. This requires the Debtors to pay the secured claim in full during the life of the plan while the secured creditor retains its lien. *Id.* Although § 1322(d) allows Debtors to modify the terms of the note, the modifications must still comply with the confirmation requirements of § 1325(a)(5)—that all partially secured claims must be paid in full during the life of the plan and debtors may not use § 506(a) with § 1322(b)(5) to reduce the secured claim and repay the claim over a period beyond the life of the plan. *Id.* at 545. The court found that in the instant case, "by proposing to dramatically decrease the principal and interest rate of the original mortgage, the Debtors propose a plan that clearly does not comply with provisions set forth in § 1322(b)(5)." *Id.* The Court also found that the

Debtors' plan did not comply with the "cram-down" provision because it did not provide mortgagee "with payments, over the life of the plan, that total the present value of [mortgagee]'s allowed secured claim." *Id.* Instead, Debtors' plan states that if the mortgagee objects to the payments extending beyond the life of the plan, the Debtors will distribute a new deed of trust which the court found to not be equivalent to periodic cash payments, thus, not complying with § 1325(a)(5)(B)(ii). *Id.* at 546.

The Debtors argued that the plan should be confirmed because mortgagee has not objected; therefore, the silence amounts to acceptance of the plan. *Id.* The Court, however, found that the amount stated in the creditors proof of claim is the amount to be repaid under the plan and under § 502(a), the burden lies on the Debtors to object to the claim. The Debtors failed to object to mortgagee's proof of claim and proposed a different treatment of the claim in the plan; however, that does not amount to an objection to the claim. *Id.* Therefore, mortgagee's failure to object to the confirmation of Debtors' plan did not constitute acceptance under § 1325(a)(5)(A). The Debtors, however, claimed that *Espinosa* "places the burden on creditors to object if treatment of their claims does not comply with the Code . . . [and] under *Espinosa*, bankruptcy courts are required to perceive a creditor's inaction as an implicit acceptance of the plan." *Id.* The court disagreed with the argument and found that its decision actually follows *Espinosa* because "the Supreme Court instruct[ed] bankruptcy courts that they have 'the authority' and 'the obligation' to instruct a debtor to conform his plan with the requirements of the Code even where the creditor fails to object." *Id.* at 547 (citing *Espinosa*, 130 S.Ct. at 1381). Therefore, by denying confirmation of the Debtors' proposed plan because it does not comply with § 1322(b)(5), the court undertook its role as gatekeeper, as instructed by the *Espinosa* Court. *Id.*

Colonial Mortg. & Loan Corp. v. Ellzey, No. 09-5447, 2011 WL 799750 (E.D. La. Feb. 28, 2011):

Chapter 13 Debtor's plan proposed to pay mortgagee the loan balance of $15,000. In response, the mortgagee did not object to the plan and filed a proof of claim for only $9,634.02. The plan was confirmed and after three years, the Debtor was discharged. The trustee's Final Report and Accounting indicated that the mortgagee's proof of claim for $9,634.02 was paid in full through the plan. *Id.* at *1. However, after the discharge, mortgagee re-instituted a foreclosure action alleging that it was still owed $4,659.41 in pre-petition defaults and that the proof of claim did not include these amounts, but only what was due at the petition date. *Id.*

Mortgagee argued that, under *Espinosa*, the amount stated in the chapter 13 plan should dictate what it is owed, not the proof of claim. *Id.* at *2. Debtor asserted that the amount proposed in the plan was an estimate and that because mortgagee did not amend its proof of claim, it cannot now argue that the trustee, Debtor, and court cannot rely on that proof of claim. *Id.*

Although the *Espinosa* Court held that a chapter 13 plan is considered "final," the court distinguished *Espinosa* from the instant case. In the case at bar, the mortgagee did not file a proof of claim that comported with the amount stated in the chapter 13 plan. *Id.* at *3. Although § 1327(a) states that chapter 13 plans on their face have a binding effect on all creditors, it is qualified by § 506(a) which "provides that the value of a claim must be determined in conjunction with any plan that would affect the creditor's interest." *Id.* A chapter 13 plan may not substitute an objection to a proof of claim. *Id.* "Therefore, the Proof of Claim provides prima facie evidence of the validity ant he amount of the claim." *Id.* (citing Fed. R. Bankr. P. 3001). This led the court to ultimately hold that "when a mortgage lender files a lesser amount than is included in the Chapter 13 plan the Trustee will adjust the amount to be paid to the creditor to match the Proof of Claim. *Id.*

Chapter 13 Outline: Generic Chapter 13 Issues

Extending the Stay

Relevant Code Section—§ 362:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

. . . .

(c) Except as provided in subsections (d), (e), (f), and (h) of this section—

. . . .

(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

. . . .

> **(4)(A)(i)** if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and
>
> **(ii)** on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;
>
> **(B)** if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;
>
> **(C)** a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and . . .

11 U.S.C. § 362.

***In re Jupiter*, 344 B.R. 754 (Bankr. D.S.C. 2006):**

Although the language of § 362(c)(3)(A) differs from that in § 362(a), which refers both to actions against a debtor and property of the estate, the Court declined to conclude that § 362(c)(3)(A) applied only to the debtor "because it believe[d] that the statutory scheme of § 362(c) is intended to and, in fact, terminates the automatic stay with respect to the Property [of the debtor's estate]." *Id.* at 759.

"In the Fourth Circuit, the plain meaning of an unambiguous statute governs, barring exceptional circumstances." *Id.* However, courts may look beyond the plain meaning if "application of a statute would produce a result demonstrably at odds with the intention of the drafters." *Id.* Looking to the plain meaning of § 362(c)(3)(A), the Court found that:

> the operative and controlling wording in § 362(c)(3)(A) is that the stay under subsection (A) "terminates." The Court construes the remaining language of "with respect to the debtor" to define which debtor is effected by this provision, with reference to § 362(c)(3). Thus, in a joint case, a "debtor" may not necessarily mean both debtors if one debtor did not have a case dismissed within the year prior to the current petition date.

Id. (citations omitted). Therefore, the Court held that under § 362(c)(3)(A), the automatic stay is lifted with respect to the debtor, as defined by § 362(c)(3), which includes the property of the debtor's estate. *Id.* at 760. The language of § 362(c)(3)(A) allows the automatic stay to continue for a joint debtor that is not effected by § 362(c)(3) or (c)(4) because he or she was not a debtor in the prior case(s). *Id.*

The Court also found that its interpretation of § 362(c)(3)(A) to be consistent with other provisions of § 362 added by BAPCPA. The Court reasoned that § 362(j), which allows parties in interest, without notice and hearing, to receive an order confirming that the automatic stay has

terminated under § 362(c), would be inconsistent with § 362(c)(3)(A) if it does terminate the stay as to the debtor and the estate. *Id.* The two provisions would not align "because § 362(j) does not carve out exceptions for property that remains protected by the stay but broadly and summarily allows parties to confirm that the stay has been terminated under § 362(c)." *Id.* Further, under § 362(c)(3)(B), any party in interest may move to extend the stay to all creditors if a hearing is held within thirty days of the petition date and the moving party demonstrates that the current case was filed in good faith. *Id.*

> It seems illogical that Congress would enact a provision which both requires moving parties to meet a high burden of proof and which requires the courts to hear these matters on an expedited basis, only to have both the process and the end result meaningless and of no utility if property of the estate remains protected by the automatic stay under § 362(c)(3)(A).

Id. (citations omitted). If § 362(c)(3)(A) was interpreted to only apply to the debtor and not the estate, "there would not appear to be a need to provide parties in interest with the right to move to extend the stay or a need to extend the stay as to all creditors." *Id.* The Court refused to find that Congress would enact this section, which requires an extraordinary amount of work on behalf of the moving party and the court, if no meaningful penalty results if the stay is not extended. *See id.* at 761. "Such an interpretation is not consistent with the intent of Congress nor the new statutory scheme set forth in § 362(c)(3)." *Id.*

The Court noted that while analyzing § 362(c)(3)(A), it is evident "that this new subsection is imperfectly drafted, may be subject to multiple interpretations, and therefore considered ambiguous, and, as discussed above, inconsistent with other provisions of § 362." *Id.* (citations omitted). Therefore, the Court looked to the legislative history of § 362(c)(3)(A) to determine if its interpretation "produces a result demonstrably at odds with the intention of the drafters." *Id.* (citations omitted). The Court found that "[t]he legislative history supports this Court's interpretation of § 362(c)(3)(A) because it is evident that the intent of the drafters was to terminate all protections of the automatic stay under this new subsection." *Id.* The legislative history does not distinguish between the language used in § 362(c)(3)(A) and that used in § 362(c)(4). Instead, it "appears to indicate that the entire automatic stay terminates under both of these new subsections of § 362 . . . It appears that Congress, in enacting bankruptcy reform, intended to close 'loopholes and incentives that allow—and sometimes—even encourage opportunistic personal filings and abuse.'" *Id.* (quoting H.R. Rep. No. 109-31(I), at 5 (2005), U.S. Code Cong. & Admin. News 2005, pp. 88, 92). The Court concluded that Congress clearly intended to make it more difficult for debtors with repeat filings or engage in bad faith to seek relief in and the protections of bankruptcy. *Id.* Therefore, by interpreting § 362(c)(3)(A) to only apply to the debtor and not property of the estate, "[a] creditor's threat to collect would be hollow . . . because § 1306 broadly incorporates nearly all of a debtor's valuable pre- and post-petition property." *Id.* at 762 (footnote omitted). If the Court to held otherwise in its interpretation of § 362(c)(3)(A) it "would be contrary to the clear legislative history, do little to

discourage bad faith, successive filings, and would create, rather than close, a loophole in the bankruptcy system by allowing these debtors to receive the principal benefit of the automatic stay—protection of property of the estate." *Id.* (citations omitted). Therefore, the Court held that § 362(c)(3)(A) terminates the automatic stay as to the debtor, the debtor's property, and property of the estate.

Cases Agreeing with *Jupiter*:

In re Reswick, No. 09-32489, 2011 WL 612728 (B.A.P. 9th Cir. Feb. 4, 2011)

Debtor appealed the bankruptcy court's decision denying him damages for a violation of the stay, requested pursuant to § 362(k)(1). Debtor asserted that his ex-wife's post-petition wage garnishments violated the stay; however, the ex-wife argued that because it was Debtor's second case within a year, the stay expired after 30 days, therefore the stay was not violated. *Id.* at *1. The Bankruptcy Appellate Panel affirmed the bankruptcy court's order denying Debtor's motion for damages because § 362(c)(3)(A) applies to the debtor and the debtor's estate; therefore, no stay was in place over the wages that were garnished by the ex-wife. *Id.*

The panel noted that "[t]he majority interpretation finds the phrase 'with respect to the debtor' to be both critical and unambiguous, and concludes that on the 30th day after the petition date, the automatic stay terminates only with respect to the debtor and the debtor's property, but not as to property of the estate." *Id.* at *3 (citations omitted). However, the panel adopted the minority interpretation because it concluded that interpretation to be better-reasoned, comport with principles of statutory construction, and supported by legislative history.

The panel found the minority interpretation to better comport with principles of statutory construction because "'[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.'" *Id.* at *4 (quoting *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486, 126 S.Ct. 1252, 163 L.Ed.2d 1079 (2006)). The court found that, when read within the context of § 362(c)(3), interpreting the phrase "with respect to the debtor" as a distinction regarding property renders § 362(c)(3)(A) internally inconsistent because the opening clause of § 362(c)(3)(A) would be surplusage as there would be no reason for it to reference actions "with respect to a debtor or property securing a debt or with respect to any lease." *Id.* at *5. In addition, "the majority interpretation, would also render section 362(c)(3)(A) devoid of any practical effect. Very few creditors would seek to pursue only the debtor personally, or only property of the debtor." *Id.* Furthermore, "[p]roperty of the estate would have to be subject to the stay termination for any party other than the debtor to have sufficient reason to file the motion [under § 362(c)(3)(B)]." *Id.* Lastly, the panel found that decisions adopting the majority interpretation:

> state that the court need not read beyond the phrase "with respect to the debtor" to discern its meaning, . . . [but] these decisions arguably do read beyond the phrase

> because they find that the stay terminates with respect to the debtor *and* to any property of the debtor that is not property of the estate.

Id. at *3 (citations omitted).

The panel found the minority interpretation to be a better reading of § 362(c)(3)(A). The court found that "with respect to the debtor" is intended to distinguish between a debtor and his or her spouse and this interpretation "is consistent with the distinction made at the beginning of § 362(c)(3)," providing for a "single or joint case filed by or against debtor." *Id.* at *6 (quoting 11 U.S.C. § 362(c)(3)).

> Because section 362(c)(3)'s opening phrase recognizes that some repeat filing cases are filed by single debtors while others are field by joint debtors, the phrase "with respect to the debtor" logically refers to *whom* (i.e. the serial filing spouse) termination of the automatic stay applies under section 362(c)(3)(A) , not *to which property* the termination applies—particularly given that section 362(c)(3)(A) specifically references "the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease.

Id. (emphasis in original). Furthermore, the legislative history supports an interpretation of § 362(c)(3)(A) to include property of the debtor's estate because it was enacted to "deter successive bankruptcy filings by imposing stricter limitations on the power of the automatic stay as subsequent bankruptcy cases are filed." *Id.* at *8. In order for § 362(c)(3)(A) to have this "intended effect, it must be interpreted as terminating the automatic stay in its entirety." *Id.* The majority's approach "would leave no meaningful consequence of a debtor filing a second case within a year and would not advance the goal of deterring a debtor's second filing, because there are very few practical situations in which a creditor would take action against a debtor or non-estate property." *Id.* at *9. Therefore, the court adopted the minority approach and held that "with respect to debtor" applies to the debtor as well as the estate.

***In re Daniel*, 404 B.R. 318 (Bankr. N.D. Ill. 2009)**

Debtor filed motion to extend stay but it was denied for failure to give proper notice. Thirty days after Debtor's subsequent filing, Bank filed a motion under § 362(j) asking the court to confirm termination of the automatic stay in order to continue its foreclosure action. *Id.* at 320. The court analyzed each of the possible interpretations of § 362(c)(3)(A) and ruled out all but the minority approach, which is that "with respect to the debtor" refers to the subsequent filing debtor and not the first-time filing spouse. *Id.* at 362-27.

The least plausible interpretation of § 362(c)(3)(A) is that "with respect to the debtor" applies only to the debtor personally, excluding any *in rem* collection from the termination of the stay. *Id.* at 321-22. However, the court found that this interpretation makes § 362(c)(3)(A) self-contradictory. In order for the language of § 362(c)(3)(A) "with respect to any action taken with

respect to a debtor or property securing such debt," "to be meaningful, termination of the stay must allow at least come collection actions to proceed against property." *Id.* at 322. However, interpreting § 362(c)(3)(A) to only apply to the debtor personally would render § 362(c)(3)(A) oxymoronic. Therefore, the court found that this is not the correct interpretation of § 362(c)(3)(A).

The majority interpretation of § 362(c)(3)(A) is that "with respect to the debtor" applies to the debtor personally and to the debtor's non-estate property. Therefore, the stay remains in effect only over the property of the debtor's estate. *Id.* at 322-23. The court found this interpretation to have little practical effect.

> Because all property that the debtor owned before filing bankruptcy is either part of the estate or exempt, the estate-property exclusion would only allow a judgment to be enforced against a Chapter 7 debtor's post-bankruptcy earnings and acquisitions, and only until the debtor received a discharge, which usually happens within 80 to 100 days after the bankruptcy filing. In Chapter 13, the expansion would have no effect whatever, because any property the debtor acquired after the filing of the case would be estate property under § 1306(b).

Id. at 323 (footnotes omitted). The court also found this interpretation to raise contextual problems because it would render meaningless the provision of § 362(c)(3)(B) that allows parties in interest to seek an order extending the stay. *Id.* "They would have no reason to seek an extension of the stay simply to prevent assessments of personal liability against the debtor or collection actions against non-estate property that could not benefit them in any event." *Id.* (citations omitted). Furthermore, the court found it difficult to read "with respect to the debtor" to apply to actions both against the debtor and against the debtor's non-estate property and discounted an explanation for the distinction under § 102(2). *Id.* at 323-24. The court reasoned that "[e]ven if § 102(2) did treat claims against the debtor and the debtor's property together, distinguishing them from claims against estate property, § 362(a) does not [because] [t]he automatic stay separately treats actions against the debtor, the debtor's estate property and the debtor's non-estate property." *Id.* at 324. Therefore, the court was not convinced that the majority approach to § 362(c)(3)(A) was the correct interpretation of the statute.

The court also discounted the interpretation that "with respect to the debtor" imposes no limitation, but merely emphasizes the termination of the automatic stay in "the debtor's case" because it makes the language "with respect to the debtor" surplusage. *Id.* at 324-25. "There is no need to emphasize that termination of the stay under § 362(c)(3)(A) applies in the debtor's case since, after all, that is the only case to which it could apply." *Id.* at 325.

The court adopted the minority approach that "with respect to the debtor" applies in the context of joint cases filed by married couples to refer to the repeat-filing spouse, "making that debtor subject to collection actions, both *in personam* and *in rem* (against estate and non-estate property) while leaving the stay completely in effect as to the newly-filing spouse's person and

property." *Id.* at 326. The court found that this interpretation avoids surplusage and gives meaning to the language "with respect to the debtor." "Moreover, a distinction between jointly-filing spouses is common in the Bankruptcy Code." *Id.* Furthermore, there are no contextual problems with this interpretation, rendering it the most plausible interpretation of § 362(c)(3)(A). *Id.*

Even though the court found the statutory language in itself to be sufficient to adopt this interpretation, the court looked to the legislative history of § 362(c)(3) to further support its finding. From the history, the court found that § 362(c)(3)(A) was intended to stop the bad faith successive bankruptcy filings from interfering with real estate foreclosures. *Id.* at 329. "This purpose would not be advanced by a provision that left the stay in effect as to the debtor's pre-bankruptcy real estate." *Id.* In addition, during the time this provision was pending in Congress, "with respect to the debtor" was never suggested to draw "a distinction between actions against the debtor personally, actions against the debtor's estate property, and actions against the debtor's non-estate property." *Id.* "This history, then, is completely at odds with the estate-property exclusion that the majority of published opinions have adopted." *Id.* Therefore, the court adopted the minority approach and held that the spousal-exclusion approach is the correct interpretation of § 362(c)(3)(A).

In re Curry, 362 B.R. 394 (Bankr. N.D. Ill. 2007)

Bankruptcy court adopted the minority approach upon the motion of creditor under § 362(j) to confirm termination of the stay. The court first found that the statute is not plain an unambiguous because "[g]iven the view of most bankruptcy judges that he statute is ambiguous and garbled, it is difficult to see how recognition that it 'is susceptible to conflicting interpretations' can nonetheless lead to a conclusion that any ultimate interpretation is 'supported by the plain meaning of § 362(c)(3)(A), § 101(12) and § 102(2) . . .'" *Id.* at 397 (citations omitted). Therefore, the language must be interpreted with reference to the statutory language and the broader context of BAPCPA changes. *Id.* at 398.

Like *Jupiter*, the court found that "[b]ased on the inclusiveness of §§ 541 and 1306 . . ." the only property that would not be property of the estate and subject to the majority's approach "is that property which has been abandoned or which is exempt or which is otherwise excluded from the definition of 'property of the estate'" *Id.* at 399 (quoting *Jupiter*, 344 B.R. at 757). The court also found the "with respect to the debtor" language to define the debtor affected by § 362(c)(3)(A). Therefore, in a joint case, "the automatic stay would continue with respect to a joint debtor who is not affected by § 362(c)(3) or (c)(4). Using that interpretation, all the statutory language is seen to have meaning." *Id.* at 401.

Furthermore, the court found that the minority's approach is consistent with other provisions added by the BAPCPA. "If § 362(c)(3)(A) did not terminate the automatic stay in its entirety, § 362(j) would be rendered inconsistent 'because § 362(j) does not carve out exceptions

for property that remains protected by the stay bur broadly and summarily allows parties to confirm that the stay has been terminated under § 362(c).'" *Id.* (quoting *Jupiter*, 344 B.R. at 760). In addition, § 362(c)(3)(B) employs a high burden of proof and participation of the court on an expedited basis. It would be absurd to reason that Congress would require such high demands for property that is not property of the estate, which is the property in which secured creditors have the strongest interest. *See id.*

Lastly, the legislative history of the BAPCPA evidences the drafters' intent to terminate the automatic stay in its entirety. "The legislative history provides, 'Discouraging Bad Faith Repeat Filings. Section 302 of the Act amends section 362(c) of the Bankruptcy Code to **terminate the automatic stay**.'" *Id.* (emphasis in original) (quoting H.R. Rep. No. 109-31(I), at 69-70 (2005), U.S. Code Cong. & Admin. News 2005, pp. 88, 138). "Moreover, there is no indication that the legislative history that §§ 362(c)(3) only partially terminates the automatic stay while § 362(c)(4) terminates the automatic stay in its entirety." *Id.* at 402.

Cases Disagreeing

***In re Jumpp*, 356 B.R. 789 (B.A.P. 1st Cir. 2006)**

The Bankruptcy Appellate Panel vacated the bankruptcy court's decision to hold that § 362(c)(3)(A) only applies to the debtor and the debtor's property. In the instant case, Debtor's Motion to Extend the Automatic stay was denied because, pursuant to § 362(c)(3)(B), the hearing on the motion was not held within 30 days of filing the petition. *Id.* at 790. However, Debtor then filed a Motion for Determination where she argued that, under § 362(c)(3)(A), the stay did not terminate with regard to property of the estate. *Id.* at 791. The bankruptcy court denied the Debtor's Motion, holding that § 362(c)(3)(A) terminates the stay in its entirety, including the property of the estate. *Id.*

The BAP noted that "[t]he majority of courts that have considered the issue have concluded that the automatic stay does not terminate with respect to property of the estate." *Id.* (footnote and citations omitted). The court first addressed whether § 362(c)(3)(A) is ambiguous because if the "provision is unambiguous, the plain language controls, so long as a literal application of the provision does not produce an absurd result or one that is demonstrably at odds with the intentions of its drafters." *Id.* at 793 (quotation marks and citations omitted). The court "disagree[d] with *Jupiter* that the phrase 'with respect to the debtor' is any less operative or controlling that the word 'terminates.' Viewed in isolation, the language itself is unambiguous." *Id.*

The court also found that terminating the stay only "with respect to the debtor" comported with other provisions of § 362. "Section 362(a) enumerates which acts and actions are stayed, *differentiating between the debtor, property of the debtor, and property of the estate* . . . ." *Id.* at 794 (emphasis added). The court also found support for in § 521(a)(6), which was also added by BAPCPA and distinguishes between types of the stay. *Id.*

The court recognized the implications addressed in *Jupiter* for terminating the stay only to the debtor. However, the court went on to agree with the approach taken by *In re Jones*, 339 B.R. 360 (Bankr. E.D.N.C. 2006), which found that "[i]t is true that if § 362(c)(3)(A) only applies with respect to the debtor, it is unlikely that anyone other than the debtor would seek an extension, but the fact that it is unlikely does not make § 362(c)(3)(A) inconsistent with § 362(c)(3)(B)." *Id.* at 364.

The court also found that the distinctions between § 362(c)(3)(A) and (4)(A) further support a finding that the stay only terminates as to the debtor. The language of § 362(c)(3)(A) clearly provides that the stay under § 362(a) will not go into effect upon the filing of the later case. *Jumpp*, 356 B.R. at 795. "Where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id.* (quoting *Keene Corp. v. United States*, 508 U.S. 200, 208, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993)). Further, because both § 362(c)(3)(A) and (c)(4) were added by BAPCPA, the court was "unconvinced that the significant difference in language between the two sections reveals a Congressional intent to say the very same thing. Rather, the language indicates an intent to differentially penalize previous filers based on the number of previous cases." *Id.* at 796 (citations omitted). Therefore, the court found that the term "with respect to the debtor" to be unambiguous.

Having found the plain language of § 362(c)(3)(A) to be unambiguous, the court determined whether a literal application of § 362(c)(3)(A) "would produce an absurd result or one that is demonstrably at odds with the intentions of its drafters." *Id.* (quotation marks and citations omitted). The court disagreed with *Jupiter*'s contention that a partial termination of the stay would fail to discourage abusive filings. *Id.* The court went on to list various ways lifting the stay only with respect to the debtor and the debtor's property penalizes the debtor and provides potential options to creditors. *Id.* (stating that it will allow suits against the debtor to commence, judgments may be enforced against the debtor, collection of actions may proceed against the debtor, liens against the debtor's property may be created and perfected, and a landlord can bring an eviction action against a debtor). "A partial termination also protects creditors by protecting estate property." *Id.* (citations omitted).

Although a complete termination of the stay under § 362(c)(3)(A) would make sense, it is not what the statute provides. *Id.* at 797. "Section 362(c)(3)(A) provides for a partial termination of the stay, which, although a lesser penalty than complete termination, nonetheless discourages abusive filings and, therefore, is a result that is neither absurd nor demonstrably at odds with the intention of drafters." *Id.* Therefore, the court vacated the bankruptcy court's decision in holding that § 362(c)(3)(A) only terminates the stay as to the debtor and the debtor's property and not to the property of the estate.

***In re Holcomb*, 380 B.R. 813 (B.A.P. 10th Cir. 2008)**

***In re Taylor*, No. 07-31055-KRH, 2007 WL 1234932 (Bankr. E.D. Va. April 26, 2007)**

***In re Tubman*, 364 B.R. 574 (Bankr. D. Md. 2007)**

***In re Brandon*, 349 B.R. 130 (Bankr. M.D.N.C. 2006)**

BUSINESS EXPENSES – ABOVE OR BELOW THE LINE?

Allow the Expense Above the Line -

"[T]he Judicial Conference of the United States approved and published, effective Jan. 1, 2008, amended Official Forms 22A, 22B, and 22C to provide that current monthly income should include only net business expense amounts. *See* Lines 4 and 5 on Official Form 22A and Lines 3 and 4 on Office Form 22C. This decision was made to be consistent with the usage in the *Internal Revenue Manual* and the American Community Survey of the Census Bureau. The Census Bureau's median-income figures are based on net business and rental income." Mark A Redmiles and Saleela Khanum Salahuddin, *The Net Effect*, 27-OCT Am. Bankr. Inst. J. 16 (2008).

"Section 5.15.1.11(C) of the Internal Revenue Code states for a self-employed individual, net income is 'the amount the taxpayer earned after paying ordinary and necessary business expenses.' In addition, because of the nature of tax law, a tax regulator will think of business income as an amount net of expenses. The courts are trying to apply deduction rules for business expenses from a regulatory regime that considers these expenses as an inherent part of the calculation of income." Robert M. Lawless, *A Few Recent Developments in the Bankruptcies of Small Businesses and Their Owners,* 29 No. 1 Bankruptcy Law Letter 1 (January, 2009). .

In re Geiger, 2010 WL 2756760 (Bkrtcy.N.D.Ohio)(debtor who owns Subchapter S corporation can subtract the business expenses from its gross receipts to determine debtor's flow-through income)

In re Leach, 2009 WL 1010552 (Bkrtcy.D.Mont.)(debtors who were not in the business of selling cars could deduct their cost basis from the sales proceeds of their personal vehicles when calculaiting CMI)

Don't Allow the Expense Above the Line -

In re Compann, 2010 WL 4008311 (Bkrtcy.N.D.Ga.)("Other courts faced with this same question have characterized the analysis as, '*The Bankruptcy Code v. The Official Bankruptcy Forms.' In re Arnold,* 376 B.R. 652, 653 (Bankr.M.D.Tenn.2007). In this case, Trustee's objection is sustained 'because as we all know, the Bankruptcy Code always wins,' no matter how poorly drafted.")

In re Bembenek, 2008 WL 2704289 (Bkrtcy.E.D.Wis.)(The plain language of the Code prohibits taking the deduction above the line. Further, allowing the expense deduction leads to double-dipping.)

In re Wiegand, 386 B.R. 238 (B.A.P. 9th Cir. 2008)(The plain language of the Code disallows the deduction above the line.)

UNEMPLOYMENT AND CMI

Unemployment is Not Included in CMI -

In re Sorrell, 359 B.R. 167 (Bankr. S.D.Ohio 2007)(The court applied a "Plain Meaning" analysis to find that unemployment compensation is a benefit under the Social Security Act and therefore should not be included as income for purposes of determining Current Monthly Income.)

In re Munger, 370 B.R. 21 (Bankr. D.Mass 2007)(Since the Unemployment Trust Fund is distributed to the states by the federal government, and since the Supremacy Clause governs the states' unemployment laws, unemployment compensation payments are benefits under the Social Security Act.)

Unemployment is Included in CMI -

In re Baden, 396 B.R. 617 (M.D.Pa 2008)(The court adopted the Internal Revenue Service's definition of "taxable income," which includes unemployment compensation, as its definition of "income from all sources" for purposes of the Bankruptcy Code's Means Test. And since unemployment compensation was included in the pre-BAPCPA definition of disposable income, excluding it from Current Monthly Income would violate the "general rule of statutory construction that deviations from established applications of judicial interpretation should be done with specificity.")

In re Kucharz, 418 B.R. 635 (Bankr. C.D.Ill 2009) (Unemployment compensation is not a benefit under the Social Security Act, but instead arises under state law. Since unemployment compensation is a temporary, partial substitute for lost wages, including it in a debtor's Current Monthly Income is consistent with the Means Test's policy and purpose. Finally, BAPCPA is a remedial statute and exceptions to remedial legislation should be construed narrowly.)

In re Winkles, 2010 WL 2680895 (Bkrtcy.S.D.Ill.)(Unemployment benefits are not benefits received under the Social Security Act – they are paid under state programs. Unemployment compensation is not the type of income that Congress was trying to protect.)

In re Rose, 2010 WL 2600591 (Bkrtcy.N.D.Ga.)(Sound arguments can be made for either side, but people do not generally think of unemployment benefits as being part of Social Security.)

Other Thoughts:

The definition of Current Monthly Income in Section 101(10A) makes a distinction between *benefits received* and *payments to.* Consequently, "benefit" must mean something different than "payment."

Section 2003(a) of the American Recovery and Reinvestment Act of 2009 amended Section 903 of the Social Security Act to provide for a pro rata payment of $7,000,000,000 in federal funds to eligible states for payment of unemployment benefits and expenses (i.e. the payments were not made out of state funds)

Would courts that require unemployment payments to be included as CMI, require the same for benefits paid by Medicare (which also was established under the Social Security Act but administered by the states)?

NON-FILING SPOUSE'S INCOME

Joint Tax Refunds – Whose Refund Is It?

Community Property States –

In re Martin, 2009 WL 1911760 (Bkrtcy.N.D.Tex.)(The non-debtor spouse's post-confirmation tax refund may be considered property of the estate if the debtor has a community property interest in the spouse's share of the tax refund and possesses the requisite control required by statute)(citing *Ragan v. C.I.R. (In re Ragan),* 135 F.3d 329 (C.A.5 1998))

In re Ragan, 135 F. 3d 329 (C.A.5 1998)(Personal earnings are under the sole management and control of the spouse who earned them. A tax refund generated from excess withholding of those earnings is under the sole management and control of the spouse that generated them. "[T]o the extent that the income is attributable to one spouse's sole management community property, the refund from the excess tax on that income is the sole management community property of that spouse.")

Tenancy by the Entireties –

In re Kant, 2006 WL 4919043, 5 (Bkrtcy. M.D.Fla.)("[I]t appears that the spouses do not have a unity of interest in the tax refund. The spouses' tax return for the year in question shows that the Debtor was the only spouse with income and withholdings for the year, and that a portion of the refund is attributable to the overpayment of the withholdings. Accordingly, the portion of the tax refund that is attributable to the overpayment of withholdings from the husband's income is attributable to the husband, the Debtor in this case, so the refund is not exempt as being owned by the Debtor and his wife as tenants by the entireties.")

The Presumption of Equal Ownership -

In re Smith, 2011 WL 345865 (Bkrtcy.S.D.Ind.)(The court "adopted the presumption that spouses have equal ownership in a tax refund which may be rebutted only by evidence of a domestic relations court order or an enforceable, written, pre-petition contract between the spouses' designating alternative ownership of the refund.")

In re Glenn, 430 B.R. 56 (Bankr. N.D.N.Y. 2010)(Absent very unusual circumstances, ownership of joint tax refunds should be allocated 50/50 between the spouses)(joint chapter 7 case where wife earned 91% of the household income)

In re Spina, 416 B.R. 92 (Bankr. E.D.N.Y. 2009)(Follows the presumption that any joint tax refund belongs to the spouses equally)

Apportion by % of Payments and Liability (The Hypothetical MFS) –

In re Palmer, 2011 WL 890690 (Bkrtcy.D.Mont.)(Adopts hypothetical "married fling separately" approach)

In re Evans, -- B.R. --, 2010 WL 6612501 (Bkrtcy.N.D.Ga.)((Drake, J)(Adopts *Crowson* and applies a three-step process based upon the spouses filing "married filing separately" returns.)

In re Crowson, 431 B.R. 484 (10th Cir. B.A.P. 2010)(Looks to IRS formula, treats credits as payments, and bases ownership on blend of payments and liabilities)

Apportion by the Amount of the Respective Withholdings –

In re Lyall, 191 B.R. 78 (Bankr. E.D.Va. 1996)(The most equitable and efficient method of dividing couple's joint tax refund between husband and wife is to allocate the percentage of refund to each, in accordance with percentage each spouse contributed to couple's total withholdings.)

In re Levine, 50 B.R. 587 (Bankr. S.D.Fla. 1985)("In Florida, where a debtor and his non-debtor spouse are entitled to a tax refund as a result of a joint return filed pre-petition, the trustee is presumed to be entitled to an amount "reflecting a direct ratio to the monies withheld from the debtor's and the non-debtor spouse's respective paychecks.")

Apportion by the Amount of the Respective Income Earned –

In re Baker, 82 B.R. 461 (Bankr. S.D.Ohio 1987)(Congress did not alter the rights of parties in property by providing for the filing of a joint return. Those rights are determined only under the applicable state law. Under Ohio law, wife did not have exemptable interest in that portion of tax refund arising from overwithholding of husband's earnings, even though parties had filed joint return, and husband was thereby able to obtain larger refund.)

Can a Plan Provision Affect Non-Fling Spouse's Refund?

In re Malewicz, 2010 WL 4613119 (Bkrtcy.E.D.N.Y.)(Wife-debtor's confirmed plan provision providing that the debtor would remit all tax refunds to the chapter 13 trustee did not apply to the non-filing spouse's share of the joint tax refund)

In re Rice, 442 B.R. 140 (Bankr. M.D.Fla. 2010)((1) Debtors who had filed joint income tax returns with their non-debtor, income-earning spouses did not have interest in entirety of any refunds associated with those returns; (2) Only debtors' interests in tax refunds associated with joint income tax returns that they had filed with their non-debtor, income earning spouses were included in "property of the estate"; and (3) Chapter 13

plan confirmation order requiring chapter 13 debtors to commit all tax refunds received to their respective plans was not binding on non-debtor spouses.)

The Marital Adjustment

In re Grubbs, 2007 WL 4418146 (Bkrtcy.E.D.Va.)([I]n a single case, a debtor's spouse's income shall be included in the debtor's current monthly income to the extent that it is paid 'on a regular basis for the household expenses of the debtor or the debtor's dependents.' ")

In re Borders, 2008 WL 1925190 (Bkrtcy.S.D.Ala.)("In drafting the statute, Congress was surely aware that '[t]he additional income of a spouse is completely irrelevant if that spouse's income is not available to cover household expenses.' This is the case where only one spouse files for bankruptcy. To conclude otherwise would mean that a married debtor who files individually would be worse off than one who files jointly because the debtor would appear from his or her B22C to have money to pay into a plan that he or she really does not have because it belongs to a nonfiling spouse.")

In re Green, 2008 WL 7880899 (Bkrtcy.N.D.Ga.)("Under section 101(10A), current monthly income includes the income of a spouse only if the spouse is also a debtor in the same (joint) case. This case is not a joint case. Therefore, a non-debtor's spouse has no 'current monthly income' … the Trustee's construction of the statute would reflect the intent of Congress to require a married debtor to make plan payments for 5 years, even at the risk of divorce and with no financial support provided by the spouse, merely because the sum of gross incomes exceeds the applicable median.")

In re Trimarchi, 421 B.R. 914 (Bankr. E.D.Ill. 2010)(Debtor could not take both the marital adjustment for husband's mortgage payment and then also take the standard housing expense deduction – no double dipping)

In re Vollen, 426 B.R. 359 (Bankr. D.Kansas 2010)(Mortgage payments that debtor's non-filing spouse regularly made from his separate income on residential property which, while legally titled only in name of non-filing spouse, was acquired by debtor and spouse during their marriage and provided home for debtor and her dependent daughter when daughter was not in college had to be included in debtor's "current monthly income" (CMI), and could not be backed out; debtor could not back out payments that non-filing spouse regularly made from his separate income for college expenses of, and motor vehicle driven by, dependent daughter of debtor and spouse; but amounts withheld by taxing authorities from paychecks of non-filing spouse, as well as amounts that were deducted as contributions to spouse's personal retirement plan or in repayment of loan from plan, were not regularly devoted to household expenses and did not have to be included in calculating debtor's "current monthly income")

In re Duran, 2010 WL 3947318 (Bkrtcy.S.D.Cal.)(An adult daughter who resided in debtor's home is not to be treated the same as a non-filing spouse for purposes of the

means test. The debtor is not required to list all of the daughter's gross income and then take a "marital adjustment" for her separate expenses – the debtor is only required to list the amount that the daughter regularly contributes to the household expenses of the debtor and the debtor's dependents.")

In re Rable, 445 B.R. 826 (Bankr. N.D.Ohil 2011)(A debtor may be entitled to a downward "marital adjustments" for expenditures by non-debtor spouse that were purely personal, but not for the spouse's mortgage payments on the house where the debtor also resided.)

MORTGAGE REMEDIES OUTSIDE OF BANKRUPTCY

Real Estate Settlement Procedures Act (RESPA) -

12 U.S.C. 2605(e) – Qualified Written Request

A Qualified Written Request must be in writing and provide enough information to ascertain the name and ac count number of Borrower and a statement underlying the borrower's belief that the accounting is wrong or other information sufficient to inform the lender the information being sought

In re Conley, 404 B.R. 157 (E.D.Mich. 2009)(Chapter 13 debtorss are not precluded by Bankruptcy Code or Rules from sending out QWR's pursuant to RESPA.)

Lender may designate a particular address for QWR's to be sent

In re Holland, 2008 WL 4809493 (Bkrtcy.D.Mass.)(" Issues abound concerning whether § 2605(e) authorizes servicers' counsel to receive QWRs where, as here, the servicer did not establish a specific address to receive qualified written requests under 24 C.F.R. § 3500.21(e)(1) and where the servicer did not specifically authorize its counsel to receive QWRs. These issues multiply and mutate in the context of a bankruptcy proceeding where, as here, counsel to the servicer requested that all notices and pleadings be sent to it and filed pleadings related to the subject matter discussed in the QWR.")

Lender must acknowledge receipt of the QWR within 20 days.

Within 60 days, Lender must investigate, correct the error (if appropriate) and report back to Borrower

Failure to comply:

Actual damages (including emotional distress) for each violation

Additional damages up to $1,000– if show pattern or course of conduct in not complying

For borrowers who are individuals – can get costs and attorneys fees.

In re Salvadore, 2011 WL 1833188 (Bkrtcy.M.D.Ga.)(Smith, J)("Further, on the issue of actual damages, section 2605(f)(1)(A) allows an individual to recover "any actual damages to the borrower *as a result of the failure* " to respond to a qualified written request. (emphasis supplied) …Debtors have the burden of proving that these damages were proximately caused by Wells Fargo's failure to respond to a valid qualified written request (QWR).")

In re Jacques, 406 B.R. 63 (Bankr. E.D.N.Y. 2009)(Discussion of (a) the Bankruptcy Code's preemption of RESPA and FDCPA in providing the remedy for a wrongful proof of claim; and, (b)discussion of the debtor's burden of proof in establishing actual pecuniary damages that arose from the creditor's beach of a statutory duty.)

Course of conduct or pattern – most courts will require a systemic policy rather than one or 2 instances of noncompliance. See, for example, *In re Maxwell*, 281 B.R. 101 (Bankr. D.Mass. 2002)(Although the servicer twice failed to respond to the debtor's QWR, the two violations, without more, did not rise to the level of a "pattern or practice" of RESPA violations.)

12 U.S.C. 2609 – Annual Escrow Reports

The Lender on a *federally related mortgage* must provide an annual accounting of the borrower's escrow (if there is an escrow – the existence of an escrow has been hotly litigated). This section, however, does not give rise to a private cause of action – it is enforceable by the Secretary of HUD. However, some courts find that a pattern of noncompliance with this requirement may be considered a waiver of the right to collect escrow shortages and fees.

Lenders argue that mortgages are exempt from this requirement when the property is 3 months delinquent, it is in foreclosure or a bankruptcy has been filed. Most courts, however, say that that *annual accounting* is excused, but not the requirement to provide the notice of escrow shortages on an annual basis. See, for example, *In re Johnson,* 384 B.R. 763 (Bankr. E.D.Mich. 2009)

Fair Debt Collection Practices Act (FDCPA) -

Pullen v. Harris, 10-82188, Ad.P. 10-6355 (Bankr. N.D.Ga. 2011)(Murphy, J)(The court analyzed the definition of "debt collector" under the FDCPA in finding that an attorney who sent out foreclosure notices was liable as a debt collector under the act.)

Morris v. EquiFirst Corp., 2010 WL 890877 (M.D.Tenn. 2010)(Chapter 13 debtor's allegations failed to plead a claim under the FDCPA against an original mortgagee and the first purchaser of the mortgage, because they did not qualify as debt collectors. The original mortgagee sold the mortgage to a purchasing company, which again sold the mortgage to another company. The debtor never alleged that the original mortgagee or the first purchaser of the mortgage attempted to collect on a debt.)

In re Johnson, 2009 WL 559950 (E.D.Tenn.2009)(A servicer normally is not subject to the FDCPA under the definition of "debt collector" unless it took the assignment of the loan after it was in default.)

Truth In Lending Act (TILA) -

15 U.S.C. Sections 1601-1666

In re Ragan, 439 B.R. 522 (Bankr. D.Kan. 2010)(Under the Truth in Lending Act (TILA), an assignee of a consumers' home mortgage loan was not liable for a statutory penalty or award of attorneys fees for failure to grant rescission in response to consumers' notice of rescission. Although TILA provides for the recovery of statutory damages and fees from a creditor who fails to comply with the enumerated TILA provisions, including its rescission provisions in question, the assignee was not such a "creditor." The violation which was the basis for rescission was not apparent on the face of the loan documents, therefore, the assignee was protected by the statutory assignee defense, and there was no alternative statutory basis to award fees. Truth in Lending Act, §§ 125, 131(a, b).)

In re Grinkele, 2009 WL 2588746, FN6 (S.D.Fla.)("The statutory periods are as follows: TILA provides Plaintiffs one year from the "transaction," typically the execution of the document in question, to sue for damages; TILA also provides three years from the date of the "transaction" to seek rescission. 15 U .S.C. § 1640(e); *In re Smith,* 737 F.2d 1549, 1552 (11th Cir.1984). RESPA also provides a three year statutory period according to the section on which Plaintiffs rely, 12 U.S.C. § 2605, pertaining to failures to disclose information regarding loan servicing. 12 U.S.C. § 2614.")

*In re Roach***,** 598 F.Supp.2d 741, 749 (E.D.Va. 2009)(The TILA disclosure requirements apply to creditors. " The term 'creditor' refers only to a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement. Thus, TILA's disclosure provisions only apply to a party (i) that regularly extends consumer credit as set forth in the statute if that party (ii) is also the entity to which the debt is initially payable. *Id.*; *see also Cetto v. LaSalle Bank Nat'l Ass'n,* 518 F.3d 263, 270 (4th Cir.2008) (observing that "the first sentence of § 1602(f) *requires* that *both* elements of the two-part test be met for determinations of 'creditor' status" (emphasis in original)). A creditor's "assignee," however, may also be held liable for a creditor's TILA violations in loan transactions involving real property if the assignment is voluntary and the TILA violation at issue "is apparent on the face of the disclosure statement provided in connection with such transaction pursuant to this subchapter." 15 U.S.C. § 1641(e)(1).")

Wells Fargo Bank,N.A. v. Jaaskelainen, 407 B.R. 449 (D.Mass. 2009)(discussion of the effect of rescission on the mortgagee's proof of claim in the bankruptcy context)

Home Equity Conversion Mortgage (HECM) aka Reverse Mortgages -

A Reverse Mortgage is a mortgage which is insured by the FHA and HUD. There are three types of reverse mortgages – HECM, HECM Standard and HECM Safe. The program is designed to assist elderly borrowers by allowing them to "withdraw" equity in their homes. No monthly loan repayment is required, although the borrower is still responsible for property taxes and insurance. The no payment status lasts until either the death of the borrowers, the home ceases to be the borrowers' principal residence for more than 12 months, or the house is sold. Upon the death of the last surviving borrower, any equity above the amount of the outstanding loan balance belongs to the estate.

To qualify for a reverse mortgage, the borrower must be at least 62 years old. The home must be free and clear of all existing liens or all existing liens must be satisfied with the reverse mortgage. Generally, there are no credit score or income requirements. Most home types are eligible. A mobile homescannot be more than 30 years old, the land it is on must be owned by the borrower, the structure must be on a permanent foundation, and the home must pass an FHA inspection.

Reverse Mortgage proceeds can be disbursed in a variety of ways: (a) a lump sum of cash at closing; (b) in equal monthly installments as long as the borrower lives in the home; (c) in equal monthly installments for a fixed period of time; (d) it can be drawn down at the borrower's discretion until the proceeds are exhausted (line of credit): or, (e) any combination of the foregoing.

Short Sales -

Short sales are becoming more commonplace**.** Many debtors are being convinced that a short sale of their property has a much lesser impact on their credit rating than a foreclosure – even where the foreclosure proceeding already has been commenced. Many debtors will attempt to obtain a short sale with their senior mortgagee without taking into account the junior mortgagee's interests or providing proper notice to them. Generally, in the chapter 13 context, most short sales only inure to the benefit of the real estate agent who is pushing the transaction. In some instances – albeit rarely – a short sale may result in taxable income attributes to the borrower.

State Laws and Procedures -

Practically every state has its own version of TILA, FDCPA and RESPA. In many cases the remedies available are more liberal then the federal laws. Further, in judicial foreclosure jurisdictions, many state courts now require mandatory mediation in foreclosure disputes.

Programs Provided by the Mortgage Companies -

Many mortgage companies are now providing mortgage relief programs of their own, either by modifying the terms of the loan, writing down the amount of the indebtedness, or granting a forebearance of payments for a certain time period. For example, HSBC Mortgage Services, Inc., has a program called The Tax Settlement Offer. It allows certain borrowers a limited time to make a one-time payment of a percentage of their account balance (ostensibly with their tax refunds) in full satisfaction of the debt. In one case, the mortgagee was willing to take $4,661.12 as settlement in full of its $46,612.45 loan balance.

Chapter 13 Outline: Means Testing

Lanning & Ransom

***Hamilton v. Lanning*, 130 S.Ct. 2464 (June 7, 2010):**

Issue:

Whether "projected disposable income," as utilized in § 1325(b)(1) should be calculated using the "mechanical approach," which means past average monthly disposable income multiplied by the number of months in the debtor's plan, or the "forward-looking approach," which takes into account significant changes in the debtor's financial circumstances that are known or virtually certain.

Facts:

Debtor filed for chapter 13 relief and had over $36,000 in unsecured debt. Her income six months prior to filing was greatly inflated due to a one-time buyout from her former employer. This caused her current monthly income (CMI) to exceed the median average for a family of one in Kansas. However, on her Schedule I, Debtor reported the income from her new job, which was below the state median. This income and her actual monthly expenses resulted in monthly disposable income of $149.03.

Debtor filed a plan that required her to pay $144 per month for 36 months. The Chapter 13 trustee objected confirmation of the plan under § 1325(b)(1)(A) for failure to pay the full amount of unsecured claims, and § 1325(b)(1)(B) for not committing all of her projected disposable income to the repayment of creditors. Trustee argued that the "mechanical approach" is the proper way to calculated projected disposable income (multiply disposable income, as calculated on Form 22C, by the number of months in the commitment period). Using this approach, Debtor's creditors would be paid in full if Debtor made monthly payments of $756 for 60 months. However, there was no dispute that Debtor's actual income was insufficient to make payments of this amount.

Holding:

The "forward-looking approach" is the proper way to calculate "projected disposable income" under § 1325(b)(1). Therefore, courts may account for changes in a debtor's income or expenses that are known or virtually certain at the time of confirmation.

Discussion:

The Court first found that Debtor's argument for the "forward-looking approach" was stronger than trustee's argument for the "mechanical approach." Because "projected" is not defined in the Code, the Court must employ its ordinary meaning, "and in ordinary usage future occurrences are not 'projected' based on the assumption that the past will necessarily repeat itself

. . . While a projection takes past events into account, adjustments are often made based on other factors that may affect the final outcome." *Id.* at 2471-72. Also, "projected" appears in many federal statutes, but "Congress has rarely used it to mean simple multiplication." *Id.* at 2472 (discussing the Agricultural Adjustment Act of 1938 which defined terms such as "projected national yield," to include historical averages adjusted for abnormal weather and other significant changes). In addition, in the Code, "when Congress wishes to mandate simple multiplication, it does so unambiguously—most commonly by using the term 'multiplied.'" *Id.* Importantly, the Court found that pre-BAPCPA case law supports the "forward-looking approach" because courts generally would "multiply a debtor's currently monthly income by the number of months in the commitment period *as the first step* in determining projected disposable income . . . But *courts also had discretion* to account for known or virtually certain changes in the debtor's income." *Id.* (emphasis added) (citations omitted). This was a significant factor in the Court's decision "because we 'will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.'" *Id.* at 273 (citations omitted). Because Congress did not amend the term "projected disposable income" and pre-BAPCPA practice reflected the use of the "forward looking approach," the Court reasoned that if "Congress intended for 'projected' to carry a specialized—and indeed, unusual—meaning in Chapter 13, Congress would have said so expressly." *Id.* at 2473-74.

The Court then determined that the mechanical approach clashes repeatedly with terms of § 1325. Section 1325(b)(1)(B)'s reference to projected disposable income "to be received in the applicable commitment period" strongly favors the "forward-looking approach." In addition, § 1325(b)(1) requires courts to determine projected disposable income at the effective date of the plan (i.e., when it is confirmed). "Had Congress intended for projected disposable income to be nothing more than a multiple of disposable income in all cases, we see no reason why Congress would not have required courts to determine that value as of the *filing* date of the plan." *Id.* at 2474. Measuring projected disposable income on the confirmation date "is more consistent with the view that congress expected courts to consider postfiling information about the debtors' financial circumstances." *Id.* Further, the requirement of § 1325(b)(1)(B) that projected disposable income to be applied to make the payments is logically read to contemplate that the debtor will actually pay creditors in the calculated monthly amounts. "But when, as of the effective date of a plan, the debtor lacks the means to do so, this language is rendered a hollow command." *Id.*

The Court also found that the trustee's arguments in favor the mechanical approach were unpersuasive. Trustee contended that only the mechanical approach is consistent with § 1129(a)(15)(B), which refers to "projected disposable income' of the debtor. The Court did not find § 1129(a)(15)(B)'s reference to "projected disposable income" offered any insight to the meaning of "projected" in that statute. Trustee also argued that § 707, which allows courts to take "special circumstances" into consideration, is incorporated by § 1325(b)(3), but only with respect to calculating expenses, not the debtor's income. However, the Court "decline[d] to infer

from § 1325's incorporation of § 707 that Congress intended to eliminate, *sub silentio*, the discretion that courts previously exercised when projecting disposable income . . ." *Id.* at 2475.

Lastly, the Court discounted any alternatives to the "forward-looking approach" that the trustee set forth. Trustee suggested that a debtor may delay filing a petition in order to move the increased income outside the 6-month look-back period. The Court discounted this suggestion because delay is often not a viable option for debtors when filing for bankruptcy and delaying filing may give the appearance of bad faith. *Id.* at 2476. Trustee also argued that the debtor could seek leave to delay filing a Schedule I and then act the court to exercise its authority under § 101(10A)(A)(ii) to choose a 6-month period that is representative of the debtor's future disposable income. However, the Court found that "[i]f the Code required use of the mechanical approach in all cases, this strategy would improperly undermine what the Code demands." *Id.* And even if this strategy were used, "it would not help all debtors whose disposable income during the plan period is sharply lower than their previous disposable income." *Id.* at 2477. Trustee also suggested that the debtor can dismiss its petition and re-file later. However, the Court found this to plainly circumvent the statutory limits on the court's ability to shift the look-back period, and may be hurtful to the debtor by preventing them from refiling under § 109(g). *Id.* Lastly, the trustee argued that the debtor may have been able to obtain relief under Chapter 7 or by converting to Chapter 7. However, in the instant case, the presumption of abuse would arise under the means test due to Debtor's disposable income. This presumption would not be rebuttable under "special circumstances" because those only refer to a "serious medical condition or a call or order to active duty in the Armed Forces" and a decline income is not included.

Each of these considerations led the Court to hold that the "forward-looking approach" is the proper way to calculate "projected disposable income."

Selected cases citing Lanning

In re Buck, 443 B.R. 463 (N.D. Ga. Nov. 10, 2010):

Debtors had above-median income and confirmed a plan that included a five-year "applicable commitment period" ("ACP"). Subsequent to confirmation, Debtors experienced a substantial change in circumstances (loss of job and unemployment benefits) that made it impossible for them to continue paying the $340 monthly plan payments. Debtors filed a motion for a post-confirmation modification of the plan to reduce the plan to 36 months from 60. Debtors had already completed 40 months of payments; therefore, if granted, the motion would make Debtors' case ready for discharge. The Chapter 13 Trustee objected claiming that the modification provided for an improper ACP because § 1329 does not permit a debtor to shorten a plan term to less than the ACP under § 1325(b). The court, finding for the Trustee, held that § 1329 does not permit Debtors, as above-median income debtors, to reduce their ACP below 60 months. *Id.* at 470.

Section 1325(b)(4) requires above-median debtors to have an ACP of five years. Under § 1325(b)(4)(B), the ACP may be less than five years "only if the plan provides for payment in full of all allowed unsecured claims over a shorter period." The Court recognized that it is bound by the Eleventh Circuit's decision in *In re Tennyson*, 611 F.3d 873 (11th Cir. 2010). The *Tennyson* court "held that the ACP prescribes a minimum duration for an above-median income debtor's Chapter 13 Plan," because a plain reading of § 1325(b) required that ACP be a temporal term and that the legislative intent behind BAPCPA supports this interpretation. *Id.* at 466-67 (citing *Tennyson*, 611 F.3d at 879 ("[T]he Eleventh Circuit clearly stated that the Congressional intent behind BAPCPA was to require above-median income debtors to remain in their plans for five years.")).

Looking to the *Lanning* decision, the Court noted that the Court adopted a "more flexible" and forward-looking approach to determine a Chapter 13 debtor's projected disposable income. However, "there was no suggestion that the adoption of a more forward-looking interpretation of projected disposable income would allow a debtor to change his or her ACP under the statute." *Id.* at 468. In addition, the court looked to the *Tennyson* court's interpretation of *Lanning*, which stated that "*Lanning* does not directly comment on the definition of 'applicable commitment period' but what it does indicate is that § 1325(b) is not a strict mechanical formula existing in a vacuum." *Id.* (quoting *Tennyson*, 611 F.3d at 878).

The court went on to hold that although there is no reference to § 1325(b) in § 1329, §1329 does not permit above-median income debtors to reduce their ACP below 60 months. The court reasoned that, when read together, "the best efforts test of § 1325(b) is incorporated into § 1329 plan modifications when there is an objection by a trustee or holder of an allowed unsecured claim." *Id.* at 469. In addition, § 1325(A)(1) requires modification to comply with "other applicable provisions of this title," which would include § 1325(b)(1).

In re Welsh, 440 B.R. 836 (Bankr. D. Mont. Nov. 16, 2010):

A chapter 13 co-debtor was disabled and collected retirement and social security income (SSI). The Schedule I listed co-debtors' combined average monthly income of $7,692.68, including SSI of $1,165. However, the CMI did not include the co-debtor's SSI, causing the monthly disposable income under § 1325(b)(2) to amount to $218.12. The chapter 13 trustee objected to confirmation of the plan, which proposed 30 monthly payments of $125 and 30 monthly payments of $500, claiming that Debtors did not commit 100% of their disposable income as required by § 1325(b), and instead are deducting payments for unnecessary secured claims under § 707(b)(20(A)(iii). The Trustee argues that the "plan fails to satisfy the disposable income requirement of § 1325(b)(1)(B) because they omit social security income when calculating their projected disposable income." *Id.* at 842.

"The Trustee cites *Lanning* for the proposition that pre-BAPCPA practice included SSI income as a component of projected disposable income and, absent a clear indication that

Congress intended a departure from pre-BAPCPA practice, the Supreme Court will not read the Bankruptcy Code to erode that past bankruptcy practice." *Id.* (citing *Lanning*, 130 S.Ct. at 2473-74). However, the court refused to accept the Trustee's argument because *Lanning* did not involve or include any mention of SSI as income, and the *Lanning* decision does not interpret applicable statutes governing the treatment of SSI in bankruptcy. *Id.* at 843. The Court found that the language of 42 U.S.C. § 407 of the Social Security Act evidences that:

> Congress knew how to limit the application of 407(a) to limit or modify its provisions, by requiring express reverence to § 407 . . . § 1325(b) . . . [does not] include such an express reference to § 407 which is required to limit or modify its limitation to "other legal process, or to the operation of *any bankruptcy* or insolvency law."

Id. at 844 (emphasis in original). The Trustee did not identify any express reference to 42 U.S.C. § 407 that would limit or modify its provisions in the disposable income requirement of § 1325(b)(2) of the means test. *Id.* "On the contrary, by enacting § 101(10A)(B) congress demonstrated an intent to reinforce or buttress the protections of 42 U.S.C. § 407(a) against inclusions of SSI in CMI." *Id.* The Court found that because SSI is excluded from CMI under the plain language of § 101(10A)(B), it is, therefore, excluded from disposable income under the means test. *Id.* at 845.

The Trustee also argued "that *Lanning*'s forward-looking approach . . . means that this Court should include Debtors' 'actual' SSI to determine disposable income because it is certain to exist in the future, notwithstanding the plan language of § 101(10A)(B) and 42 U.S.C. § 407(a)." *Id.* However, the court found that *Lanning* makes clear that the "calculation of projected disposable income is not so much 'different' from the calculations of CMI and disposable income . . . but rather the calculation of projected disposable income begins with CMI. *Id.* at 846. Further, because SSI is excluded from CMI by § 101(10A)(B), enacted in BAPCPA, pre-BAPCPA practice of applying SSI to projected disposable income would violate the both § 101(10A)(B) and 42 U.S.C. § 407(a). *Id.*

Lanning states that after calculating disposable income, "[i]t is only in unusual cases that a court may go further and take into account other known or virtually certain information at the time of confirmation." 130 S.Ct. at 2475. "The Trustee does not explain how the instant case is an unusual case, and does not explain what changes in the Debtors' income or expenses are known or virtually certain at the time of confirmation. [Co-debtor's] SSI income has not been shown to increase or decrease during the term of the Plan." *Welsh*, 440 B.R. at 846. Therefore, the Court found that the co-debtor's SSI is not subject to the disposable income requirement and Debtors satisfied their burden of proof under the § 1325(b). *Id.* at 847.

In re Thiel, No. 10-00434-TLM, 2011 WL 799779 (Bankr. D. Idaho March 1, 2011):

Chapter 13 Trustee objected to Debtors' plan under § 1325(b)(1)(B) because the plan proposes to pay unsecured creditors les than 10% of the debt. Debtors argued that their "reasonable" expenses are higher than what Form 22C allows. Therefore, Debtors claimed that their "actual" disposable income is less than what the Form 22C states. *Id.* at *1. In support of their argument, Debtors read *Lanning* to support "the proposition that Form 22C should be used to determine the length of the plan (36 or 60 months), and then—*unless* Form 22C is fully 'accurate'—schedules I and J should be used to determine a debtor's 'reasonable' expenses and project the debtor's disposable income." *Id.* at *2 (emphasis in original). The court held that the "Debtors read *Lanning* far too broadly, [and] their construction of the *Lanning* cannot be harmonized with the subsequent decision of the Supreme Court in *Ransom v. FIA Card Services, N/A*, __ U.S. __, 131 S.Ct. 7016, 178L.Ed.2d 603, 2011 WL 66438 (Jan. 11, 2011)." *Id.*

Interpreting *Lanning*, the court found that it "certainly did not suggest that looking beyond Form 22C would be the norm." *Id.* at *3. Instead, the court would look beyond the statutory formula only in exceptional cases where significant changes in a debtor's financial circumstances are known or virtually certain. *Id.* The Debtors' contention

> that the Court should use From 22C only if it is, in Debtor's terms, "reasonably connected" to schedules I and J reaches too far. Indeed, if in order to look beyond Form 22C all that was required was a showing that a debtor's actual expenses varied from the standard expenses allowed under the means test, deviation from Form 22C would be the rule, not the exception.

Id.

Looking to *Ransom*, the court found that "the Supreme Court construed § 707(b)(2)(A)(ii)(I), as incorporated by § 1325(b)(3) in above-median income chapter 13 cases, to disallow an attempt to claim a vehicle-ownership expense when the debtor's vehicle was owned free and clear." *Id.* Because the statute specifically states "applicable" expenses, "an above-median income debtor may claim an expense deduction only if the debtor will incur that expense during the life of his plan." *Id.* at *4. Furthermore, "Debtors may claim only the standard allowance, rather than their actual expenses," and the *Ransom* court understood that "Congress clearly expressed a requirement that the formula be applied notwithstanding [the fact that the formulaic expenses or deductions may not match the debtor's actual expenses." *Id.* Therefore, the court held that "debtors, who are conceded to be above median income, cannot simply jettison Form 22C in favor of schedules I and J under an unduly expansive reading of *Lanning*." *Id.*

In re Thomas, 443 B.R. 213 (Bankr. N.D. Ga. Dec. 19, 2010):

Trustee objected to Debtor's proposed Chapter 13 plan because he contributed none of his Social Security Income ("SSI") to the plan and paid a zero dividend to unsecured creditors.

The Court held that under a plain reading of the Code, SSI is excluded from projected disposable income. *Id.* at 219.

The Court reasoned that projected disposable income:

> is often a direct function of disposable income, which is defined in § 1325(b)(2) as the currently monthly income ("CMI") received by a debtor, less necessary and reasonable expenses . . . The Code defines CMI as the average monthly income of a debtor during the six months prior to filing, 11 U.S.C. § 101(10A)(A). The Code, however, *explicitly excludes SSI from CMI*.

Id. at 215 (emphasis added) (citing *Lanning*, 130 S.Ct. at 2471). Therefore, courts ultimately use the CMI calculation, which excludes SSI, to determine a debtor's projected disposable income.

However, according to *Lanning*, courts may use their discretion to account for changes in a debtors' income or expenses that are known or virtually certain at the time of confirmation. *See id.* "In the instant case, however, Debtor's pre-petition and post-petition income will not be significantly different. Debtor simply seeks to exclude from [projected disposable income] the same income that is excluded from CMI." *Id.*

> The "unusual case," per *Lanning*, which allows courts to stray from § 1325(b)(2)'s formula for disposable income, occurs when CMI used to calculate disposable income will be substantially different from a debtor's disposable income during the plan period. If a debtor will receive substantially the same income in the six month look-back period of § 1325 and the plan period, a debtor's disposable income, as derived by CMI, will not be different.

Id. at 16 (footnotes omitted). Therefore, because Debtor's SSI does not change from the time he calculated his CMI and throughout the plan period, there is no reason for the court to look beyond the CMI and disposable income calculations for Debtor's projected disposable income.

The Court clarified that while projected disposable income "*is* a forward-looking analysis of disposable income, disposable income is, by statute, a direct function of CMI, which excludes SSI. Following *Lanning*, courts should follow the directives of § 1325 and derive [projected disposable income] from CMI, unless a debtor's circumstances change so the disposable income during the plan period will be significantly different from the disposable income in the look-back period." *Id.* at 217.

***Ransom v. FIA Card Serv., N.A.*, 131 S.Ct. 716 (Jan. 11, 2011):**

Issue:

Whether, under the means test, a debtor, who owns a car outright and therefore does not make loan or lease payments on the car, may claim an allowance for car-ownership costs; thereby reducing the amount the debtor will repay creditors under the Chapter 13 plan.

Facts:

The means test was instituted by the BAPCPA to calculate a debtor's disposable income and, thus, determine how much the debtor could repay creditors. "The statue defines 'disposable income' as 'current monthly income' less 'amounts reasonably necessary to be expended' for 'maintenance or support,' business expenditures, and certain charitable contributions." *Id.* at 721 (citing §§ 1325(b)92)(A)(i) and (ii)). If a debtor has above-median income for his state, "the means test identifies which expenses qualify as 'amounts reasonably necessary to be expended'" from allowances under the National and Local Standards established by the IRS. *Id.* at 721-22. "The Local Standards include an allowance for transportation expenses, divided into vehicle 'Ownership Costs' and vehicle 'Operating Costs.'" *Id.* at 722. Further, the Collection Financial Standards state that the ownership costs pertain to "nationwide figures for monthly loan or lease payments," and instruct that, in the tax-collection context, "if a taxpayer has no car payment . . . only the operating costs portion of the transportation standard is used to come up with the allowable transportation expense." *Id.*

In the instant case, among Debtor's assets, he listed a car that he owns free of any debt. However, when calculating his expenses under the means test, Debtor claims a car ownership deduction of $471 for the car. This amount represents the full amount specified in the IRS's "Ownership Costs" allowance. *Id.* at 723. In addition, Debtor listed a separate $338 deduction for car-operating costs.

Debtor proposed a 5-year plan that would result in repayment of approximately 25% to unsecured creditors. However, unsecured creditor FIA objected to confirmation of the plan claiming that it did not direct all of Debtor's disposable income to unsecured creditors. *Id.* FIA argued that Debtor could not claim the car-ownership allowance because he does not make any loan or lease payments on his car. Further, if the allowance is disallowed, Debtor's disposable income would increase by $471, resulting in a difference of approximately $28,000 over the life of the plan. *See id.*

Holding:

Based on the BAPCPA's text, context, and purpose, the Court held that the Local Standard expense amount for transportation "Ownership Costs" is not "applicable" to a debtor who will not incur any such costs, that is loan or lease payments, during the bankruptcy plan.

Because Debtor owned his car outright, he was not able to claim "Ownership Costs" as an applicable deduction when calculating his expenses.

Discussion:

The Court first found that the plain meaning of "applicable" required the Debtor to actually incur that expense in order to claim that particular deduction under the means test. The statute states that:

> The debtor's monthly expenses shall be the debtor's *applicable* monthly expense amounts specified under the National Standards and Local Standards, and the debtor's *actual* monthly expenses for the categories specified as Other Necessary expenses issued by the [IRS] for the area in which the debtor resides.

§ 707(b)(2)(A)(ii)(I) (emphasis added). The Court stated "[t]he key word in this provision is 'applicable': A debtor may claim not all, but only 'applicable' expense amounts listed in the Standards." *Id.* at 724. Looking to the definition of applicable, it means "'capable of being applied: having relevance' or 'fit, suitable, or right to be applied: appropriate.'" *Id.* (quoting Webster's Third New International Dictionary 105 (2002)). Therefore, the Court reasoned that an expense amount is "applicable," under the plain meaning of the statute, when it is appropriate, relevant, suitable, or fit and "[w]hat makes an expense amount 'applicable' in this sense . . . is most naturally understood to be its correspondence to an individual debtor's financial circumstances." *Id.* Therefore, a deduction is only appropriate if the debtor will incur that kind of expense, as described in the National or Local Standards, during the life of the plan. Without the word "applicable" included in the statute, "all debtors would be eligible to claim a deduction for each category listed in the Standards. Congress presumably included 'applicable' to achieve a different result." *Id.* (citations omitted).

The Court found that its reading of "applicable" is also supported by the statutory context of the means test.

> Because Congress intended the means test to approximate the debtor's reasonable expenditures on essential items, a debtor should be required to qualify for a deduction by actually incurring an expense in the relevant category. If a debtor will not have a particular kind of expense during his plan, an allowance to cover that cost is not "reasonably necessary" within the meaning of the statute.

Id. at 725. The Court also found that the BAPCPA's underlying purpose supports its interpretation of "applicable" because the means test was designed by Congress to measure a debtor's disposable income in a way that ensures debtors will repay creditors the maximum they can afford. *Id.* "Requiring a debtor to incur the kind of expenses for which he claims a means-test deduction thus advances BAPCPA's objectives." *Id.*

The Court then looked to what the "vehicle ownership" category covers to determine if the Debtor was able to claim this deduction. Although not adopting the Collection Financial

Standards, which are the IRS's explanatory guidelines to the National and Local Standards, the Court did employ them as guidelines for interpreting the categories under the national and Local Standards. *See id.* at 726. According to the Collection Financial Standards, there is a clear "distinction between ownership and operating costs, making clear that individuals who have a car but make no loan or lease payments may claim only the operating allowance." *Id.* Therefore, "[t]he ownership category encompasses the cost of a car loan or lease and nothing more." *Id.* at 725. Because Debtor owned the car free and clear of any encumbrance, he did not incur any loan or lease expenses, he could not claim the ownership category as a deduction to his expenses under the means test. *Id.* at 726.

The Court rejected Debtor's interpretation of the term "applicable." Debtor "determines his 'applicable' deductions by locating the box in each National or Local Standard table that corresponds to his geographic location, income, family size, or number of cars. Under this approach,, a debtor 'consult[s] the table[s] alone' to determine his appropriate expense amounts." *Id.* Therefore, under Debtor's approach, "'applicable' serves a function wholly internal to the tables; rather than filtering out debtors for whom a dedication is not at all suitable, the term merely directs each debtor to the correct box . . . within every table." *Id.* The Court found that the Debtor's interpretation of "applicable" does not align with the statute's text, context, or purpose because it would render the term "applicable" superfluous. *Id.* at 726-27. It would "sever the connection between the means test and the statutory provision it is meant to implement—the authorization of an allowance for (but only for) 'reasonably necessary' expenses [because] wholly fictional [expenses] are not easily thought of as reasonably necessary." *Id.* at 727. It would also "run counter to the statute's overall purpose of ensuring that debtors repay creditors to the extent they can—here, by shielding some $28,000 that he does not in fact need for loan or lease payments." *Id.*

Lastly, the Court discounted each of the Debtor's policy arguments for a contrary reading of "applicable." Debtor argued that only including lease and loan payments in this category was contrary to a separate sentence of the means test that provides: "Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts" § 707(b)(2)(A)(ii)(I). Therefore, according to the debtor, the car-ownership deduction cannot include *only* loan and lease payments because those payments are *always* debts. *See id.* at 728. However, the Court found the Debtor was ignoring that this sentence governs all of the deductions under the National and Local Standards and the Other Necessary Expense categories and "any friction between the two likely reflects only a lack of attention to how an across-the-board exclusion of debt payments would correspond to a particular IRS allowance." *Id.* at 728-29 (footnote omitted). In addition, this sentences functions only to exclude, not authorize, deductions; therefore, "[i]t cannot establish an allowance for non-loan or –lease ownership costs that no National or Local Standard covers." *Id. at 729.*

Debtor also claimed that his interpretation of the means test is necessary to avoid senseless results not intended by Congress. However, as previously stated, the Court found that

his interpretation "would frustrate BAPCPA's core purpose of ensuring that debtors devote their full disposable income to repaying creditors." *Id.* Anomalies that result from the Court's interpretation are "inevitable result[s] of a standardized formula like the means test . . . [because] such formulas are by their nature over-and under-inclusive." *Id.* Furthermore, "[i]n eliminating the pre-BAPCPA case-by-case adjudication of above-median income debtors' expenses, on the ground that it leant itself to abuse, Congress chose to tolerate the occasional peculiarity that a brighter-line test produces." *Id.*

Debtor also argued that "denying the ownership allowance to debtors in his position 'sends entirely the wrong message, namely that it is advantageous to be deeply in debt on motor vehicle loans, rather than to pay them off.'" *Id.* The Court discounted this by stating that "the deductions serve merely to ensure that debtors in bankruptcy can afford essential items . . . If the debtor already owns a car outright, he has no need for this protection." *Id.* at 730. The Court also discounted Debtor's assertion that he may need to replace his car during the life of the plan and granting the ownership-cost deduction "accords best with economic reality." *Id.* However, the Court found that he was seeking "an emergency cushion for car owners. But nothing in the statute authorizes such a cushion which all debtors presumably would like in the event some unexpected need arises." *Id.*

American Bankruptcy Institute
16th Annual Southeast Bankruptcy Workshop

Lien Stripping on Debtor's Principal Residence

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Lien Stripping

When is lien stripping permissible on a Debtor's principal residence and whether a Chapter 13 Debtor who is ineligible for a discharge due to a recent Chapter 7 discharge, may strip a lien on a wholly unsecured second mortgage on a principal residence?

I. No Modification of Principal Mortgage

Nobelman v. American Savings Bank, 508 U.S. 324 (1993). A Chapter 13 Debtor motioned to value his second mortgage secured by his residence pursuant to § 506(a) and bifurcate the mortgage claim into secured and unsecured portions. The Debtor argued that the protection of § 1322(b)(2) applies only to the secured portion of his mortgage. The Debtor proposed no payments to the unsecured creditors. Rather than focusing on the value of the property and the claim, the Supreme Court stated that the lien holder was "indisputably the holder of a claim secured by a lien." The lien holder's rights are reflected in its mortgage instruments which are enforceable under state law. The Debtor's proposal would modify the rights of the lien holder which is prohibited by § 1322(b)(2) where, as here, the lien holder's interest is secured by the principal residence of the debtor.

II. Lien Stripping permitted in Chapter 13

In re Tanner, 217 F.3d 1357 (11th Cir. 2000). The 11th Circuit held that the Nobleman decision does not extend to wholly unsecured homestead lenders. A Chapter 13 Debtor motioned to strip her wholly unsecured junior mortgage, and intended on treating the mortgage as a general unsecured creditor entitling the creditor to a 6% dividend as an unsecured creditor. The 11th Circuit adopted the majority view, which held that § 1322(b)(2) does not prohibit modification of wholly unsecured junior mortgages after a § 506(a) valuation.

In re Dickerson, 222 F.3d 924 (11th Cir. 2000). The 11th Circuit affirmed their holding in Tanner, stating that creditors whose liens are wholly unsecured after a § 506(a) valuation are not entitled to the protection of § 1322(b)(2) even if the claim was secured solely by a lien against the Debtor's principal residence. Section 1322(b)(2) of the bankruptcy code protects only those homestead mortgages that are secured by some existing equity in the Debtor's principal residence according to § 506(a). However, the Court in dicta stated that if the 11th Circuit had not recently reached the decision in Tanner that this panel would not allow a Debtor to strip a lien of a wholly unsecured mortgage, finding the district court's opinion persuasive because "valuation outside the actual market place is inherently inexact." Id. 925

In re Zimmer, 313 F.3d 1220 (9th Cir. 2002). The Chapter 13 Debtor filed suit to against the holder of a wholly unsecured junior mortgage to avoid their lien. The 9th Circuit adopted the view that § 1322(b)(2) did not prohibit the modification of the wholly unsecured lien that was secured by a security interest in real property. Utilizing the Supreme Court's 3-part rationale from Nobleman, the 9th Circuit held that courts should first determine the value of the claim using § 506(a), and then determine whether the party has a secured claim for purposes of Section 1322(b)(2). The claim holder was not the holder of a secured claim under the definitions provided in the Bankruptcy Code, and therefore its rights could be modified under § 1322(b)(2). In this case, the lender was a holder of a claim secured only by a security interest in real property that was the debtor's home. Nonetheless, because the lender was still not a holder of a secured claim, it could not qualify for antimodification protection.

III. Chapter 20 Debtor May Not Strip a Lien

An overwhelming majority of Bankruptcy Courts have held that the Debtor's inability to receive a discharge in a "Chapter 20" case prevents the Debtor from stripping the liens in a Chapter 13 Plan. See In re Picht, 428 B.R. 885, 890 (10th Cir. BAP 2010); In re Fenn, 428 B.R. 494, 500 (Bankr. N.D. Ill. 2010); In re Mendoza, No. 09-22395, 2010 UL 736834 (Bankr. D. Colo. Jan. 21 2010); In re Winitzky, No. 1:08-bk-19337-MP, 2009 Bankr. LEXIS 2430 (Bankr. C.D. Cal. May 7, 2009); In re Jarvis, 390 B.R. 600 (Bankr. C.D. Ill. July 9, 2008); Blosser v. KLC Fin., Inc., (*In re Blosser*), 2009 WL 1064455 (Bankr. E.D. Wis. Apr. 15, 2009), In re Loban, 426 B.R. 805(Bankr. D. Minn Apr. 2, 2010); In re Casey, 428 B.R. 519 (Bankr. S.D. Cal. 2010).

In re Gerardin, 2011 Bankr. LEXIS 514, 2011 WL 672050 (Bankr. S.D. Fl. February 17, 2011). Seven Debtors filed Chapter 13 bankruptcy cases soon after receiving their discharge in a prior Chapter 7 case. There was no dispute that none of the Debtors were eligible for Chapter 13 discharge. The Debtors sought to strip off their junior liens and motions to value were filed in each case. The Chapter 13 trustee and the mortgage holders opposed the Debtors' position, arguing that none of the Debtors could satisfy the § 1325(a)(5) requirements, because (1) they were not paying the underlying debt in full and/or (2) were are not eligible to receive a discharge under § 1328.

The United States Bankruptcy Court for the Southern District of Florida rejected the analysis Bankruptcy Court jurisdictions that allow the striping of wholly unsecured liens in Chapter 20 cases. The Bankruptcy Court stated that the pro-striping jurisdictions failed to include the complete language of § 502(b)(1). Section 502(b)(1) states that the claim will not be allowed if it is unenforceable against both "the Debtor and the Debtor's property"; however, the pro-striping jurisdictions held that it was disallowed if it is unenforceable only against the Debtor. These Debtors received a discharge in Chapter 7 that relieved them of in personam

liability; however, the claims are still allowed and enforceable against the Debtor's property. The Bankruptcy Court held that a junior lien cannot be stripped in a Chapter 20 case until the payment of the underlying debt is complete.

In re Jarvis, 390 B.R. 600 (Bankr. C.D. Ill. 2008). The Debtor's plan proposed to strip off a wholly unsecured junior mortgage pursuant to §506(d) upon confirmation of the Chapter 13 Plan. The Debtor had previously received a Chapter 7 discharge and was therefore ineligible for a Chapter 13 discharge. The Bankruptcy Court held that a Debtor's inability to receive a discharge in a Chapter 13 case precluded the debtor from stripping off a wholly unsecured junior lien. In arriving at this decision, the Court noted that "a no-discharge Chapter 13 case may certainly be utilized to obtain the protections of the automatic stay for the purpose of proposing a plan to make payments on debts. A no-discharge Chapter 13 case may not, however, result in a permanent modification of a creditor's rights where such modification has traditionally only been achieved through a discharge and where such modification is not binding if a case is dismissed or converted. This Court can find no evidence that, by adding new § 1328(f), Congress intended to expand debtors' remedies in the way that the Debtor here proposes." The Court denied confirmation of the Debtor's plan.

In re Fenn, 428 B.R. 494, 500 (Bankr. N.D. Ill. 2010). Chapter 20 Debtors attempted to value a wholly unsecured junior mortgage and strip the lien. The Court concurred with Jarvis, holding that while a "junior lien can be valued at zero for plan confirmation purposes, … the lien cannot be held to be unenforceable and void until the plan ends and the Debtors receive a § 1328 discharge." The Court rejected the debtors' argument that a junior mortgage lien should be classified as void under § 506(d) of the Bankruptcy Code simply because the claim is valued at zero. Rather, the court concluded that § 506(a) "determines the amount of funds a plan has to provide for the payment of a second claim; it does not by its terms or operation disallow claims." The Court held that sections 1322(b)(2), 1325(a)(5) and 506(d) can be reconciled to mean that § 506(d) allows lien avoidance where the claim secured by the lien has been disallowed, and that the specific provisions of § 1325(a)(5) govern the subject of lien retention in the context of chapter 13 plans.

In re Lilly, 378 B.R. 232 (Bankr. C.D. Ill. 2007). Creditor objected to confirmation of the Debtor's Chapter 13 plan which proposed to cram down the interest rate of an automobile purchased within 910 days of filing. The Court overruled the Creditor's objection to the interest rate modification; however, it held that where a debtor does not receive a discharge, any modifications to a creditor's rights imposed in the plan are not permanent and have no biding effect once the term of the plan ends. The amount of the debt outside the bankruptcy context is the full amount due on the obligation owed to the creditor. The collectability of that debt, whether from the debtor or the collateral, does not impact the amount of the underlying obligation.

In re Winitzky, No. 1:08-bk-19337-MT, 2009 Bankr. LEXIS 2430 (Bankr. C.D. Cal. 2009). No party opposed debtor's motion to avoid the lien and no party objected to confirmation of the plan. However, the Court held that it has independent duty to determine whether debtors meet all requirements for confirmation. Where a Chapter 13 case does not afford a discharge and its main purpose is to work out a repayment plan for debts not discharged in the Chapter 7, a lien strip would allow a debtor to simply do indirectly what the Supreme Court has ruled he may not do directly. The Court concluded that Bankruptcy Code does not allow for lien strip because a discharge is required to lien strip in a Chapter 13 case.

In re Blosser, Ch. 13 Case No. 07-28223-svk, Adv. No. 08-2353, 2009 Bankr. LEXIS 1049, 2009 WL 1064455 (Bankr. E.D. Wis. 2009). A Chapter 13 Debtor, who was ineligible for a discharge due to a recent Chapter 7 discharge, motioned to strip a wholly unsecured junior mortgage. The Court held that the Debtor was not allowed. Allowing a debtor to file Chapter 7, discharge all dischargeable debts and then immediately file Chapter 13 to strip off a second mortgage lien would not be much different than simply avoiding the mortgage lien in the Chapter 7 itself.

In re Mendoza, No. 09-22395, 2010 Bankr. LEXIS 664, 2010 WL 736834 (Bankr. D. Colo. 2010). Debtors filed § 506 motion to strip off a wholly unsecured lien. The Trustee objected to confirmation arguing that by trying to strip a completely unsecured consensual lien from their primary residence, debtors are effectively seeking to do that which they cannot do because they are not entitled to a discharge. The Court followed Jarvis and Winitzky and held that lien avoidance of an unsecured lien prior to discharge does not comport with the Code. The issue of good faith was not decided as no one objected on those grounds, but the Court did raise it as a possible issue in future cases. The Debtors must either amend their plan or dismiss their case.

In re Quiles, 262 B.R.191 (Bankr. D. R.I. 2001). Chapter 13 Trustee objected to theplan confirmation on grounds that plan was not proposed in good faith. The Trustee argued that the debtors' plan is an abuse of process, in violation of the aim of Chapter 13. Further, the debtors should have followed the good faith route of filing a Chapter 13 case in the beginning and used some of their net disposable income to pay unsecured and under secured creditors.

Grandstaff v. Casey (In re Casey), 428 B.R. 519 (Bankr. S.D. Cal. 2010). The Creditor moved for relief from stay to foreclose on her third position trust deed. The Court held that under the Bankruptcy Code there are only 2 ways to make an enforceable debt go away permanently. One is to pay it in full. The other is to obtain a permanent discharge of any remaining obligation. "In the case of a "Chapter 20", there can be no discharge and conversion is not an option. Dismissal is the necessary result, without discharge, when a debtor performs a plan that leaves one or more debts wholly or partially unpaid. Any other outcome would give the debtor a de facto discharge when by statute no discharge is available."

In re Picht, 428 B.R. 885, 890 (10th Cir. BAP 2010): After receiving a Chapter 7 discharge, Debtors filed Chapter 13 in order to strip off a partially unsecured second mortgage. Debtors offered to pay the secured portion of the mortgage, and then strip off the unsecured balance. The Bankruptcy Court confirmed the plan and the creditors appealed. The Court held that because the Debtors' Chapter 13 case did not comply with § 1325(a)(5), the bankruptcy court erred in confirming the plan. The Debtors' plan violated the lien retention provision of § 1325(a)(5)(B)(i). The appropriate interpretation of "underlying debt under nonbankruptcy law" in § 1325(a)(5)(B)(i)(I)(aa) is the amount of the debt outside of the bankruptcy context.

In re Lindskog, 2011 Bankr. LEXIS 1666, 2011 WL 1576561 (Bankr. E.D. Wis. April 13, 2011). The Bankruptcy Court for the Eastern District of Wisconsin held that a Chapter 20 debtor may not strip a wholly unsecured second mortgage lien, because the Debtor was ineligible, pursuant to § 1328, for a discharge. The Creditor has a secured claim, because the lien is within the meaning of § 1325(a)(5)(B)(i)(I). The Creditor may be treated as a general unsecured creditor for dividend purposes during the bankruptcy, however, pursuant to § 348(f)(1)(C) and 349(b)(1)(C), the liens will "spring back" upon conversion or dismissal of the Chapter 13 case.

IV. Chapter 20 Debtor May Strip a Lien

In re Frazier, Ch. 13 Case No. 09-48595-E-13L, 2011 Bankr. LEXIS 78, 2011 WL 96836 (Bankr. E.D. Cal. March 31, 2011). Debtors filed a Chapter 13 case 9 days after receiving their discharge in a Chapter 7 case. There was no dispute that the Debtors were ineligible for a Chapter 13 discharge. Among the debts still in existence was a junior mortgage on their principal residence. The junior mortgage holder objected to the confirmation of the Debtors plan, pursuant to § 1325(a)(5), and argued that the plan was not filed in good faith and their mortgage was secured. The Bankruptcy Court for the Eastern District of California reviewed the secured interest of the claim holder and the good faith intention of the Debtor. After a § 506(a) evaluation, the Court held that the junior lien holder was unsecured, because there was no value for the creditor's interest to attach. Further, the lien holder had no sufficient basis for asserting rights under § 1325(a)(5), leaving it with a lien and an unsecured claim. The Court then applied the totality of the circumstances test holding that the plan was proposed in good faith. The Court confirmed the plan with the value of the junior mortgage holder's claim at $0.00, since it was wholly unsecured.

"By the § 506(a) valuation that court does not remove or "strip" the lien from the property. Rather, upon the completion of the Chapter 13 plan and payment of the value in the collateral securing the claim, there is no obligation remaining to be secured by the lien. With the obligation satisfied, the creditor is required under the terms of the note, deed of trust, and applicable state law to reconvey the deed of trust. In addition, §506(d) provides that to the extent that a claim against the debtor is not an "allowed secured claim" and the lien securing the claim is void."

In re Tran, 431 B.R. 230 (Bankr. N.D. Cal. 2010). The Bankruptcy Court combined two Chapter 13 cases into one opinion: In re Tran and In re Bennett. Both Tran and Bennett filed Chapter 7 and received discharges within the previous 4 years; therefore, neither Debtor was eligible for a Chapter 13 discharge. The Chapter 13 Trustee objected to the plan filed by the Debtors, and requested dismissal of Tran's case and objected to the lien stripping within Bennett's plan. The Trustee argued that the Debtors may not strip off the junior mortgage which is wholly unsecured, because the Debtors are ineligible for a Chapter 13 discharge. The Court reasoned that "eligibility requirements for Chapter 13, does not condition a Debtor's eligibility for relief under Chapter 13 on the Debtor's eligibility for a discharge. Nor does § 109 preclude Chapter 13 relief to a Debtor that has recently received a discharge in Chapter 7."

Pursuant to sections 506(a) and (d), the Court held that a Chapter 13 Debtor may strip off a lien on his "principal residence if the lien is completely unsecured based on the value of the residence and the amount of the senior loans." The Court agreed with Hart v. San Diego Credit Union, 2010 U.S. Dist. Lexis 130761 (S.D. Cal. 2010) and In re Casey, holding that nothing in § 506, § 1322, or any other section in Title 11 condition a "Chapter 13 Debtor's right to strip off a wholly unsecured junior lien on the Debtor's eligibility for a discharge." The right to strip off the lien is conditioned on 1) a good faith plan filing, 2) Chapter 13 plan confirmation, and 3) full performance under the plan.

Pursuant to §1325(a)(3), the Court may not confirm a plan absent a finding that the plan was proposed in good faith. Utilizing the totality of the circumstances in In re Warren, the Court dismissed Tran's case due to unfair manipulation of the bankruptcy code, because of the Debtor's nominal-repayment of debt.

In re Fair, Ch. 13 Case No. 10-C-1128, 2011 U.S. Dist Lexis 43025, 2011 WL 1486021 (E.D. Wis. April 19, 2011). District Court overruled the Bankruptcy Court and held that a wholly unsecured junior lien on the Chapter 13 Debtor's principal residence can be stripped off in Chapter 13 despite ineligibility for a discharge, pursuant to § 1328(f)(1). Congress understood the distinction between modification and discharge when drafting § 1328(f)(1); therefore, the section only limits discharges for Debtors who have received discharges within the previous 4 years not lien modification and stripping. The District Court remanded the Debtor's case to the bankruptcy Court to determine whether the Chapter 13 proceedings were conducted in good faith pursuant to § 1325(a)(3) and (7). Bad faith is evidenced by a Debtor filing a Chapter 13 case "solely for the purpose of the lien avoidance" which suggests manipulation of the bankruptcy code. Hill and Tran.

In re Haque, 331 B.R. 524 (Bankr. D. Mass. 2005). The pertinent issue was whether a Chapter 20 Debtor may avoid a judicial lien not avoided in the prior Chapter 7. Since the personal liability was discharged in the Chapter 7, the claim is now a nonrecourse claim against his estate. The creditor's lien can and will be avoided, because the Courts cannot treat a Chapter 13 Debtor who received a discharge in Chapter 7 with fewer rights thus creating two classes of

Chapter 13 Debtors. Even though the Court voided the lien, the Debtor's plan was not confirmed, because the Debtor either completely ignored the claim or provided less than the full amount of the claim. The lien would also be reinstated if the Debtor's plan was not confirmed or full payments were not made according to the plan. The Court concluded by stating that liens do not survive bankruptcy where the debt is provided for in the plan and paid in full, but where the debt is not paid in full, a secured creditor's lien is not extinguished.

In re Jazo, No. 09-16609-JM13, 2010 Bankr. LEXIS 3534, 2010 WL 3947303 (Bankr. S.D. Cal. 2010): Debtors moved to strip off junior lien of Washington Mutual. No opposition, but Court took it under submission because of previous Chapter 7 discharge. Court agreed to sign lien strip order so long as it does not purport to permanently avoid or grant a de facto discharge of the underlying debt when the debtors are not eligible for a discharge. The Court left the issue as to whether the plan could be confirmed for the confirmation hearing.

In re Hill, 440 B.R. 176 (Bankr. S.D. Cal. 2010): Court held that nothing in 11 U.S.C. § 506,1322,1325 or 1328(f) or any other section of the Bankruptcy Code provides that a Chapter 13 Debtor's right to modify or strip off liens is conditioned on the debtor being eligible for a discharge. However, the Court held that the lien was not void pursuant to section 506(d) but relied on § 1322. The plan valued the creditor's secured and unsecured claim at $0.00. The Creditor did not oppose lien strip motion or object to the plan. Chapter 13 Trustee objected to confirmation on bad faith grounds. Court rejected the Trustee's argument finding no bad faith, because the Debtors had a need for the bankruptcy other than the lien strip. In addition, the Debtors acted equitably and with good intentions, devoting all of their income to the plan and did not use serial filings to avoid payment to creditors. The Court granted motion to avoid lien and confirmed the plan.

In re Grignon, Chap. 13 Case No. 10-34196-tmb13, 2010 Bankr. LEXIS 4279, 2010 WL 5067440 (Bankr. D. Or. 2010). The Bankruptcy Court held that a debtor who is ineligible for a Chapter 13 discharge due to § 1328(f) can strip a wholly unsecured lien from real estate. The Court rejected the analysis of Blosser, Jarvis, and Mendoza, and agreed with Tran concluding that "nothing in the Bankruptcy Code precludes a debtor that is not eligible for a discharge from filing a chapter 13 case, obtaining conformation, and with the exception of discharge, from enjoying all of the rights of a chapter 13 debtor, including the right to strip off liens." The Court also noted that the Debtor must proceed in stripping the lien with an adversary proceeding due to the local rules that stipulate a "motion to avoid a lien is only available to debtors who are eligible for discharge."

In re Gounder, 266 B.R. 879 (Bankr. E.D. Cal. 2001). A Chapter 20 Debtor argued that the Creditor's claim should not be an allowed claim against her Chapter 13 estate, because it was discharged in her Chapter 7 case. The Court held, pursuant to § 506(a), that the under-secured claim would be treated as an allowable unsecured claim against the estate even though her personal liability was discharged. The unsecured claim, now a claim against the estate,

would receive the same percentage in plan payments as other similarly situated unsecured creditors. The claim holder is "entitled to be paid whatever sections 1325(a)(4) and 1325(b) require to be paid to unsecured creditors."

V. Required Notice

Espinosa v. United Student Aid Funds, Inc., 130 S. Ct. 1367 (2010). The Supreme Court addressed the finality of orders entered in the bankruptcy context and noted that a judgment is not void merely because it might have been erroneous. The Debtor filed the Chapter 13 plan requesting discharge of all student loan interest. The lien holder failed to object, and the plan was confirmed and later the case was discharged. After discharge, the student loan holder requested the reopening of the case arguing a due process violation because notice was not provided. The Supreme Court held that the lien holder slept on its rights and was provided sufficient notice of the plan and sufficient time to object.

In re Borkowski, Sr., 446 B.R. 220 (Bankr. W.D. Pa. February 22, 2011). The mortgage creditor (Well's Fargo) motioned to vacate the Debtor's discharge and reopen the case in order to reinstate a mortgage lien on the Debtor's property. The creditor argued that the Debtor failed to comply with a mortgage amendment filed by the creditor that increased the mortgage payments by 2/3. The Bankruptcy Court for the Western District of Pennsylvania reiterated Espinosa's holding, which stated that no violation of due process exists where a creditor had an opportunity to challenge an issue but slept on its rights. Furthermore, the Chapter 13 trustee did not violate the due process rights of the creditor by failing to move for an adversary proceeding.

VI. Good Faith

In re Kull, 12 B.R. 654 (S.D. Ga. 1981). Kull included eight Chapter 13 cases (one of which was In re Kitchens) with confirmed plans and the District Judge reversed and remanded the cases. The common issue was the good faith requirement for confirmation pursuant to § 1325(a)(3). The purpose of Chapter 13 is rehabilitation and payment of debt; however, Congress left the specifics of interpreting the good faith criteria to judicial discretion for a case by case determination. Judge Bowen rejected the bankruptcy Courts' reasoning for confirmation which stated that any percentage of payments proposed by a Debtor will be confirmed if it is more than creditors would receive in Chapter 7 liquidation. Moreover, the judge held that the reasoning was "impermissible," because the "true test of good faith is whether a Debtor proposes to pay his creditors an amount sufficient to warrant the Court's finding that the Debtor is committed to the purpose and spirit of Chapter 13." The Judge applied the totality of the circumstances and directed the lower Courts to determine whether the payment Debtors had offered creditors

through their plan satisfied the spirit of Chapter 13, which includes rehabilitation and repayment of debt.

In re Kitchens, 702 F.2d 885 (11 Cir. 1983). The 11th Circuit Court of Appeals affirmed the use of In re Kull's list of factors in determining whether a Debtor has filed a plan in good faith. The Court must consider but not be limited to the following:

> (1) the amount of the Debtor's income from all sources; (2) the living expenses of the Debtor and his dependents; (3) the amount of attorney's fees; (4) the probable or expected duration of the Debtor's Chapter 13 plan; (5) the motivations of the Debtor and his sincerity in seeking relief under the provisions of Chapter 13; (6) the Debtor's degree of effort; (7) the Debtor's ability to earn and the likelihood of fluctuation in his earnings; (8) special circumstances such as inordinate medical expense; (9) the frequency with which the Debtor has sought relief under the Bankruptcy Reform Act and its predecessors; (10) the circumstances under which the Debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealings with his creditors; and (11) the burden which the plan's administration would place on the trustee.

The Court concluded by restating another factor added by the Eighth Circuit which is "consideration of the type of debt to be discharged and whether such debt would be nondischargeable under Chapter 7. This is yet another factor to which bankruptcy Courts should be alert." The example of nondischargeable debt was student loans within the Chapter 7.

In re Gibson, 45 B.R. 783, 786 (Bankr. N.D. Ga. 1985). The debtor has the burden of proving that her plan was filed in good faith.

VII. Miscellaneous Related Issues

In re Barrios, 257 B.R. 626 (Bankr. S.D. Fl. 2000). The Court reviewed the case to determine whether (1) an unsecured creditor has standing to object to a Debtor's out of plan payments to a wholly unsecured junior mortgage lender and (2) whether the unsecured creditor can file a motion to strip the junior mortgage thereby making the mortgage holder unsecured and included within the pool of general unsecured creditors. The general unsecured creditor had standing to file the motion pursuant to § 506(c), because the creditor "had a colorable claim for expenses and was the only creditor that would zealously pursue that claim." In re McKeesport, 799 F.2d 91, 93 (3d Cir. 1986). Therefore, the unsecured creditor, in lieu of the trustee, had standing to force the modification of the wholly unsecured junior mortgage and the addition of the mortgage payments to his disposable monthly income.

In re Sadala, 294 B.R. 180 (Bankr. M.D. Fl. 2003). The Court held that no adversary proceeding is required where a Debtor is moving to value collateral and to void an unsecured lien under § 506 and Rule 3012 unless the dispute involves a determination of validity, priority, and extent of underlying lien. The Court addressed the point at which the lien would be stripped in case dicta. The secured claim will be valued at zero as an unsecured claim during the Chapter 13 case. If the Debtor completes the required payments and receives a discharge, then the lien related to this unsecured claim shall be declared void upon entry of discharge. "Because so many Chapter 13 cases fail and because it would be inappropriate to strip off a lien when the Debtor later defaults and no discharge is granted. The Court will treat the claim at zero and if the Debtor completes all payments and receives a discharge, then the lien related to this unsecured claim shall be declared void upon entry of discharge.

In re Robert, 313 B.R. 545 (Bankr. N.D. N.Y. 2004). A Debtor may motion to value and declare void a wholly unsecured junior mortgage, pursuant to § 506(c), unless the Debtor challenges the validity, priority, and extent of the lien. Validity, priority, and extent of the lien refer to the enforceability (existence or legitimacy of the claim itself), superiority in rank and position, and identification of the property encompassed by or subject to the lien. If the Court values the security interest at zero, the lien shall be stripped off upon completion of the Chapter 13 plan and issuance of discharge pursuant to § 506(d) without further litigation.

Proper notice is required to strip off a mortgage. In re Sadala. A Debtor attempting to strip off a lien must effect service upon the mortgagee in compliance with Rule 7004. Additionally, the Debtor must, in its related motion, comply with the fundamental principles of due process making clear and conspicuous the proposed treatment of the creditor's claim and the factual basis of the treatment.

Johnson v. Home State Bank, 501 U.S. 78 (1991). The Supreme Court held that a mortgage lien discharged in a Chapter 7 case is still a claim in a subsequent Chapter 13 case even though personal liability for the claim was discharged. Applying § 502(b)(1), the Court must allow the claim if it is enforceable against the Debtor or Debtor's property; therefore the in rem claim is allowed and not subject to § 506(d). Justice Marshall also noted that Congress did not intend to categorically foreclose the benefit of Chapter 13 reorganization to a Debtor who previously filed Chapter 7 relief.

American Bankruptcy Institute
16th Annual Southeast Bankruptcy Workshop

The Applicable Commitment Period

Submitted by

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Special thanks to Matthew Dials
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The Applicable Commitment Period

The debate of whether the applicable commitment period is a temporal period or a multiplier has reached four Circuit Courts of Appeal.

Since the creation of the 2005 Bankruptcy Abuse Prevention Consumer Protection Act ("BAPCPA"), Trustees, Creditor and Debtor Attorneys have argued over the meaning of the newly included sections and terms within the code in order to advocate for their respective clients. Defining terms such as, applicable commitment period ("ACP") and projected disposable income ("PDI") has created much debate among the legal communities.[1] In order to resolve the issues, both terms must be defined by using plain statutory language and judicial interpretation where Congressional intent is ambiguous.[2] The majority of courts define the ACP as a temporal standard required in all cases.[3] The minority utilizes the ACP as a multiplier to calculate the total amount of funds to be paid to unsecured creditors, and applies no independent significance where the debtor has no PDI.[4]

1. Projected Disposable Income

Defining the term PDI involves the use of § 1325(b)(1)(A) and (B), which states that the court may not approve the debtor's plan unless, the value of the property to be distributed under the plan is not less than the amount of such claims, or the plan provides that all of the debtor's PDI to be received in the ACP will be applied to make payments to unsecured creditors under the plan.[5] Disposable income is defined as "current monthly income received by the debtor…less amounts reasonably necessary to be expended…."[6] Much debate revolves around whether disposable income and PDI are interrelated terms, and if so, whether courts must calculate the PDI using current monthly income.

"Current monthly income means the average monthly income from all sources that the debtor receives … derived during the 6-month period ending on the last day of the calendar month immediately preceding the date of the commencement of the case…."[7] Current monthly income is generally seen as a six month look back at the debtor's income. However, the term does not define the debtor's actual current monthly income at the effective date of the plan due to situations beyond the debtor's control, such as, changes in the debtor's income and expenses.

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[1] William L. Norton, Jr *"Disposable Income" test – Applicable commitment period*, 7 Norton Bankr. L. & Prac.3d § 151:23 April 2011, at 1, available at NRTN-BLP § 151:23.
[2] Whaley v. Tennyson, 611 F.3d 873, 877 (11th Cir. 2010).
[3] Norton, *supra* note 1, at 1.
[4] *Id.*
[5] 11 U.S.C. § 1325(b)(1).
[6] 11 U.S.C. § 1325(b)(2).
[7] 11 U.S.C. § 101(10A).

2. Applicable Commitment Period (ACP)

Pursuant to 11 U.S.C. § 1325(b)(4), ACP is defined as 3 years for the below median income debtor or not less than 5 years for the above median income debtor; however, it may be less than 3 or 5 years if the plan provides for full payment of all allowed unsecured claims over a shorter period.

3. U.S. Circuit Courts of Appeal Cases

The following cases from the 6th, 8th, 9th and 11th Circuits exhibit the objections made by Chapter 13 Trustees regarding the ACP and the Debtors' argument over the definition of ACP.[8] Two conflicting lines of cases exist in the discussion of ACP. One line views ACP as a minimum duration for a Chapter 13 case, whereas, the other views ACP as part of the calculation for PDI, the multiplier approach. The cases are discussed in chronological order of decision by Circuit Courts of Appeal.

Maney v. Kagenveama

Edward Maney, as Chapter 13 Trustee, objected to the confirmation of the Debtor's Chapter 13 plan, because the Debtor was an above median income debtor who proposed to make plan payments for less than five years.[9] The bankruptcy court confirmed the plan, and the Trustee appealed directly to the Ninth Circuit Court of Appeals.[10] The Trustee argued that the plan failed to comply with 11 U.S.C. § 1325(b)(4), which mandates a 60 month ACP for an above median income Debtor.[11] The Ninth Circuit opinion rests on the meaning of two phrases: projected disposable income and applicable commitment period.[12] The Court rejected the Trustee argument supporting the forward looking approach of PDI; however, the Court agreed with the Trustee's meaning of ACP.[13]

The trustee argued that PDI is based on the debtor's anticipated income during the plan and not merely an average of the debtor's prepetition income as computed on Form B22C.[14] The Ninth Circuit rejected this definition of PDI, because of its reliance on Congress's definition of disposable income within § 1325(b)(2), which defines disposable income as "current monthly income received by the debtor less amounts reasonable necessary to be expended."[15] The statute does not mention anticipated income; therefore, the Court reasoned that one simply takes the

[8] Maney v. Kagenveama, 541 F.3d 868, 871 (9th Cir. 2008); Coop v. Frederickson, 545 F.3d 652, 654 (8th Cir. 2008); Whaley v. Tennyson, 611 F.3d 873, 877 (11th Cir. 2010); Baud v. Carroll, 634 F.3d 327 (6th Cir. 2011).
[9] Kagenveama, 541 F.3d at 871.
[10] Id.
[11] Id.
[12] Id.
[13] Id. at 871, 874.
[14] Id. at 873-74.
[15] Id. at 874.

calculation for disposable income and multiplies it by the required period, such as 36 or 60 months.[16]

In addition, the Trustee urged the Court to use disposable income as a starting point for PDI, and then to supplement both future and historical finances of the debtor to make the final calculation.[17] The line of authority supporting this position was rejected by the Ninth Circuit because the code explicitly includes a formula to determine disposable income and Congress did not include a presumption for changed circumstances within the code.[18] The Ninth Circuit stated that Congress was aware that BAPCPA's PDI calculation produced a less favorable result for unsecured creditors; however, Congress did not correct the result even after requests were made by Chapter 13 Trustees.[19]

The Ninth Circuit agreed with the Trustee's position that the ACP is a temporal measurement that denotes the duration of the debtor's payments to unsecured creditors.[20] However, the Court disagreed with the Trustee's application of the ACP to a debtor with no PDI.[21] ACP is linked to § 1325(b)(1)(B) and the PDI calculation; therefore, the ACP will only apply in situations where the debtor has PDI.[22] If the Debtor's calculated disposable income is zero or negative, then the Debtor is not bound to make payments for the ACP.[23]

In addition, the Ninth Circuit rejected the Trustee's argument requesting that the plan of a debtor with zero or negative disposable income remain open for the ACP in order for the unsecured creditors to reap the benefit if the Debtor's financial situation improves.[24] The Court reasoned that the plan could be modified pursuant to § 1329 after confirmation so the court does not need to discuss those situations during confirmation.[25]

Coop v. Frederickson

The Chapter 13 Trustee appealed the Bankruptcy Court's ruling which was affirmed by the Bankruptcy Appellate Panel for the Eighth Circuit to the Eighth Circuit. The lower Courts held that an above median income Debtor with negative disposable income does not have an ACP.[26] One dissenting Judge in the BAP opinion wrote, "BAPCPA was intended by Congress to require that higher income debtors either pay 100% of unsecured claims, or make payments for a period of 5 years," and even though determining Congressional Intent is generally ambiguous, the house report clearly dictates "that the ACP is a durational requirement for the Chapter 13 plan, and not just, as the majority holds, a multiplier."[27] Due to the conflicting

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[16] Id.
[17] Id.
[18] Id.
[19] Id. at 875.
[20] Id.
[21] Id.
[22] Id. at 876.
[23] Id. at 876.
[24] Id. at 877.
[25] Id.
[26] Frederickson, 545 F.3d at 654.
[27] Id. at 656; See In re Frederickson, 375 B.R. 829, 837 (B.A.P. 8th Cir. 2007)(Federman, J., dissenting).

opinions and ambiguity in the meaning of PDI and ACP, the court must turn to extra textual sources.[28]

The Debtor argued that the ACP is not a temporal requirement when the debtor has no disposable income on the Form 22C even if the debtor has disposable income on Schedules I and J.[29] The Court rejected the Debtor's theory due to its conflict with the BAPCPA legislative purpose "to ensure debtors repay creditors the maximum they can afford".[30] The trustee argued that ACP in §1325(b)(1)(B) is a temporal requirement mandating payment of all disposable income during the period.[31] This theory was also rejected by the Court, because it reasoned that the above median income Debtor with a negative or small disposable income could have a plan confirmed that paid $1 for sixty months, whereas, another above median income Debtor's plan would be rejected that proposed $1000 per month for fifty-nine months.[32]

The Court determined that the Form 22C is sufficient for calculating an above median income debtor's income who has a positive disposable income; however, bankruptcy courts must use its discretion over the Form 22C calculation for an above median income debtors with negative disposable income so that the PDI will align with the actual income of the debtor.[33] In order to determine the debtor's PDI, the debtor's attorney should start with the disposable income calculation on Form 22C, and then he/she should consider changes that have occurred in the debtor's financial circumstances, actual current income, and expenses as reported on Schedules I and J.[34] Basing PDI on anticipated income rather than average past income and IRS expense calculations provides a realistic amount the debtor can pay and maximizes the amount received by his creditors.[35]

The 8th Circuit overruled the lower courts' decisions, holding that even though the debtor has no disposable income calculated by Form 22, the above median income Debtor may actually have income that can be used to pay unsecured creditors during the ACP.[36] Further, the Eighth Circuit distinguished its decision from the Ninth Circuit's decision in In re Kagenveama, because the Frederickson holding "will fully accomplish that which Congress intended to achieve through the enactment of BAPCPA."[37]

Whaley v. Tennyson

The Debtor was an above median income debtor who proposed a plan with payments for only 36 months.[38] Nancy Whaley, Chapter 13 Trustee objected to the confirmation of the Debtor's Chapter 13 plan on the basis that 11 U.S.C. § 1325(b)(4) requires an above median

[28] Frederickson, 545 F.3d at 656.
[29] Id.
[30] Id. at 657.
[31] Id.
[32] Id.
[33] Id. at 655, 657-58.
[34] Id. at 659.
[35] Id.
[36] Id.
[37] Id.
[38] Tennyson, 611 F.3d at 877.

income Debtor's Chapter 13 case to last at least 60 months unless the Debtor pays the unsecured claims in full in a shorter period of time.[39] The Debtor argued that the ACP did not apply to his plan because his disposable income was negative.[40] The bankruptcy court agreed with the Debtor and overruled the Trustee's objection to confirmation[41] and the district court affirmed.[42] The bankruptcy court and district court reasoned that the ACP exists solely for § 1325(b)(1)(B) calculation for PDI.[43] PDI is calculated by multiplying disposable income by the ACP, and where the disposable income is negative the PDI will be negative regardless of the ACP.[44]

The Trustee appealed the district court's decision to the 11th Circuit, and argued that the ACP was a time period which was the minimum duration of a debtor's Chapter 13 bankruptcy plan.[45] The 11th Circuit looked to the plain meaning of the statute and legislative intent to define ACP.[46] Congress drafted BAPCPA to limit the loopholes within Title 11 and to ensure that debtors repay creditors the maximum they can afford.[47] The 11th Circuit agreed with the Trustee that an above median income debtor is obligated to make payments for a 5 year ACP.[48] ACP is a temporal requirement that relates to the duration of Chapter 13 bankruptcy plans.[49] This is evidenced by the inclusion of § 1325(b)(4)(b) which allows the plan period to be less than three or five years if the plan provides for full payment in a shorter period, and works in conjunction with § 1322(d) delineating the maximum period of a plan as five years.[50] The confirming of an above the median income debtor's plan for less than five years deprives unsecured creditors the full opportunity to recover on their claims.[51]

Baud v. Carroll

Krispen Carroll, Chapter 13 Trustee, objected to the Debtor's plan confirmation, because it failed to meet the five year duration that is required by § 1325(b).[52] The Trustee appealed the bankruptcy and district court holdings to the U.S. Court of Appeals for the Sixth Circuit, and argued that the Debtor's ACP should be five years since the Debtor was an above median income.[53] The Sixth Circuit held that projected disposable income should be a temporal, forward-looking calculation, and that the applicable commitment period applies to Debtors with zero or negative projected disposable income.[54]

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[39] Id. at 875.
[40] Id. at 876.
[41] Id. at 875.
[42] Id.
[43] Id. at 876.
[44] Id.
[45] Id.
[46] Id. at 877.
[47] Id. at 878.
[48] Id. at 877.
[49] Id. at 880.
[50] Id. at 878.
[51] Id. at 879.
[52] Carroll, 634 F.3d at 330.
[53] Id.
[54] Id. at 331.

Pre-BAPCPA calculation of disposable income included the use of the Debtor's "actual financial circumstances, using the best information available at the time of confirmation"; however, Form 22C, which is used for BAPCPA Chapter 13 cases, includes standardized expenses that are artificial and not based on the debtor's financial circumstances.[55] The Baud Court followed the Supreme Court's forward-looking approach in Lanning that calculates the Debtor's PDI income by using "known or virtually certain changes" in the debtor's income at the time of confirmation.[56] The Sixth Circuit adopted a forward-looking approach to calculate the Debtor's projected disposable income, because it is consistent with pre-BAPCPA practices and BAPCPA's core purpose of ensuring that debtors repay creditors to the best of their ability.[57]

In addition, Section 1325(b)(4) requires full payment of allowed unsecured creditors for the confirmation of plans under 3 or 5 years in length.[58] The temporal requirement applies to Debtors irrespective of whether their projected disposable income is positive, zero, or negative at the time of plan filing.[59] Allowing an above median income debtor to confirm a plan for less than five years would "deprive unsecured creditors" their "full opportunity to recover."[60]

[55] Id. at 331, 334.
[56] Id. at 334; Hamilton v. Lanning, 130 S.Ct. 2464, 2473-77 (2010)(The U.S. Supreme Court applied a forward-looking approach to the Debtor's projected disposable income. Debtor had received a onetime buyout payment during the six months prior to the filing of her case).
[57] Carroll, 634 F.3d at 343; See also Ransom v. FIA Card Servs., N.A., 131 S.Ct. 716 (2011)(The U.S. Supreme Court interpreted the statutory provisions to serve BAPCPA's purpose, and held that a debtor is only allowed to deduct applicable expenses depending on the Debtor's actual financial circumstances).
[58] Carroll, 634 F.3d at 350.
[59] Id. at 352.
[60] Id. at 354; See Tennyson, 611 F.3d at 879.

Chapter 13 Roundtable

Proofs of Claim

Presented by: Melissa A. Youngman

Proofs of Claim – Standing

- Constitutional Standing requires:
  - Injury in fact – concrete and particularized injury to a legally protected interest
  - Causation – a fairly traceable connection between injury and alleged actions
  - Redressability – non-speculative likelihood that injury can be remedied by relief requested
- Prudential Standing (judicially created) requires:
  - Party seeking relief must be "real party in interest"
- Other standing considerations regarding mortgage claims are codified by state law under the UCC. Rights of third parties in promissory notes are governed by Article 3.

Proofs of Claim – Standing

- Mortgage notes are governed by state law regarding negotiable instruments (i.e. the UCC):
  - §3-104 : defines negotiable instrument
  - § 3-201: defines negotiation
  - § 3-203 governs transfers
  - § 3-204: governs indorsements
  - § 3-301: governs who is entitled to enforce a negotiable instrument (i.e. standing)
  - §3-305: defines holder in due course
- Merger Doctrine
  - The doctrine of merger – the debt merges into the instrument itself.
  - This principal requires the holder in due course to produce the original note, or lost note affidavit on demand
  - Original note will be returned to debtor once obligation has been satisfied

Proofs of Claim – Standing

- UCC §3-104 defines "negotiable instrument" as follows:
  - an unconditional promise or order to pay a fixed amount of money;
  - payable to bearer or to order at the time it is issued or first comes into possession of a holder;
  - payable on demand or at a definite time; and
  - Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, with certain exceptions

Proofs of Claim – Standing

- Three Ways to Obtain Standing under UCC with Possession:
  - Holder in due course with possession of original note endorsed in blank
  - Holder in due course with possession of original note endorsed to itself
  - Non-holder with possession of original note with rights of holder in due course
- To Obtain Standing without Possession (Lost Note Affidavit), must show:
  - Had possession and was entitled to enforce when note lost/destroyed, or acquired ownership from that person
  - Loss was not result of transfer or lawful siezure
  - Cannot reasonably obtain possession (destroyed, unknown wherabouts, or in possession of someone who cannot be located or is not amendable to service)
  - Must prove terms of instrument and rights to enforce

Proofs of Claim – Standing

- UCC §3-305(b): a holder in due course is someone who
  - Takes for value
  - In good faith
  - With no notice of defect or default
- UCC §3-301: Defines who is entitled to enforce a negotiable instrument:

  (1) The holder of the note:
  - Under UCC §1-201(b)(21)(A), a holder is a person who has possession, and either bears an indorsement payable
    - to the party in possession;
    - to bearer/In blank

  (2) A non-holder in possession of the note with rights of a holder
    - This occurs when a "transfer" of the note is accomplished (as defined by UCC §3-203(a), but not "negotiation" (as defined by UCC §3-201)

Proofs of Claim – Standing

- UCC §3-204 governs indorsements
  - A signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words, is made on an instrument for the purpose of
    - (i) negotiating the instrument;
    - (ii) restricting payment of the instrument; or
    - (iii) incurring indorser's liability on the instrument
  - For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument
  - Blank indorsements should include unambiguous language like "pay to the order of"

Proofs of Claim – Standing

- UCC §3-201 defines negotiation
  - a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder
  - if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.

Proofs of Claim – Standing

- What if the negotiation failed, how can non-holder establish its right to enforce?
- By showing a Transfer under UCC§3-203?
  - A negotiable note is transferred when it is delivered by a person other than the mortgagor for the purpose of giving the transferee the right to enforce it.
  - Delivery occurs when there has been a voluntary transfer of possession of the note.
  - Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course
  - Without holder status (and presumption of right to enforce), the possessor of the note must show both the fact of delivery and the purpose of the delivery to qualify as the "person entitled to enforce".
- If a creditor cannot show Article 3 negotiation, but has possession of the note, the creditor may still be able to prove it has standing to enforce the note if it can show that note was transferred to it through some other means – i.e. a bulk sale of notes without indorsements on individual notes. See In re Veal, 2011 WL 2304200 (9th Cir. BAP, June 10, 2011).
- Article 9 of the UCC governs the sale of notes – UCC §9-109(a)(3) and should be consulted to determine who owns note in a sale situation.

Proofs of Claim – Standing

- How is a note transferred?
  - A negotiable note is transferred when it is delivered by a person other than the mortgagor for the purpose of giving the transferee the right to enforce it.
  - Delivery occurs when there has been a voluntary transfer of possession of the note.
  - Under UCC §3-203(b), the transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument (i.e. a non-holder with rights of a holder)
- What does all this "non-holder" business mean for standing?
  If a creditor cannot show Article 3 negotiation, but has possession of the note, the creditor may still be able to prove it has standing to enforce the note if it can show that note was transferred to it through some other means – i.e. a bulk sale of notes without indorsements on individual notes. See In re Veal, 2011 WL 2304200 (9th Cir. BAP, June 10, 2011)

Proofs of Claim – Standing

- • Greer v. O'Dell, 305 F.3d 1297 (11th Cir. 2002) - Servicers have standing in proceedings involving the loans which they service by virtue of their pecuniary interest in the debts they service
- • In re Jorge Canellas, 2010 WL 571808 (Bankr. M.D.FL. 2010) Court denied MFR for lack of standing, despite the fact that the court found that:
  - there were no perfection issues
  - that the mortgage remained unsatisfied, and
  - legal cause existed to vacate the stay
  - Why? Mortgagee trustee presented no records or testimony that it was holder of note.
    - No evidence regarding actual possession of the note
    - No copy of note endorsement
    - Allonge dated for a date prior to the date assignee came into existence
    - Allonge was not notarized, and signature was not dated
    - No evidence that signatory of the allonge had authority to sign allonge and mortgage

Proofs of Claim – Standing

- In re Clark (Bankr. M.D.FL. 2010) – creditor did not establish an accurate chain of title demonstrating how the loan documents made their way through MERS to movant, but Court nevertheless granted relief from stay over trustee's objection
  - Why?
    - Secured creditor demonstrated that it had actual possession of the note and mortgage, and
    - the note was endorsed in blank
      - (Fla. Stat. § 673.2051(1), (2) – an instrument bearing an endorsement in blank becomes payable to the party in possession of the instrument, and may be transferred by possession alone.)

Proofs of Claim – Standing

- Kemp v. Countrywide Home Loans, Inc., 2010 WL 4777625 (Bankr. N.D.NJ. Nov. 16, 2010). Chapter 13 debtor moved to expunge Countrywide's proof of claim. Motion granted because:
  - No evidence showing that bank was the holder of the note under NJ UCC
  - Failed to show note was properly endorsed
  - No evidence of its right to enforce note
- Duetsche Bank v. Tarantola, unreported decision (D.AZ., July 29, 2010). Court found Duetsche Bank did not have standing to file a motion for relief because:
  - Allonge out of MERS appeared to have been created by attorneys due to dates
  - Allonge was not attached to claim
- Schwartz v. HomeEq Servicing (In re Schwartz), 2011 WL 1331963 (Bankr. D. Mass.): debtor raised issue of whether creditor had standing at commencement of foreclosure proceeding, court found creditor met burden by presenting evidence of chain of title.
- Densmore v. Litton Loan Servicing, LP, 445 B.R. 307 (D. Vermont Mar. 21, 2011): court found issue of fact remained on whether Litton was holder of note at commencement of bankruptcy case, and whether the original lender indorsed the note in blank

Proofs of Claim – In General

- §501 – governs who may file proofs of claim
  - Creditor
  - Debtor or trustee if creditor does not file timely claim
  - Co-obligor/co-debtor can file if creditor does not file timely claim
- §502(a) – A claim is deemed allowed unless an objection is filed
- Rule 3002 (c) – deadline to file in chapter 13 is 90 days after the first date set for meeting of creditors
- Rule 3001 – governs what must be included in claim

Proofs of Claim – Rule 3001

- (a) Form and Content. A proof of claim is a written statement setting forth a creditor's claim. A proof of claim shall conform substantially to the appropriate Official Form. (Official Form B10).
- (b) Who May Execute. A proof of claim shall be executed by the creditor or the creditor's authorized agent except as provided in Rules 3004 and 3005.
- (c) Claim Based on a Writing. When a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.
- (d) Evidence of Perfection of Security Interest. If a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected.
- (f) Evidentiary Effect. A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.

Proofs of Claim – Porter/Twomey Study

- 52.8% of filed claims involving mortgages did not include mandatory attachments as set forth in Rule 3001
  - Copy of writing shall be filed with POC – 3001 (c)
  - Evidence of perfection of security interest shall be filed with POC – 3001(d)
  - If claim includes interest or other charges, itemization shall be attached – Official Form 10
- In aggregate, mortgage servicers asserted debtors owed at least $1 billion more than debtors asserted they owed
- In an effort to address issues raised by study NACTT worked with servicers to develop "Best Practices" for trustees and mortgage servicers
- "Best Practices" adopted by NACTT, NACBA, CMIS and AFN in May 2008

Proofs of Claim – Best Practices

- "Best Practices for Trustees and Mortgage Servicers in Chapter 13" can be found at: http://www.nactt.com/infocenter/MortgageServicersChapter13.pdf
- In general, "Best Practices" provides guidelines regarding
  - Attorney's fees
  - Itemization of fees and costs
  - Escrow analysis
  - Payment change notification
  - Servicer designated point of contact for loan modifications
  - Dedicated servicer phone line for chapter 13 trustees
  - When to apply late fees on post-petition payments

Proofs of Claim –Best Practices

- POC should
  - Clearly identify type of loan and various contractual payment options available to the debtor during the bankruptcy
  - Provide breakdown of monthly payment into principal, interest, escrow and PMI components
- Attorney's Fees:
  - Reasonable and actually incurred fees for pre-confirmation plan review and claim preparation should be included in POC
  - Reasonable attorney's fees for the filing of a motion for relief should be clearly identified and included in any agreed order on the motion for relief
- Itemization of Fees and Costs:
  - Instructions can be found on Official Form 10
  - Fees and costs should be clearly identified
  - Avoid the generic term of "miscellaneous" or "other"

Proofs of Claim –Best Practices

- Escrow Analysis:
  - Servicers should perform an escrow analysis as of the petition date and yearly thereafter and provide copy to debtor, debtor's attorney and the trustee (RESPA also requires this)
  - Servicers should not include any pre-petition costs, fees or escrow shortages in any post-petition escrow analysis
- Payment Change Notifications:
  - Servicers should provide formal notice to court, debtor, debtor's attorney, and trustee (if in trustee pay all jurisdiction) of payment changes, outlining all post-petition contractual fees and costs not previously approved by the court, but which are due and owing since the prior escrow analysis or date of filing (whichever is later)
  - In the absence of objection, trustees should pay the additional fees and costs to insure debtor is current at the conclusion of the case

Proposed Changes to Rule 3001 & 3002

- Earliest effective date will be December 1, 2011
  - Current text of rules not clear as to whether the Rules will only apply in cases filed after December 1, 2011 or in all cases in which are active as of December 1, 2011
- Proposed changes to Bankruptcy Rules and Official Forms regarding Proofs of Claim:
  - Bankruptcy Rule 3001 (prescribes in greater detail the supporting information required to accompany certain proofs of claim)
  - Bankruptcy Rule 3002.1 (new rule implements § 1322(b)(5) of the Bankruptcy Code, which permits a chapter 13 debtor to cure a default and maintain payments of a home mortgage)
  - Bankruptcy Form 10 (clarifies that, consistent with Rule 3001(c), writings supporting a claim or evidencing perfection of a security interest - not just summaries - must be attached to the proof of claim)

Proposed Changes to Rule 3001 & 3002

- Federal Rulemaking is a seven-step process:
  - Step One: Initial consideration by Advisory Committee
  - Step Two: Publication for public comment (ended February 2010)
  - Step Three: Consideration of the public comments and final approval by the Advisory Committee
  - Step Four: Approval by the Standing Committee (June 2010)
  - Step Five: Judicial Conference approval (September 2010)
  - Step Six: U.S. Supreme Court approval (April 2011)
  - Step Seven: Congressional review
- Proposed Amendments to Bankruptcy Rules are currently pending Congressional Review (Step Seven)

Proposed Rule 3001

- Proposed Rule 3001 adds new sub-paragraphs (c)(1)&(2)

- Text of Proposed Rule 3001 – breaks (c) into subparts (1) and (2)

(c) SUPPORTING INFORMATION.

(1) *Claim Based on a Writing.* When a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim. [This is the text of the current Rule 3001 (c)]

Proposed Rule 3001

- Text of Proposed Rule 3001(c)(2)

(c) SUPPORTING INFORMATION.

(2) *Additional Requirements in an Individual Debtor Case; Sanctions for Failure to Comply*. In a case in which the debtor is an individual:

(A) If, in addition to its principal amount, a claim includes interest, fees, expenses, or other charges incurred before the petition was filed, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim.

(B) If a security interest is claimed in the debtor's property, a statement of the amount necessary to cure any default as of the date of the petition shall be filed with the proof of claim.

(C) If a security interest is claimed in property that is the debtor's principal residence, the attachment prescribed by the appropriate Official Form shall be filed with the proof of claim. If an escrow account has been established in connection with the claim, an escrow account statement prepared as of the date the petition was filed and in a form consistent with applicable nonbankruptcy law shall be filed with the attachment to the proof of claim.

Proposed Rule 3001

- Text of Proposed Rule 3001(c)(2) continued

(D) If the holder of a claim fails to provide any information required by this subdivision (c), the court may, after notice and hearing, take either or both of the following actions:

(i) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(ii) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

Proposed Rule 3002.1

- Text of Proposed Rule 3002.1

Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

(a) IN GENERAL. This rule applies in a chapter 13 case to claims that are (1) secured by a security interest in the debtor's principal residence, and (2) provided for under § 1322(b)(5) of the Code in the debtor's plan. [i.e. claim will be paid in debtor's plan].

(b) NOTICE OF PAYMENT CHANGES. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest rate or escrow account adjustment, no later than 21 days before a payment in the new amount is due.

(c) NOTICE OF FEES, EXPENSES, AND CHARGES. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

Proposed Rule 3002.1

- Text of Proposed Rule 3002.1 continued

(d) FORM AND CONTENT. A notice filed and served under subdivision (b) or (c) of this rule shall be prepared as prescribed by the appropriate Official Form, and filed as a supplement to the holder's proof of claim. The notice is not subject to Rule 3001(f).[i.e. no prima facie effect]

(e) DETERMINATION OF FEES, EXPENSES, OR CHARGES. On motion of the debtor or trustee filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.

(f) NOTICE OF FINAL CURE PAYMENT. Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision (g). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.

Proposed Rule 3002.1

- Text of Proposed Rule 3002.1 continued

(g) RESPONSE TO NOTICE OF FINAL CURE PAYMENT. Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).

(h) DETERMINATION OF FINAL CURE AND PAYMENT. On motion of the debtor or trustee filed within 21 days after service of the statement under subdivision (g) of this rule, the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts.

Proposed Rule 3002.1

- Text of Proposed Rule 3002.1 continued

(i) FAILURE TO NOTIFY. If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:

(1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

How will the Rule Changes Effect Daily Practice?

- New forms must be filed with respect to claims secured by the Debtor's principal residence:
  - Creditor must complete and file Attachment A to Official Form 10, and Supplement 1 or 2, if applicable
  - If payments on principal residence mortgage claim include escrow deposits, then creditor must also attach an escrow statement to POC

Proposed Forms – Official Form 10

- Official Form 10 – Revised Proof of Claim form to reflect Rule changes
  - New Section 3b: Creditor may input a Uniform Claim Identifier in this box to facilitate automated receipt, distribution, and posting of payments made by EFT by chapter 13 trustees
  - New Language in Section 4: explains that the interest rate in effect at the time the bankruptcy case was filed should be listed on the POC
  - New Language in Section 7: explains what documents need to be attached pursuant to proposed Rule 3001(c) and explains that summaries of supporting documents may only be attached in addition to the documents themselves
  - Revised Section 8 (signature box): Intended to "impress upon the filer the duty of care that must be exercised in filing a proof of claim"
  - Includes a declaration to be signed under penalty of perjury and certifying that the claim satisfies the requirements of Rule 9011;
  - Requires signor to provide his/her name, company, address and phone number, and to check off a box identifying his/her self as
    - the creditor
    - the creditor's authorized agent - must attach copy of power of attorney
    - the trustee or debtor
    - a guarantor, surety, indorser, or other codebtor

Proposed Forms - Attachment A Principal Residence Mortgage Claims

- Attachment A - "Mortgage Proof of Claim Attachment" is a 3-part form to be filed as an attachment to all principal residence mortgage claims, as required by Proposed Rule 3001(c)(2)
  - Part 1: Statement of Principal and Interest as of the Petition Date
  - Part 2: Statement of Prepetition Fees, Expenses and Charges
    - Late charges
    - NSF Fees
    - Filing fees and court costs
    - Bankruptcy/POC fees
    - Appraisal/BPO fees
    - Property inspection fees
    - Tax advances (non-escrow)
    - Insurance advances (non-escrow)
    - Escrow shortage or deficiency (not included in payments due)
    - Property preservation expenses
    - Other charges, fees or expenses not specified above
  - Part 3: Statement of Amount Necessary to Cure Pre-Petition Default as of the Petition Date

Proposed Forms - Supplement 1 Payment Change Notification

- Supplement 1 – "Notice of Mortgage Payment Changes" is a 4-part supplemental claim form reflecting any changes to the debtor's on-going monthly mortgage payments, as required by Rule 3002.1
  - Part 1: Escrow Payment Adjustment – must attach escrow statement
  - Part 2: Mortgage Payment Adjustment – must attach rate change notice
  - Part 3: Other Payment Change – must attach supporting docs (loan mod)
  - Part 4: Signature under Penalty of Perjury by Creditor or Authorized Agent (authorized agents must attach copy of Power of Attorney)
- Must be filed as a supplement to POC at least 21 days before the new payment becomes due and must be served on debtor, debtor's counsel and the trustee

Proposed Forms - Supplement 2 Notification of Postpetition Fees and Costs

- Supplement 2 – "Notice of Post-Petition Mortgage Fees, Expenses, and Charges" is a 2-part supplemental claim form providing notice of postpetition fees and costs, as required by Rule 3002.1
- Part 1: Itemization of Postpetition Fees, Expenses and Charges
  - Late charges
  - NSF Fees
  - Filing fees and court costs
  - Bankruptcy/POC fees
  - Appraisal/BPO fees
  - Property inspection fees
  - Tax advances (non-escrow)
  - Insurance advances (non-escrow)
  - Property preservation expenses
  - Other charges, fees or expenses not specified above
  - Should not include any escrow account disbursements or amounts previously itemized in a notice filed on the same claim in the same case or that have already been ruled upon by the Court
- Part 2: Supplement must be signed under Penalty of Perjury by Creditor or Authorized Agent (authorized agents must attach copy of Power of Attorney)
- Must be filed within 180 days after recoverable post-petition fees, expenses or charges are incurred and must be served on debtor, debtor's counsel and trustee

How will the Rule Changes Effect Daily Practice?

- Mortgage Servicers will now be required to file supplemental claims 30 days prior to any payment change
  - Claims register vs. case docket
  - Burdensome on creditors (HELOC/other variable rate loans can change monthly
- Once plan is completed, there is a new process for deeming the mortgage current
  - Creditor's responses will be filed on claims docket as supplemental claim
  - Creditor could be subject to sanctions if it fails to file a response

How will the Rule Changes Effect Daily Practice?

- Penalties for failure to provide the required disclosures will be strengthened, but incomplete or missing disclosures may not result in disallowance of the claim
  - Disallowance of Claim still controlled by Section 502(b)of the Bankruptcy Code – Committee notes recognize that failure to provide required information or documents is not, in itself, a grounds for disallowance of a claim
  - Exclusionary Sanctions – At the court's discretion, and after notice and a hearing, a creditor may be precluded from using missing required POC disclosures as evidence in a later contested matter or adversary proceeding, unless the court finds that the failure to disclose was "substantially justified…or harmless"
  - "Other appropriate relief including reasonable expenses and attorney's fees"

How will the Rule Changes Effect Daily Practice?

- Will the changes establish a uniform practice for the filing and review for claims filed by mortgage servicers across jurisdictions?
- Current local rules/standing orders should still be obeyed unless they directly conflict with the New Rules
- New Rule requiring the filing of supplemental claims instead of payment changes may be very burdensome on creditors, and may make it more difficult for debtors to find information about payment change

Chapter 13 Roundtable

Property of the Estate

Presented by: Melissa A. Youngman

The Chapter 13 Estate Defined

- Commencement of a case under 11 U.S.C. § 301, 302, or 303 creates an estate.
  - Section 541 applies to any type of bankruptcy case, and generally defines property of the estate to include:
    - Property Interests at Commencement of Case: all interests (legal or equitable) in property the debtor has as of the commencement of the debtor's case
    - 180 Day Property : includes inheritances, life insurance proceeds, or property settlement proceeds the debtor acquires or becomes entitled to acquire within 180 days of the commencement of the case

The Chapter 13 Estate Defined

- Examples of property interests not part of estate under §541:
  - Fiduciary powers of the debtor (i.e. power that the debtor may exercise solely for the benefit of another)
  - Interest in a non-residential lease that has expired by its own terms
  - Eligibility to participate in any program authorized under the Higher Education Act of 1965
  - Interests in liquid or gaseous hydrocarbons subject to a farm-out agreement
  - Funds placed into an education retirement account not later than 365 days prior to the filing of the case
  - Wage withholdings or employee contributions to an ERISA benefit plan, deferred compensation plan under 467 of the IRC, or a tax-deferred annuity under 403(b) of the IRC, or to a health insurance plan regulated by state law will not be considered disposable income under 1325(b)(2)
  - Pawned items (i) in the possession of the transferee; (ii) where there is no obligation to repay, redeem, or buy back at a stipulated price; and (iii) where items have not been redeemed in a timely manner

The Chapter 13 Estate Defined

- In addition to capturing the debtor's property as of the filing date, and unlike a chapter 7 or 11 case, the chapter 13 estate "looks forward" to include post-petition assets as part of the bankruptcy estate, as defined by Section 1306(a)
- Under §1306(a) Property of the chapter 13 estate generally includes:
  - Section 541 Property
  - After-Acquired Property – property acquired by debtor after commencement of the case, but before the case is closed, dismissed or converted

The Chapter 13 Estate Defined

11 U.S.C. § 1306:

(a) Property of the estate, includes, in addition to the property specified in section 541 of this title –

(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case, but before the case is closed, dismissed or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed or converted to case under chapter 7, 11, or 12 of this title, whichever occurs first.

(b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

Vesting - §1306 & §1327

Section 1327 re-vests property in debtor on confirmation

11 U.S.C. § 1327. Effect of Confirmation.

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all property of the estate in the debtor

Vesting - §1306 & §1327

Conflict between 1306(a) & 1327(b) has resulted in Split in Circuits

11 U.S.C. § 1306:

(a) Property of the estate, includes, in addition to the property specified in section 541 of this title –

(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case, but before the case is closed, dismissed or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed or converted to case under chapter 7, 11, or 12 of this title, whichever occurs first.

11 U.S.C. § 1327. Effect of Confirmation.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all property of the estate in the debtor

Vesting - §1306 & §1327

Issue: What does "vesting" mean under §1327(b)?

- Absolute ownership and control?
- Mere possession?
- If all estate property vests in the debtor at confirmation, does the estate continue to exist?
- If the estate does continue to exist, what property remains in the estate until the case is closed, dismissed or converted under § 1306(a)?

Vesting - §1306 & §1327

Four Theories of Vesting have Resulted:

- Preservation –On one extreme is preservation theory, which provides that vesting at confirmation does not transfer absolute ownership to the debtor. All property, including after-acquired property and earnings remains within the estate until the case is closed, dismissed or converted. Courts applying this theory rely heavily on §1306(a).
- *Criticism* – this approach defines vesting as something less than absolute ownership or control and makes §1327 seem like an unnecessary provision, since the debtor is already entitled to possession of the property prior to confirmation.

Vesting - §1306 & §1327

Four Theories of Vesting (continued):

- Transformation – vesting at confirmation terminates the estate, except to the extent certain assets are necessary for performance of the plan (i.e. wages necessary to fund play payments remain part of the estate).
  - Adopted by 11th Circuit in In re Telfair (11th Cir. 2000) (In a later decision, the 11th Cir. distinguished this case from cases involving assets acquired after confirmation.)

Vesting - §1306 & §1327

Criticism of Transformation Theory:

- Plain language does not support this interpretation. Neither provision distinguishes between property necessary for execution of the plan and non-essential property
- Whether property is "essential" to performance of the chapter 13 plan could change during course of confirmation (i.e. a work vehicle could be deemed essential at confirmation, but what happens if debtor changes jobs later?)
- Favors post-petition creditors, who will not need stay relief post-confirmation unless they are seeking to enforce their claims against property deemed essential to plan performance

Vesting - §1306 & §1327

Four Theories of Vesting (continued):

- Termination – this theory is the opposite extreme from preservation. Under this theory, all property of the estate is vested in the debtor upon confirmation , with confirmation effectively terminating the chapter 13 estate
  - Adopted by 9th Circuit B.A.P. in In re Jones; 420 B.R. 506 (9th Cir. BAP 2009)
- *Criticism of Termination Theory:*
  - Other provisions of the Code seem to assume the existence of the estate after confirmation. For example, §§345(a), 347(a), 704(2), and 1302(b) all provide for general duties of the chapter 13 trustee that must be performed after confirmation
  - Seems to render Section 1306(a) meaningless

Vesting - §1306 & §1327

Four Theories of Vesting (continued):

- Reconciliation – Property of the estate that exists at the time of confirmation vests in the debtor free of any claims of creditors. The estate does not cease to exist, it continues to be funded by the debtor's regular income and all assets acquired after confirmation.
  - Adopted by first circuit in Barbosa v. Solomon, 235 F.3d 31 (1st Cir. 2000)
  - Adopted by eighth circuit in Sec. Bank of Marshalltown, Iowa v. Neiman, 1 F.3d 687 (8th Cir. 1993)
  - Adopted by eleventh circuit in In re Waldron, 536 F.3d 1239 (11th Cir. 2008)(holding that its earlier decision in Telfair only resolved tension between 1306(a) & 1327(b) with respect to property that existed at confirmation; in cases involving assets acquired after confirmation, (here, a claim for under-insured motorist benefits) the court found the reconciliation theory to be more persuasive and in line with plain-language of statutes.

Vesting - §1306 & §1327

Criticism of Reconciliation Theory:

- Attempts to give effect to both 1327 and 1306, but does it?
- Seems to hold that the debtor must fund claims against the estate with assets that are vested in him free and clear of any creditor claims.
- Could have a situation where a debtor who converts prior to plan completion ends up in a better situation than a debtor who completes his plan payments. For example, if debtor acquired a substantial asset after confirmation, under this theory, it would become property of the estate until the case is closed, dismissed or converted. If debtor converted to chapter 7, the new asset would not become part of chapter 7 estate under §348(f)(1) because it did not exist at commencement of case. (But see §348(f)(2) (bad-faith exception)). Doesn't this discourage completion of plan in this type of scenario?

Vesting - §1306 & §1327

Solution to Differing Vesting Interpretations:

- §1327(b) provides "Except as otherwise provided in the plan or the order confirming the plan…."
- Some courts include provision in confirmation orders stating that property of the estate does not vest in the debtor at confirmation (NDGA)

Conversion Issues - §348(f)

§348(f) governs what property remains in estate upon conversion

11U.S.C. §348(f)

(1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title –

(A) property of the estate in the converted case shall consist of property of the estate, as of the filing date of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion;

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(2) If the debtor converts a case under chapter 13 of this title to a case under another chapter of this title in bad faith, the property of the estate in the converted case shall consist of the property of the estate as of the date of conversion. [*This exception does not apply if conversion did not result from debtor's own motion*].

Conversion Issues - §348(f)

- Issue – what does "possession and control" under§ 348(f)(1)(A) mean?
- Four Scenarios
- Scenario One: Debtor owns a house in fee simple in which she resides as of the commencement of her chapter 13 case. Her plan is confirmed and the property re-vests in her under section 1327(b). She then converts her case to a chapter 7 case.

Conversion Issues - §348(f)

- Answer: She has both possession and control of the house. Therefore, the house is property of the chapter 7 estate.

Conversion Issues - §348(f)

- Scenario Two: What if the debtor moves out of the house between confirmation and conversion, but rents the house to her cousin?

Conversion Issues - §348(f)

- Answer: The house is no longer in her possession, but is still theoretically within her control. Accordingly, it would be deemed property of the estate.

Conversion Issues - §348(f)

- Scenario Three: What if debtor sells the house between confirmation and conversion?

Conversion Issues - §348(f)

- Answer: It would no longer be in her possession or control, and would not be deemed part of the chapter 7 estate.

Conversion Issues - §348(f)

- Scenario four: What if debtor sold house to her brother between confirmation and conversion, but then leased it back from him as her residence?

Conversion Issues - §348(f)

- Answer: She has possession and control, but her only interest remaining in the property is her leasehold interest. Accordingly, the leasehold interest would be property of the chapter 7 estate.