Concurrent Breakout

Looking Ahead: What's in Store for Consumer Practitioners in 2011

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Educational Materials

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A. EXEMPTIONS

1. ***Schwab v. Reilly*, __ U.S. __, 130 S.Ct. 2652 (2010)**
2. ***Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992)**
3. ***In re Gebhart*, 621 F.3d 1206 (9th Cir. 2010)**
4. ***In re Messina*, 386, Fed. Appx. 152, 2010 WL 2712141 (3rd Cir. 2010)**

(1) Supreme Court reverses Circuit Court's in-kind exemption holding

The debtor in this case had valued her kitchen equipment at $10,718 and claimed an exemption in that same dollar amount (i.e., an in-kind exemption). The trustee did not object within the 30-day period allowed by Rule 4003(b). When the trustee sought to sell the equipment, the debtor objected to his motion claiming that the asset had been removed from the estate through an exemption, the deadline to object to which had already expired. The Bankruptcy Court, District Court, and Circuit Court all ruled in favor of the debtor. The Supreme Court reversed, agreeing with the trustee (and the United States and National Association of Bankruptcy Trustees as *amici curiae)* that the Bankruptcy Code defines the property the debtor is authorized to exempt as an interest, the value of which may not exceed a certain dollar amount in a particular type of asset, not as the asset itself. Accordingly, the trustee had no duty to object to an exemption within the limits the Code allowed.

The Supreme Court determined that the Third Circuit erred in holding that the Supreme Court's earlier decision in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992), dictated a contrary conclusion. While *Taylor*, likewise concerned a trustee's obligation to object to the debtor's entry of a "value claimed as exempt," there was no colorable basis for claiming the exemption. In *Schwab v. Reilly*, the opposite was true as the amounts listed by the debtor as the value of the claimed exemptions were facially within the limits prescribed by the Code and raised no warning flags that warranted an objection. *Taylor* did not rest on an "unstated premise" that a debtor who exempts the entire reported value of an asset is claiming the "full amount," whatever it turns out to be. Instead, *Taylor* stood for the straightforward proposition that an interested party must object to a claimed exemption if the amount the debtor lists as the "value claimed exempt" is not within statutory limits. The Supreme Court concluded that the debtor's approach "threatens to convert a fresh start into a free pass." The Supreme Court's ruling effectively overturns *In re Green*, 31 F.3d 1098 (11th Cir. 1994) where the Eleventh Circuit also interpreted *Taylor* to mean that an in-kind exemption was an indication of a claim that the asset was being fully exempted regardless of its actual value, thereby requiring an objection to the exemption claimed.

(2) Trustees entitled to sell homes based on post-petition appreciation

In the two consolidated cases, individual debtors had filed Chapter 7 petitions in 2003 and 2004 respectively and obtained their discharge later in the same year. In each case, there was disclosed equity in the homes that did not exceed the lawful exemption amounts. Debtors had, in fact, listed the dollar amount of equity in each case as exempt. In neither case did the trustee file an objection to the claimed exemption.

Because of other assets in the cases, the estates remained open. The trustees believed that while the cases remained open, the homes had appreciated in value significantly. In one case, the trustee sought to employ a broker to sell the home and was met with a motion by the debtor to compel abandonment. The bankruptcy court ruled in favor of the trustee, and the district court affirmed. Debtor then appealed to the Ninth Circuit. In the other case, due to payment defaults, the lender had filed a stay relief motion that the trustee opposed on the basis of the equity. The bankruptcy court ruled against the trustee on the basis of the failure to object to the exemption. The Ninth Circuit BAP reversed and held that the appreciation in the homestead belonged to the estate. That decision was also appealed to the Ninth Circuit. The Ninth Circuit affirmed both the district court and BAP opinions, holding that the increase in value belonged to the bankruptcy estates in each of the cases. *In re Gebhart*, 621 F.3d 1206 (9th Cir. 2010). In light of *Schwab v. Reilly*, 130 S.Ct. 2652 (2010), it was clear to the Ninth Circuit that the trustee had no obligation to object to the exemptions claimed in each case even though the value of the claimed exemptions plus the amount of the encumbrances was, in each case, equal to the market value of the residences. The failure to object did not remove the entire asset from the estate. The Ninth Circuit noted that in *Reilly*, the debtor had undervalued the asset where as in these cases they were accurately valued. Nevertheless, any additional value in the property remained property of the estate regardless of whether the property increased in value after the filing. Moreover, the Circuit Court held that what is frozen as of the date of the filing of a petition is the value of the debtor's exemption, not the fair market value of the property claimed as exempt. Finally, the Circuit Court acknowledged that, in some instances, trustees might be inclined to leave the case open longer than necessary. However, the remedy was to seek an abandonment under § 554(b) or hold the U.S. Trustee to its oversight obligations. Denying creditors assets that had not been exempted was not an available remedy. [*Comment*: Based on this holding, certainly trustees in the Ninth Circuit will be tempted to keep open cases during rising real estate markets, and debtors will be tempted to move quickly for abandonment under § 554(b).]

(3) Another Circuit applies *Schwab v. Reilly*

The Trustee did not object to the $36,900 homestead exemption claimed by the debtors, and subsequently brought an action to avoid a mortgage on the property in the amount of $396,000. While this action was pending, the court approved the trustee's proposed sale of the property for a little over $200,000. After the sale, the defendant-mortgagee consented to avoidance. The trustee then moved for an order declaring the debtors' homestead exemption to have a value of zero, as there was no equity in the property to which the exemption could attach. The debtors responded by moving for satisfaction of their $36,900 exemption claim from the sale proceeds because the trustee had failed to timely object under Bankruptcy Rule 4003. The Bankruptcy Court held for the trustee, but the District Court reversed on appeal. Further appeal was taken to the Third Circuit. *In re Messima*, 386 Fed. Appx. 152, 2010 WL 2712141 (3rd Cir.).

The Circuit Court suspended the appeal, awaiting determination of the then-pending Supreme Court case of *Schwab v. Reilly*, 130 S.Ct. 2652 (2010). Based on the subsequent Supreme Court decision, the Third Circuit noted that the 30-day objection period of Rule 4003 "applies to objections based on 'three and only three' elements of a claimed Schedule C exemption" :1) exempted property description; 2) the Bankruptcy

Code exemption provisions; and 3) the amount stated as the value of claimed exemption. The court found that when an exemption objection is based on other elements, such as the debtor's market value estimation and the right of the estate to retain value beyond the amount exempted, the Rule 4003 30-day deadline does not apply.

B. BANK ACCOUNT FREEZES/TURNOVER/STAY VIOLATION

1. ***In re Mwangi*, 432 B.R. 810 (9th Cir. BAP 2010.**
2. ***In re Young*, 439 B.R. 211 (Bankr. M.D. Fla. 2010)**
3. ***Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995).**
4. ***In re Brubaker,* 426 B.R. 902 (Bankr. M.D. Fla. 2010)**
5. ***In re Pyatt*, 486 F.3d 423 (8th Cir. 2007)**
6. ***In re Bailey*, 380 B.R. 486 (6th Cir. BAP 2008)**

(1) Cases split on whether stay violated by Wells Fargo's freeze of accounts

When Wells Fargo learned of the chapter 7 debtors' bankruptcy filing, it placed an administrative freeze on the debtors' checking and savings account, pursuant to its national policy. The Debtors had scheduled two accounts with balance totaling $1,300.00. Wells Fargo's freeze was against four accounts of the debtors totaling $17,075.06. Debtors amended to list all of the accounts and funds and claimed 75% exempt. No objection was ever filed by anyone to the claim of exemption. Wells Fargo took no action after receiving no instructions from the trustee to whom it had sent notice of the freeze. It also had refused to release the funds to the debtors in the meantime. Debtors brought a contempt action against Wells Fargo for willful violation of the stay, not withstanding the § 542(b) requirement that property of the estate be paid to the trustee. The bankruptcy court ruled against debtors after determining that §362(a) did not apply because the funds were exempted and not property of the estate. Debtors appealed. The BAP reversed and remanded finding Wells Fargo had exercised control over property of the estate and, therefore, violated the automatic stay, notwithstanding the § 542(b) requirement that property of the estate be paid to the trustee. *In re Mwangi*, 432 B.R. 812 (9th Cir. BAP 2010). The BAP determined that *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995) was inapplicable since there were no setoff rights to protect here. Next, it determined that the accounts were property of the bankruptcy estate and the bank could have paid the account funds to the trustee or released the account funds claimed as exempt to the debtors when demand was made, but it did neither. Moreover, the bank could have sought direction from the bankruptcy court by way of a stay relief motion or otherwise, but it did not. Instead, the bank chose to hold the funds until a demand was made for payment that it alone deemed appropriate. The case was remanded to the bankruptcy court to determine if the violation was willful, and if so, the appropriate amounts of damages to be assessed under § 362(k). *Contra, In re Young*, 2010 WL 3965698 (Bankr. M.D. Fla. 2010)(Williamson, J.)(stay not violated by bank's hold on debtor's accounts pending instructions from trustee because it was merely a refusal to perform its promise to pay to the debtor, who had absolutely no authority to direct disposition of estate property after the case was filed).

(2) Trustee entitled to turnover of petition date bank balance

Debtors scheduled their bank account balance at $513. The actual bank account balance on the petition date was $5,862.38. The difference was attributable to checks written by the debtor pre-petition that had not cleared as of the petition date. The trustee demanded turnover of the account balance on the petition date of $5,862.38. Debtors opposed the motion arguing that because the funds were no longer in the account the trustee could not obtain turnover of the petition-date balance, citing *In re Pyatt*, 486 F.3d 423 (8th Cir. 2007). The bankruptcy court here disagreed. *In re Brubaker*, 426 B.R. 902 (Bankr. M.D. Fla. 2010). Judge Paskay noted that there were two schools of thought. One school placed the burden on the debtor to recover the money and the other believed the trustee should be responsible and have to pursue the transferees. However, both schools had agreed that the funds were property of the estate and that neither outcome would be good for debtors. The court held that the funds remained in the account until the checks cleared and were therefore property of the bankruptcy estate subject to the control of the debtors until they had cleared. The checks that had been written were negotiable instruments that constituted an unconditional promise to pay. Although debtors may not have had technical custody of those funds as to which they had written checks to their creditors, they did have control over the funds on the date they filed their petition. Accordingly, debtors were ordered to turnover the funds to the trustee with no reduction for checks which the debtors had written pre-petition, but which had not cleared their account as of the petition date.

(3) Debtors not liable for turnover of bank account funds which were property of the estate, but subsequently transferred

The Eighth Circuit Court has ruled that § 542 does not allow a Trustee to recover property of the estate from a debtor, where such property is money in the debtor's bank account at the time of filing, which gets transferred post-petition through negotiation of a check written by the debtor. *In re Pyatt*, 486 F.3d 423 (8th Cir. 2007).

On the date he filed his petition, the debtor had $1,938.76 in his bank account. He had written several checks to creditors on the eve of filing, and scheduled $300.00 in the account on his Schedule B, having apparently subtracted the amount of the outstanding checks. The trustee sought turnover of the $1,938.76 petition date balance under § 542(a), which was subsequently compelled by Bankruptcy Court order. On appeal, the BAP reversed, with the majority finding the bankruptcy trustee was better positioned to recover the funds as unauthorized post-petition transfers, under § 549. The concurring opinion disagreed, finding the debtor was better able to prevent loss to the estate, but held that § 542(a) was not authorized for turnover of funds that the debtor no longer possessed or controlled.

The trustee argued the funds were property of the estate because they remained in the account at the time of bankruptcy filing. She further argued that § 542(a) provides for turnover of property or its "value"; and cited the Seventh Circuit Court case of *In re USA Diversified Products, Inc.*, 100 F.3d 53 (7th Cir. 1996), which held that a turnover defendant need not possess property of the estate for a trustee to compel its turnover. The

Seventh Circuit reasoned that if present possession were required, "the possessor…could thwart the demand simply by transferring the property to someone else."

The Eighth Circuit agreed with the BAP that a § 542(a) turnover action is not available unless the property remains in the "possession, custody, or control" of the entity against whom turnover is sought. Answering the Seventh Circuit Court concern that this might lead to manipulation through planned transfers of property, the Eighth Circuit held that §549 was available for the trustee to "proceed against the payees of the checks and bring the transferred funds back into the administration of the estate." The court further suggested that trustees could obligate banks to turn over the petition date balance under §542(b), by notifying them prior to post-petition honor of checks

Comment:: In *In re Schoonover*, 2006 WL 3093649 (Bkrtcy. Kan. 2006), a bankruptcy court in the Eighth Circuit specifically rejected the BAP holding in *In re Pyatt*, 348 B.R. 783 (8th Cir. BAP 2006), and noted that in seven prior reported decisions on this issue, four cases found the debtor responsible for returning the funds to the estate, while three required the trustee to recover the money from the payees under §549. In *Schoonover*, Judge Karlin took a practical approach, based on the realities of bankruptcy estate administration He acknowledged that trustees could file avoidance claims under § 549, but the cost of filing and prosecuting these adversary complaints would frequently, if not almost always, outweigh the benefit of any recovery. The $250.00 filing fee alone would chill many actions. Judge Karlin further considered the trustee's ability to expeditiously notify banks prior to post-petition honor of checks. Unlike the Eighth Circuit, the Bankruptcy Judge acknowledged the "real life" difficulty, if not impossibility, of accomplishing this. The *Schoonover* Court further noted the obvious fact, which was somehow overlooked by the Eighth Circuit that debtors are in control of their checkbooks and accounts, while the trustee is not. When read in the context of actual, rather than academic bankruptcy estate administration, the Eighth Circuit *Pyatt* decision does exactly what the Seventh Circuit feared in *USA Diversified Products, Inc.* It allows debtors to thwart estate administration by permitting them to transfer estate property to whom they choose, while remaining immune from any consequence for this action.

(4) Debtors required to pay amount of tax refund received post-petition, which they had previously paid to their attorney

After filing their case, the debtors received a tax refund derived from pre-petition earnings. On advice of counsel that the funds were exempt, they used part of this money to pay their counsel's attorney fee. The trustee subsequently filed a turnover motion under § 542(a), and the Bankruptcy Court ruled for the trustee, finding the funds were not exempt, and ordering the Debtors to pay the entire amount, including what they had paid their attorney. Appeal was taken to the BAP. *In re Bailey*, 380 B.R. 486 (6th Cir. BAP 2008).

Writing for the BAP, Judge Gregg first found that the erroneous advice of counsel did not create a defense to the turnover action. Further, turnover was appropriate because the refund was property of the estate which was in the debtors' possession during the pendency of the bankruptcy proceeding. The court noted that under pre-1978 Code law,

as held by the Supreme Court in a 1948 case, turnover would not be permitted if the defendant did not have possession of the property when the turnover action was filed. However, under the 1978 Code amendments, the trustee's recovery rights were expanded in § 542 to include recovery of "such property, *or the value* of such property." The addition of the words "or the value of such property" were held to specifically apply to this situation, where the debtors are in control of property and are liable for its unauthorized transfer.

C. INHERITED IRAS

1. ***In re Sims*, 241 B.R. 467 (Bankr. N.D. Okla. 1999)**
2. ***In re Navarre*, 332 B.R. 24 (Bankr. M.D. Ala. 2004**
3. ***In re Jarboe,* 365 B.R. 717 (Bankr. S.D. Tex. 2007)**

(1) PRE-BAPCPA

Virtually all courts pre-BAPCPA and many post BAPCPA have ruled that IRAs inherited by anyone other than a spouse are non tax-exempt, not qualified as retirement plans of the debtor, and may not be exempted from the bankruptcy estate. These cases include *In re Sims,* 241 B.R. 467 (Banker. N.D. Okla 1999); *In re Navarre*, 332 B.R. 24 (Bankr. M.D. Ala. 2004); and *In re Jarboe*, 365 B.R. 717 (Bankr. S.D. Tex 2007). These courts essentially found that an inherited IRA was no longer an IRA at all. There could be no further contributions to it; it could not be rolled over; beneficiaries could take withdrawals at any time without penalty; and withdrawals were required so that the full amount would be entirely disbursed within five years, regardless of the age of the inheriting owner.

1. ***In re Nessa*, 426 B.R. 312 (8th Cir. BAP April 9, 2010)**
2. ***In re Kuchta, 434 B.R.* 837 (Bankr. S.D. Ohio April 16, 2010)**
3. ***In re Tabor*, 433 B.R. 469 (Bankr. N.D. Pa. June 18, 2010)**
4. ***In re Chilton*, 426 B.R. 612 (Bankr. E.D. Tex. March 5, 2010)**
5. ***In re Klipsch*, 435 B.R. 586 (Bankr. S.D. Ind. June 7, 2010)**
6. ***In re Ard*, 435 B.R. 719 (Bankr. M.D. Fla. August 18, 2010)**

(2) POST-BAPCPA

For whatever reason, a multitude of cases on this issue have been decided in 2010. Some have found that inherited IRAs remain exempt under two BAPCPA provisions: § 522(d)(12) (under election of federal exemptions) or § 522(b)(3)(c) (preemption of state law exemptions). *In re Nessa*, 426 B.R. 312 (8th Cir. BAP April 9, 2010); *In re Kuchta*, 434 B.R. 837 (Bankr. S.D. Ohio April 16, 2010); *In re Tabor*, 433 B.R. 469 (Bankr. M.D. Pa. June 18, 2010, as amended on July 30, 2010). Contra decisions include *In re Chilton*, 426 B.R. 612 (Bankr. E.D. Tex. March 5, 2010); *In re Klipsch*, 435 B.R. 586 (Bankr. S.D. Ind. June 7, 2010); and *In re Ard*, 435 B.R. 719 (Bankr. M.D. Fla. August 18, 2010).

The latter cases distinguish the *Nessa* line of cases based on the proposition that for funds "to be retirement funds," they must contain contributions made by the debtor for retirement, which these inherited IRAs do not. In *Ard*, Judge May made the further important distinction that funds in the original IRA account do not retain the same tax exempt status after being distributed to the beneficiary. The court was assisted in this analysis by a Florida state court decision, *Robertson v. Deeb*, 26 So. 3d 936 (Fla. 2d DCA 2009), where the state court held that an inherited IRA is not exempt from the claims of a garnishing creditor of a non-spouse beneficiary.

Comment: Interestingly, neither line of cases cit as authority § 408(d)(3)(C)(i) of the Tax Code, which appears to provide that an inherited IRA is *not an IRA*. This is simply omitted from the *Nessa* line of cases, while the contra cases are based on the law of the particular state which had opted out of the federal exemption scheme.

D. DISCHARGE ISSUES

1. ***In re Coady*, 588 F.3d 1312 (11th Cir. 2009)**
2. ***In re Matos*, 267 Fed. Appx. 884 (11th Cir. 2008)**
3. ***In re Jordan*, 521 F.3d 430 (4th Cir. 2008)**
4. ***In re Jones*, 490 F.2d 452 (5th Cir. 1974)**
5. ***In re Eckert*, 375 B.R. 474 (Bkrtcy. N.D. Ill. 2007)**

(1) Eleventh Circuit affirms debtor's denial of discharge for concealing equitable interest in wife's business

Debtor had formerly been a successful real estate developer with a net worth of approximately $10 million, but an economic downturn left him $27 million in debt. While so indebted, he married, moved into his wife's house, drove a car leased in her name, and for over ten years worked exclusively as an "uncompensated independent contractor" for business entities under her sole ownership. He drew no salary (which his judgment creditors could have garnished), but his wife allowed him to write checks in her name on the business accounts to pay personal expenses. She also paid for his country club and golf club memberships. Although he had neither income nor an individual bank account, he was able to personally execute a $164,000 promissory note to fund a real estate development for one of the businesses. One of his creditors sued him in 2004 to recover on a $290,000 judgment. He filed his Chapter 7 petition in Florida before the conclusion of those proceedings. The creditor then objected to his discharge under §§ 727(a)(2)(A), claiming that he had "concealed" his equitable interest in his wife's businesses. Debtor denied that he had any equitable interest in his wife's property and, alternatively, that any concealment occurred well more than the one-year look-back under that code section. The Bankruptcy Court found debtor had, with the intent to shield assets from his creditors, diverted the fruits of his labor to his wife's businesses and then used business assets to support his personal lifestyle. The debtor appealed and the District Court affirmed. The debtor then appealed to the Court of Appeals for the Eleventh Circuit which also affirmed. *In re Coady*, 588 F.3d 1312 (11th Cir. 2009).

The Circuit Court noted that the debtor was the sole person actually and actively involved in the businesses, and their success depended solely on his continued efforts. Whatever increase in equity resulting in the future from his labor would be protected from his creditors, while being available for his benefit or to fulfill his legal obligations of support for his family. Moreover, the Circuit Court noted that debtor's personal use of business accounts, along with his wife's financial support, replaced any regular compensation that might otherwise have been available to satisfy his creditors' claims. Through this arrangement, he acquired and concealed an equitable interest in his wife's businesses. The Circuit Court also held that the doctrine of continuing concealment provided for situations such as this where a debtor had kept his assets out of a creditor's reach during the look-back period by means of a sham ownership arrangement established more than one year before the bankruptcy petition was filed. Accordingly, the discharge was denied. [*Comment*: Debtor's equitable interest in his wife's businesses would constitute property of the bankruptcy estate under § 541 that should be administered by the trustee.]

(2) Eleventh Circuit clarifies grounds for revocation of discharge

After the Debtor received his Chapter 7 discharge, a creditor sought revocation based on, among other grounds, the Debtor's failure to obey a court order directing production of documents and setting a four-week deadline for production. The Debtor produced 694 documents prior to the deadline, and another 5,300 after the deadline. On appeal the Eleventh Circuit affirmed the lower Court's denial of discharge revocation. *In re Matos*, 267 Fed.Appx. 884 (11th Cir. 2008).

The Court found late production of documents alone was insufficient to show the requisite willful or intentional refusal to obey an order, or that the order was ignored. The Circuit Court also noted that the Bankruptcy Court's analysis had fully comported with the relevant factors set out in *In re Jones*, 490 F.2d 452 (5th Cir. 1974). The factors to be considered thereunder are (1) the detriment to the proceedings and the dignity of the court versus the potential harm to the Debtor if discharge is denied; (2) whether the Debtor's acts were willful, or was there a justifiable excuse, (3) whether there was injury to creditors, and (4) whether there was some way the Debtor could make amends for the conduct.

Compare this to another revocation case where the Debtor failed to comply with a series of court orders requiring production of documents and testimony at a BR 2004 examination, and was ordered to pay a $3,000.00 sanction. The Debtor failed to pay the sanction, produce the documents, testify, or otherwise respond to material questions concerning disposition of property of the bankruptcy estate. The Trustee and some creditors filed a complaint to revoke the Debtor's discharge under §§727(d)(3) and (a)(6)(C). *In re Eckert*, 375 B.R. 474 (Bkrtcy. N.D. Ill. 2007).

(3) Discharge revoked: burden of proof

Judge Squires joined the majority court view that the plaintiffs in a revocation of discharge action had to establish that the debtor willfully and intentionally refused to

obey a court order and not just failed to obey the order as a result of inadvertence, mistake, or inability to comply. This required the plaintiffs to demonstrate some degree of willfulness on the part of the debtor. However, the plaintiffs could meet their initial burden by showing that the debtor received the order in question and failed to comply with its terms, thereby shifting the burden of proof to the debtor to explain non-compliance. Here, plaintiffs showed that the debtor had a "disparaging pattern of refusing to comply with lawful orders of the court." This constituted grounds for revocation of discharge, along with separate grounds established by the failure to produce documents and respond to material questions concerning the disposition of assets.

(4) Revocation of debtor's discharge reversed

After performing a liquidation analysis, the trustee determined that there was insufficient realizable value to market and sell debtor's home. However, the case remained open and no abandonment of the home had occurred. After debtor received a discharge, she promptly refinanced her home, paying off the existing mortgages and receiving approximately $15,000 which she used for living expenses. The refinancing occurred without the knowledge or consent of the trustee or the court. The trustee only learned of the refinancing when he obtained a buyer for the property without the assistance of a realtor so that sufficient value could be realized for the estate. Thereafter, the trustee filed a complaint to revoke the debtor's discharge pursuant to § 727(a)(6) for violating an order of the court. The bankruptcy court revoked the discharge, and its order was affirmed on appeal. The case was further appealed to the Circuit Court, which reversed in part in a split decision. *In re Jordan*, 521 F.3d 430 (4th Cir. 2008). Both the majority and dissenting opinions agreed that the court was required to find that the debtor's lack of compliance with the relevant court order was willful and intentional, that the trustee could satisfy his burden by demonstrating that the debtor received the order in question and failed to comply with its terms, and that the burden would then be shifted to the debtor to explain the non-compliance. However, the majority noted that the bankruptcy court had found that the failure to comply was not willful and, therefore, reversed. The dissenting judge noted that the trustee was required to show simply that the debtor had intentionally and willfully refinanced her home and that the refinancing violated the terms of the court's order. The trustee was not required to show any maliciousness on the part of the debtor. The dissent would, therefore, have affirmed the revocation of discharge.

E. *ESPINOSA* AND DUE PROCESS

1. ***United Student Aid Funds, Inc. v. Espinosa*, ___ U.S. ___, 130 S.Ct. 1367 (2010)**
2. **In re Miell, 439 B.R. 704 (8th Cir. BAP December 9, 2010)**

Upon conversion from Chapter 11 to Chapter 7, the trustee filed a motion to sell several parcels of real estate, free and clear of all liens, encumbrances, claims, and other interests, to Heritage Bank. The Holsingers were junior lienholders against two of the parcels. The trustee gave written notice of her motion to all creditors and other parties

in interest, including the Holsingers, but failed to actually serve them with the motion. The only objection filed to the sale was by the debtor, and that objection was overruled. The bankruptcy court entered an order authorizing the proposed sale, and no appeal was taken from that order. The sale was consummated. Thereafter, the Holsingers filed an adversary complaint challenging the sufficiency of the trustee's notice and sought a determination that their liens were unaffected by the sale or a declaration that their liens attached to the proceeds of the sale. The bank moved to dismiss the complaint for failure to state a claim. The bankruptcy court granted the bank's motion, and the Holsingers appealed. The BAP affirmed. *In re Miell*, 439 B.R. 704 (8th Cir. BAP December 9, 2010).

The Holsingers first argued that the bank was not a good-faith purchaser and, thus, not entitled to the protections afforded such a purchaser under § 363(m). However, the BAP noted that no one had appealed the bankruptcy court order authorizing the sale and, therefore, § 363(m) was inapposite. That left the Holsingers with only a Rule 60(b) argument that the judgment was void. The Holsingers argued that they were denied due process because the trustee's motion did not specifically identify them as secured creditors or specifically describe their liens. The BAP disagreed. The Holsingers did not deny having actually received a copy of the notice of the proposed sale even if they were not directly served with the motion. The notice itself was captioned "NOTICE OF MOTION TO SELL REAL ESTATE FREE AND CLEAR OF ALL LIENS AND ENCUMBRANCES…." The notice went on to list the parcels to be sold, noted that he sale was free and clear of all liens and encumbrances, informed interested parties how to obtain a copy of the motion, the deadline for filing an objection, the deadline for submitting a competing bid, and when and where a hearing would be held to consider any objection or competing bid. Although the trustee clearly violated Rule 6004(c) by failing to serve the motion itself on a party with a lien on the property to be sold, the BAP held it did not rise to a violation of due process rights, citing *United Student Aid Funds, Inc. v. Espinosa*, ___ U.S. ___ , 130 S.Ct. 1367 (2010).

In that case, the Supreme Court stated: "Rule 60(b)(4) strikes a balance between the need for finality of judgments and the importance of insuring that litigants have a full and fair opportunity to litigate a dispute. Where, as here, 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.* at 1380. The BAP concluded: "Like the creditor in *Espinosa*, the Holsingers were afforded a full and fair opportunity to litigate, and like the creditor in *Espinosa*, their failure to avail themselves of that opportunity does not justify Rule 60(b)(4) relief." 439 B.R. at 710.

F. JUDICIAL ESTOPPEL

1. ***Reed v. City of Arlington*, 620 F.3d 477 (5th Cir. 2010)**
2. ***Kane v. National Union Fire Ins. Co.*, 535 F.3d 380 (5th Cir. 2008)**
3. ***Biesek v. Soo Lion R.R.*, 440 F.3d. 410 (7th Cir. 2006)**
4. ***Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1268 (11th Cir. 2004)**
5. ***Pavlov v. Ingles Markets, Inc.*, 236 Fed. Appx. 549 (11th Cir. 2007)**

(1) Trustee judicially estopped due to debtor misconduct

The debtor was a firefighter for the City of Arlington, Texas. He had brought a pre-petition action against the City asserting that he was terminated in violation of the Family and Medical Leave Act. He obtained a judgment for over one million dollars. The City appealed. During the appeal, the debtor and his wife filed a Chapter 7 petition, omitting the lawsuit and judgment from their statements and schedules. They obtained a discharge of approximately $300,000 of unsecured debt. Creditors had been led to believe that this was a "no asset" case. When the trustee and court learned of the omissions, the discharge was revoked. The trustee then attempted to pursue the action so that a distribution could be made to creditors of the estate. The district court found the elements of judicial estoppel were satisfied regarding the debtor but not the trustee. The district court held that the trustee should be permitted to pursue the debtors' claim, reasoning that the trustee had not engaged in inconsistent conduct and that the creditors would be unduly harmed by her inability to further pursue the appeal. The Court ordered the City to pay the entire judgment to the trustee but, to the extent of any remaining funds, they would be returned to the City rather than the debtor. The City appealed. The Circuit Court reversed. *Reed v. City of Arlington*, 620 F.3d 477 (5th Cir. 2010). The Fifth Circuit determined that the district court had erred in two ways. First, by incorrectly distinguishing the debtor's conduct from that of the trustee in applying judicial estoppel. "Even though [the trustee] herself takes no inconsistent legal positions, she succeeds to the debtor's claim with all of its attributes, including the potential for judicial estoppel." Second, the district court was held to have erred in its weighing of equitable factors. The Fifth Circuit did not believe creditors would be materially advantaged if the case were to proceed further because many had not filed proofs of claim or filed them late and only one-sixth of the original creditors had timely filed and would be behind large priority administrative expenses caused by the ongoing litigation, including the claim of the trustee which was substantially increased because of the judicial estoppel litigation, and the debtor's trial attorney who had already received some payment for his services. In reversing the district court, the Fifth Circuit recognized that its prior decisions had been inconsistent on the judicial estoppel principle, with the court noting that "Their results create, to put it kindly, a mosaic." The panel seemed to invite *en banc* consideration.

Comment: Wow!!!!! The Fifth Circuit straightforwardly applied judicial estoppel to the Chapter 7 trustee, while conceding that the trustee neither misrepresented nor concealed anything in the bankruptcy case process. The court apparently assigned such misdeeds to the trustee as successor to the debtor. How does a trustee, as representative of the bankruptcy estate, become liable for post-petition misdeeds of a debtor? And what about the creditors? Apparently the fact that the trustee would be paid a little more than 5 percent of the amount to be distributed to creditors was a problem for the court, along with the fact that many creditors did not file timely claims. Should those creditors who did file timely be denied payment of their claims? And are not the untimely filed claimants likely to receive distribution as well, as this appears to be a surplus case, though the defendant rather than the debtor would receive any surplus? Is this decision really based upon a dislike and distrust of the bankruptcy system itself? The Fifth Circuit

decisions are also completely inconsistent with the Fifth Circuit's earlier decision of *Kane v. National Union Fire Ins. Co.*, 535 F.3d 380 (5th Cir. 2008).

(2) Raising *Kane*

The debtors neither disclosed their pending personal injury action in the schedules filed in their Chapter 7 case, nor otherwise informed the trustee, who filed a no asset report. The debtors subsequently received their discharges. When the personal injury action defendants filed a motion in state court seeking dismissal based on judicial estoppel, for failure of the debtors to list the action as an asset in their bankruptcy case; the debtors moved to reopen the bankruptcy proceeding to allow the trustee to administer the lawsuit for the bankruptcy estate. Over the defendants' opposition, the bankruptcy court granted the motion to reopen. The case was then removed by the state court defendants to federal court, where they again moved for dismissal based on judicial estoppel. Shortly thereafter, the trustee moved to substitute himself for the debtors in the lawsuit as the real party in interest. The Federal District Court granted the dismissal motion, and summarily denied the trustee's motion as moot. Appeal was taken to the Fifth Circuit. *In re Kane v. National Union Fire Ins. Co.*, 535 F.3d 380 (5th Cir. 2008).

The Circuit Court distinguished its earlier case of *In re Superior Crew Boats, Inc.*, 374 F.3d 330, upon which the District Court had relied. The Court noted that the prior case had involved an asset which the trustee was informed about, and which was formally abandoned under § 554. There, the debtors had the asset back and stood to profit from their prior nondisclosure. Here, the asset had not been abandoned and the Debtor could only benefit from surplus funds available after case administration. The Fifth Circuit cited and followed the Seventh Circuit case of *Biesek v. Soo Line R.R. Co.*, 440 F.3d 410, 413 (7th Cir. 2006), which stated, "Judicial estoppel is an equitable doctrine, and using it to land another blow on the victims of bankruptcy fraud is not an equitable application."

(3) 11th Circuit holds judicial estoppel does not apply to trustee

Approximately two years after filing an employment discrimination action, the debtor filed a Chapter 7 petition. The discrimination claim was not listed in the schedules, and a no asset discharge was granted. When the trustee subsequently learned of the lawsuit, he reopened the bankruptcy case and intervened as plaintiff in the discrimination action on behalf of the bankruptcy estate. Upon motion of the defendants, the District Court dismissed the trustee under the doctrine of judicial estoppel. Appeal was taken to the Circuit Court. *Parker v. Wendy's International, Inc.*, 365 F.3d 1268 (11th Cir. 2004). The Circuit Court found the discrimination action to be an asset that was never abandoned from the bankruptcy estate or by its representative, the trustee. Because the trustee made no false or inconsistent statement under oath in a prior proceeding, he was not tainted or burdened by the debtor's misconduct. Accordingly, the District Court was reversed, "Because the doctrine of judicial estoppel was improperly invoked."

(4) Judicial estoppel applies where Trustee fails to intervene

The *pro se* debtors failed to schedule a personal injury claim in their chapter 13 case. Based on judicial estoppel, the district court granted summary judgment to the defendants. The Eleventh Circuit affirmed. *Pavlov v. Ingles Markets, Inc.*, 236 Fed.Appx. 549 (11th Cir. 2007). In *Parker v. Wendy's Int'l, Inc.* at 365 F.3rd 1268 (11th Cir. 2004), the Eleventh Circuit held that a district court had abused its discretion in applying judicial estoppel because the plaintiff's cause of action was the property of her Chapter 7 bankruptcy estate, and the trustee had intervened as a party-plaintiff in the underlying lawsuit. Here, however, the circuit court distinguished *Parker* because there had been no appearance by the trustee through intervention or otherwise. (*Comment:* Once an undisclosed personal injury or other claim is discovered by the trustee, the trustee should take immediate steps to intervene to prevent a result like this one).

G. STANDING

1. ***In re Seres*, 473 B.R. 775 (Bankr. W.D.N.Y. 2010)**
2. ***In re Adams*, 424 B.R. 434 (Bankr. N.D. Ill. 2010)**
3. ***In re T.G. Morgan, Inc.*, 394 B.R. 478 (8th Cir. BAP 2008)**

(1) Debtor lacks standing to object to trustee's settlement

The Chapter 7 debtor had failed to schedule as an asset of the estate his pending personal injury action against those who injured him in a pre-petition motor vehicle accident. He also failed to disclose it when questioned by the trustee at the meeting of creditors. The trustee moved to approve a $75,000 settlement of the personal injury action. Debtor objected on the basis that it was woefully inadequate given the severity of his injuries. The bankruptcy court approved the settlement. *In re Seres,* 473 B.R. 775 (Bankr. W.D. N.Y. 2010). Judge Bucki ruled that debtor's failure to disclose the existence of the PI action was essentially a representation by debtor that it was of no more than *de minimis* value and was judicially estopped from challenging the adequacy of the settlement.

(2) Debtors lack standing to object to trustee's sale price

Debtors listed a 20% interest in a particular LLC which they valued at $280,000. Trustee moved to sell the estate's interest in the LLC for $20,000, and debtors objected. Trustee attempted to negotiate with the debtors over the next nine months during which time the offer increased to $36,000, but no agreement was ever reached with the debtors, so the trustee went forward with the motion. Trustee argued that debtors lacked standing to object because they had no pecuniary interest in the bankruptcy case that would directly and adversely affect them. Debtors countered that they did have a pecuniary interest because of claims filed by the IRS and the Illinois Department of Revenue for over $200,000 that debtors characterized as non-dischargeable. Thus, the more money the Trustee made on the proposed sale, the more that would be paid to satisfy the tax claims. The court overruled the objection and approved the trustee's sale. *In re Adams*, 424 B.R. 434 (Bank. N.D. Ill. 2010). Judge Goldgar first recognized that to have standing a person must have a pecuniary interest in the outcome of the bankruptcy proceedings, and,

moreover, the order must directly and adversely affect that interest. Here, the debtors were hopelessly insolvent with no chance of a surplus. While the Court recognized that several other courts had endorsed the debtor's theory of standing in Chapter 7 cases, it rejected those cases. First, Judge Goldgar found that the possibility of reduction of non-dischargeable tax claims was an indirect and not a direct effect of the court's order. Second, to grant standing to every "debtor who happens to be subject to some non-dischargeable claim would interfere with the administration of chapter 7 cases." Indeed here, the debtors' objection had delayed the sale by a full year even though the debtors had not themselves offered to pay more than the trustee's proposed sale price nor had they produced a bidder willing to do so. Under no circumstances would the debtors have received a distribution from the estate in this case and, therefore, they had no standing to object to the sale

(3) Parties objecting to trustee's final report had no standing

Throughout the course of this case's 17-year history, Trustee had taken possession and distributed various assets which certain individuals claimed that they owned, and the Trustee also had pursued avoidance actions against those same individuals. These individuals had no claims against the bankruptcy estate but nevertheless objected to the Trustee's 110-page Final Report and Proposed Distribution alleging "massive fraud," breach of fiduciary duty and accusing the bankruptcy court of abrogating its jurisdiction to the Trustee. The objections were overruled and they appealed. *In re T.G. Morgan, Inc.*, 394 B.R. 478 (8th Cir. BAP 2008). As an initial matter, the BAP agreed with the bankruptcy court that the objecting parties lacked standing to object because they had no pecuniary interest in the outcome. The BAP also agreed with the bankruptcy court's determination that the objectors' claims were barred by the doctrine of *res judicata* and collateral estoppel. The BAP noted that over a 15-year period, the objecting parties were extremely prolific in litigation to the point where several of them were admonished and enjoined from prosecuting any action against the trustee and others without an attorney or prior written authorization from a judicial officer of the District Court of Minnesota. The court agreed with the trustee's assertion that the objections had nothing to do with the Final Report but were merely frivolous and unfounded claims that had been rejected by the courts on numerous occasions in prior litigation. Accordingly, the objections were overruled and the order approving the Final Report affirmed.

Looking Ahead: What's in Store for Consumer Practitioners in 2011

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Proof Of Claim Documentation - Unsecured Claims

In re Sandifer, 318 B.R. 609 (Bankr. M.D. Fla. 2004)

The Court held that the creditor's proofs of claim as originally filed did not meet the requirements of Rule 3001(c), because they did not include documentation from which the validity of the claims could be determined. Instead of attaching documentation, the creditor stated that itemized monthly statements were mailed to the debtor pre-petition, and it provided a phone number for obtaining account statements. The proofs of claim also stated that "[c]laim may include contractual interest and/or late charges."

Although the Court rejected any bright-line test for determining the adequacy of claim documentation, it stated that "[d]ebtors are entitled to adequate documentation regarding the claims, but creditors should not be burdened with providing unnecessary documentation." It further explained what it meant by "adequate documentation":

> The Debtor is entitled to fair notice of the conduct, transaction and occurrence that forms the basis of the claim. Adequate documentation of the claim reflecting charges, payments, fees and interest enables Debtor or Trustee to evaluate and challenge, if necessary, portions of the claim deemed inaccurate. The claimant should provide documentation in understandable language, specifically setting forth the basis of the claim, including the calculation of interest and fees.

In re Sandifer, 318 B.R. 609, 611 (Bankr. M.D. Fla. 2004).

The Court disallowed the inadequately documented claims, but it allowed the creditor's amended claims, which attached two to four months of credit card statements or other documentation of charges, payments, fees, and interest.

Proposed and approved changes:

(c) SUPPORTING INFORMATION.

(1) *Claim Based on a Writing.* Except for a claim governed by paragraph (3) of this subdivision, w~~W~~hen 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. ~~When a claim is based on an open-end or revolving consumer credit agreement, the last account statement sent to the debtor prior to the filing of the petition shall also be filed with the proof of claim.~~

(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 property of the debtor, the proof of claim shall include a statement of the amount necessary to cure any default as of the date of the petition.

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

(D) If the holder of a claim fails to provide any information required by this subdivision (c), ~~the holder shall be precluded from presenting the omitted information, in any form, as evidence in any hearing or submission in any~~

~~contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless. In addition to or in lieu of this sanction, the court may, after notice and hearing, award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.~~ 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.

(3) *Claim Based on an Open-End or Revolving Consumer Credit Agreement.*

(A) When a claim is based on an open-end or revolving consumer credit agreement, a statement shall be filed with the proof of claim including, as applicable, the following information:

(i) the name of the entity from whom the creditor purchased the account;

(ii) the name of the entity to whom the debt was owed at the time of the last transaction on the account by an account holder;

(iii) the date of the last transaction on the account by an account holder;

(iv) the date of the last payment on the account;

(v) the date on which the account was charged to profit and loss.

(B) On written request, the holder of a claim based on an open-end or revolving consumer credit agreement shall provide a party in interest the documentation specified in paragraph (1) of this subdivision.

* * * * *

COMMITTEE NOTE

Subdivision (c) is amended to prescribe with greater specificity the supporting information required to accompany certain proofs of claim and, in cases in which the debtor is an individual, the consequences of failing to provide the required information.

Existing subdivision (c) is redesignated as (c)(1). It is amended to require that a proof of claim based on an open-end or revolving consumer credit agreement (such as an agreement underlying the issuance of a credit card) be accompanied by the last account statement sent to the debtor prior to the filing of the bankruptcy petition. This requirement applies whether the statement was sent by the entity filing the proof of claim or by a prior holder of the claim.

Subdivision (c)(2) is added to require additional information to accompany proofs of claim filed in cases in which the debtor is an individual. When the holder of a claim seeks to recover – in addition to the principal amount of a debt – interest, fees, expenses, or other charges, the proof of claim must be accompanied by a statement itemizing these additional amounts with sufficient specificity to make clear the basis for the claimed amount.

If a claim is secured by property of the debtor and the debtor defaulted on the claim prior to the filing of the petition, the proof of claim must be accompanied by a statement of the amount required to cure the prepetition default. If the claim is secured by the debtor's principal residence and an escrow account has been established in connection with the claim, the proof of

claim must also be accompanied by an escrow account statement showing the account balance, and any amount owed, as of the date the petition was filed. The statement shall be prepared in a form consistent with the requirements of nonbankruptcy law. *See, e.g.,* 12 U.S.C. § 2601 *et seq*. (Real Estate Settlement Procedure Act).

Paragraph (D) of subdivision (c)(2) sets forth the sanctions that apply to, or that may be imposed by the court against, a creditor in an individual debtor case that fails to provide information required by subdivision (c).

COMMITTEE NOTE

Subdivision (c) is amended to add paragraph (3), which specifies information that must be provided in support of a claim based on an open-end or revolving consumer credit agreement (such as an agreement underlying the issuance of a credit card). Because a claim of this type may have been sold one or more times prior to the debtor's bankruptcy, the debtor may not recognize the name of the person filing the proof of claim. Disclosure of the information required by paragraph (3) will assist the debtor in associating the claim with a known account. It will also provide a basis for assessing the timeliness of the claim. The date, if any, on which the account was charged to profit and loss ("charge-off" date) under subparagraph (A)(v) should be determined in accordance with applicable standards for the classification and account management of consumer credit.

To the extent that paragraph (3) applies to a claim, paragraph (1) of subdivision (c) is not applicable. A party in interest, however, may obtain the writing on which an open-end or revolving consumer credit claim is based by requesting in writing that documentation from the holder of the claim.

* * * * *

Calculation Of Projected Disposable Income

Hamilton v. Lanning, 130 S. Ct. 2464 (2010), *aff'g Hamilton v. Lanning* (*In re Lanning*), 545 F.3d 1269 (10th Cir. 2008).

The Court rejected the so-called mechanical approach as inconsonant with the Code, and held that:

> ***"…when a bankruptcy court calculates a debtor's projected disposable income, the court may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation."***

According to Justice Alito, the determination of projected disposable income will begin and end with the calculation of disposable income, except in the "unusual" case. Echoing the appeals court's analysis, the Court opined that the meaning of statutory language such as "projected" (as in "projected disposable income"), "to be received in the applicable commitment period," and "as of the effective date of the plan" (being defined by the Court as the confirmation date), lead to a holding that "the 'forward-looking approach' is correct." Such an approach is further supported by pre-BAPCPA practice, still valid "'absent a clear indication that Congress intended such a departure.'"

Two themes emerge from the Court's reasoning. First, the Supreme Court rejected the inference drawn by mechanical approach proponents that Congress sought to eliminate judicial discretion in the determination of a debtor's projected disposable income. Congress showed no explicit indicium of any intention to change pre-BAPCPA discretion in the projection of disposable income, nor does the disposable income test's (11 U.S.C. § 1325(b)) incorporation of the means test (11 U.S.C. § 707(b)) tacitly show otherwise.

Second, Congress did not intend the "senseless results" flowing from the mechanical approach. More specifically, Congress had no intention to deny easily affordable repayments to creditors by a debtor whose post-confirmation disposable income exceeded pre-petition disposable income. Nor did Congress intend to deny bankruptcy protection to a debtor forced to

propose an unfeasible plan because her mechanically calculated pre-petition income exceeded her real ability to pay. The Court rejected as flawed and unsatisfactory each of the "escape strategies" and "maneuvers" that the trustee urged to circumvent this exigency.

These two themes merge in the Supreme Court's statement of its test for "account[ing] for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation." The Court, virtually quoting the Tenth Circuit, rejected the mechanical approach "[i]n cases in which a debtor's disposable income during the 6-month look-back period is substantially either lower or higher than the debtor's disposable income during the plan period." According to the Tenth Circuit, whether a change is "substantial" is left to the discretion of the bankruptcy court.

The lone dissenter, Justice Scalia, agreed that while "expenses at least arguably depend on estimations of the debtor's future circumstances," current monthly income is a fixed amount based strictly on historical data. The dissent isolated the issue: "The puzzle is what to make of the word 'projected.'" Projecting income does not mean adjusting it; rather it means multiplying it by the number of months in the applicable commitment period. It is very plausible to project by merely multiplying forward past experience; at worst, "it may simply be off the mark." Such is the only proper result of fidelity to the text of the statute. If this result runs counter to that which Congress intended, it may correct it.

What is a known or virtually certain change in income or expenses?

- How certain is "virtually?'
- Is a "change," pre-confirmation *cf.* post-confirmation, required?
- What is the test for "substantial," as in "substantially either lower or higher" disposable income, pre-petition (viz., in the six month CMI period) vis-à-vis post-confirmation (viz. in the plan period)?

Darrohn v. Hildebrand, 615 F.3d 470 (6th Cir. 2010): The *Darrohn* court held that, pursuant to *Hamilton v. Lanning*, the bankruptcy court erred in confirming debtors' proposed chapter 13 plan, such plan as included an expense for the cost of debt service for collateral (*i.e.*, real property) intended by the terms of the plan for surrender. The court, noting that the surrender of the properties was undisputed, found that the bankruptcy court failed to account for

changes in the debtor's expenses that were known or virtually certain at the time of confirmation, as required by *Lanning*. Furthermore, according to the Sixth Circuit, the bankruptcy court's decision was discordant with the requirements of 11 U.S.C. § 1325 because, in confirming the plan, it relied on the debtors' disposable income rather than their *projected* disposable income.

Burden v. Seafort (*In re Seafort*), 437 B.R. 204 (B.A.P. 6th Cir. 2010) (reversing a bankruptcy court and holding that a debtor may not use income freed up after satisfaction of 401(k) loan to contribute to 401(k) plan rather than to "step up" his chapter 13 plan payment, pursuant to statutory language, legislative history, bankruptcy policy, and to *Lanning*, and *Darrohn* that projected disposable income is forward looking, taking into account known changes).

In re Warren, No. 10-40865-JDP, 2010 Bankr LEXIS 4644 (Bankr. D. Idaho Dec. 15, 2010) (sustaining a trustee's objection to confirmation of debtor's proposed chapter 13 plan and holding that, pursuant to *Lanning*, the debtor may not use a lower income amount because he had failed to show that his projected disposable income was known or virtually certain to be lower than his pre-petition income which included overtime compensation).

Zeman v. Liehr (*In re Liehr*), 439 B.R. 179 (B.A.P. 10th Cir. 2010) (reversing a bankruptcy court and holding that a debtor may not, when calculating projected disposable income, expense debt service for item being surrendered because *Lanning* compels a forward looking view, both as to the income and expense aspects of the computation, to determine projected disposable income, and to avoid senseless results).

***Ransom v. FIA Card Servs., N.A.*, No. 09-907, slip op. (U.S. Jan. 11, 2011), *aff'g Ransom v. MBNA, Am. Bank, N.A.* (*In re Ransom*), 577 F.3d 1026 (9th Cir. 2009)**

The Court held, based on the Bankruptcy Code's statutory text, context, and purpose, that a debtor who owns his car unencumbered by a loan or lease may not expense an allowance for car ownership costs (thereby increasing the amount he will pay into his chapter 13 plan) in calculating his projected disposable income that he must pay his unsecured creditors. The Bankruptcy Code states that a debtor's monthly expenses shall be the debtor's *applicable* monthly

expense amounts specified under the National Standards and Local Standards. The Court decided that an expense is "applicable" if a debtor incurs costs that correspond to it—more precisely,

> ***"only if the debtor will incur that kind of expense during the life of the plan."***

According to the court, any other interpretation would render "applicable" surplusage. Second, the Court, in examining the statutory context of the means test, particularly its use in the calculation of a chapter 13 debtor's projected disposable income, reasoned that if a debtor will not pay a particular expense during the life of his plan, then an allowance for a wholly fictional expense is not "reasonably necessary" (a chapter 13 requirement). Finally, the Court reminded that Congress purposed, in its 2005 amendments to the Bankruptcy Code (enacted as the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005), to ensure that a debtor repays to his creditors the maximum affordable amount. Allowing the debtor to deduct an expense that he does not pay would, according to the Supreme Court, thwart this purpose.

Questions after *Lanning* and *Ransom*

- How does *Lanning*'s avoiding senseless results (especially as resulting from a mechanical approach to calculating PDI) harmonize with *Ransom*'s elimination of "pre-BAPCPA case-by-case adjudication," despite "the occasional peculiarity that a brighter-line test produces"?

- What expenses fall within the ambit of *Ransom*? Does it apply to vehicle ownership expense only, or may it be extended to other expenses that are included in the National and Local Standards regime?

- Other expenses that might be affected by *Ransom* (in the National Standards listing) include food, housekeeping supplies, apparel and services, personal care products and services, and miscellaneous.

- Housing for a debtor who pays no mortgage or rent expense. *See*, e.g., *In re Farrar-Johnson*, 353 B.R. 224 (Bankr. N.D. Ill. 2006) (allowing a debtor to expense IRS

standard housing expense, although he paid none because he resided in government provided housing on a military reservation).

- Will *Ransom* prompt debtors to purchase new cars as a part of their pre-petition planning? Could this raise a good faith objection to confirmation? Is 11 U.S.C. § 526(a)(4) implicated (prohibition against advice to incur more debt in contemplation of bankruptcy)? Recall *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324 (2010) (impermissible to advise a person to incur more debt if the impelling reason is the prospect of filing a petition ("principally motivated" by the prospect, not merely "awareness of the possibility"))

- How is it possible to infer from BAPCPA, with its virtually tectonic changes to consumer bankruptcy, that, as the *Lanning* Court opined, Congress showed no clear indication to change pre-BAPCPA's forward looking practices?

- Motion to modify (after *Ransom*):

    - What showings are required (*viz*., "substantial and unanticipated change in circumstances")?

    - Is the divergent treatment of creditor movant *cf*. debtor movant intended?

- If a vehicle loan is paid off during the plan period, a creditor may move to modify a plan to recover the monies freed. Was the pay-off unanticipated?

- If a debtor needs to replace an aging and failing vehicle during the plan period, must the expenses be "unanticipated," as the Court explicitly describes?

- Does *Ransom* apply in chapter 7?

    - Yes, because the means test used in chapter 7 is the same means test used in chapter 13, albeit for different purposes.

    - Yes, because the Court sought to resolve a split among circuits, citing without distinguishing two chapter 13 cases and two chapter 7 cases.

- No, because an opinion should be applied only to similar facts. Is not chapter 7 inherently and practically different enough from chapter 13 to forestall application of *Ransom* in chapter 7?

- No, because Ransom relied on "statutory context", viz., the requirement of "reasonably necessary" as found in chapter 13, such as is not duplicated in chapter 7.

- Social Security Income (SSI). The Code plainly excludes SSI from current monthly income, 11 U.S.C. § 101(10A)(B), thus, from disposable income, 11 U.S.C. § 1325(b)(2).

  - *In re Thomas*, No. 10-67280-MHM, 2010 Bankr. LEXIS 5004 (Bankr. N.D. Ga. Dec. 29, 2010) (Plain language of the statute excludes SSI from current monthly income and, thus, from projected disposable income; *Lanning* does not apply because it requires a change in a debtor's financial circumstances); *contra In re Cranmer*, 433 B.R. 391 (Bankr. D. Utah 2010) (holding that a plan that excludes SSI from projected disposable income is not permissible because, pursuant to Lanning, it would produce senseless results mechanically to ignore income a debtor will accrue going forward that he excluded from his backward looking current monthly income).

  - Importance of paying maximum affordable amount. *Ransom*.

  - *Lanning* arguably requires a *change* in financial circumstances. If a debtor receives it prior to petition, and continues to receive it in the plan period, has a change occurred?

  - Effect of Social Security's statutory anti-alienation protection, 42 U.S.C. § 407? *See In re Carpenter*, 614 F.3d 930, 936 (8th Cir. 2010) ("We therefore hold, in accord with the BAP's decision, that § 407 operates as a complete bar to the forced inclusion of past and future social security proceeds in the bankruptcy estate.").

Yet To Be Decided

The Court opined that if a debtor's vehicle ownership cost exceeds the standard amount, his expense is limited to the standard amount instead of his actual cost. The Court explicitly declined to decide the reverse, *i.e.*, what the allowable means test expense is for vehicle ownership if the car payment is less than the standard allowance.

- Expense the full payment, apportioned between the Official Form 22C entry for vehicle ownership expense and for otherwise uncategorized secured debt?
- Expense up to, but not more than, the standard allowance with no additional expense on the basis that the standard allowance is the exclusive category for permissible vehicle ownership expense?

Looking Ahead: What's in Store for Consumer Practitioners in 2011

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A. EXEMPTIONS

1. Schwab v. Reilly, __ U.S. __, 130 S.Ct. 2652 (2010)
2. Taylor v. Freeland & Kronz, 503 U.S. 638 (1992)
3. In re Gebhart, 621 F.3d 1206 (9th Cir. 2010)
4. In re Messina, 386, Fed. Appx. 152, 2010 WL 2712141 (3rd Cir. 2010)

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B. BANK ACCOUNT FREEZES/TURNOVER/ STAY VIOLATION

1. In re Mwangi, 432 B.R. 810 (9th Cir. BAP 2010.
2. In re Young, 439 B.R. 211 (Bankr. M.D. Fla. 2010)
3. Citizens Bank of Maryland v. Strumpf, 516 U.S. 16 (1995).
4. In re Brubaker, 426 B.R. 902 (Bankr. M.D. Fla. 2010)
5. In re Pyatt, 486 F.3d 423 (8th Cir. 2007)
6. In re Bailey, 380 B.R. 486 (6th Cir. BAP 2008)

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C. INHERITED IRAS

PRE-BAPCPA

- In re Sims, 241 B.R. 467 (Bankr. N.D. Okla. 1999)
- In re Navarre, 332 B.R. 24 (Bankr. M.D. Ala. 2004
- In re Jarboe, 365 B.R. 717 (Bankr. S.D. Tex. 2007)

POST-BAPCPA

- In re Nessa, 426 B.R. 312 (8th Cir. BAP April 9, 2010)
- In re Kuchta, 434 B.R. 837 (Bankr. S.D. Ohio April 16, 2010)
- In re Tabor, 433 B.R. 469 (Bankr. N.D. Pa. June 18, 2010)
- In re Chilton, 426 B.R. 612 (Bankr. E.D. Tex. March 5, 2010)
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D. DISCHARGE ISSUES

1. In re Coady, 588 F.3d 1312 (11th Cir. 2009)
2. In re Matos, 267 Fed. Appx. 884 (11th Cir. 2008)
3. In re Jordan, 521 F.3d 430 (4th Cir. 2008)
4. In re Jones, 490 F.2d 452 (5th Cir. 1974)
5. In re Eckert, 375 B.R. 474 (Bkrtcy. N.D. Ill. 2007)

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E. ESPINOSA AND DUE PROCESS

1. United Student Aid Funds, Inc. v. Espinosa, ___ U.S. ___, 130 S.Ct. 1367 (2010)
2. In re Miell, 439 B.R. 704 (8th Cir. BAP December 9, 2010)

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F. JUDICIAL ESTOPPEL

1. Reed v. City of Arlington, 620 F.3d 477 (5th Cir. 2010)
2. Kane v. National Union Fire Ins. Co., 535 F.3d 380 (5th Cir. 2008)
3. Biesek v. Soo Lion R.R., 440 F.3d. 410 (7th Cir. 2006)
4. Parker v. Wendy's Int'l, Inc., 365 F.3d 1268 (11th Cir. 2004)
5. Pavlov v. Ingles Markets, Inc., 236 Fed. Appx. 549 (11th Cir. 2007)

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G. STANDING

1. In re Seres, 473 B.R. 775 (Bankr. W.D.N.Y. 2010)
2. In re Adams, 424 B.R. 434 (Bankr. N.D. Ill. 2010)
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