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Consumer Workshop III

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HOT TOPICS IN CONSUMER CASES

CASE LAW UPDATE

ABI ROCKY MOUNTAIN CONFERENCE

JANUARY, 2012

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INDEX OF MATERIALS

CHAPTER 5

Section 541: Property of the Estate

Funds in Debtor's bank account are property of the estate if checks written from account were issued pre-petition but have not cleared on the petition date.

- Reversing the Bankruptcy Court's denial of a chapter 7 trustee's motion for turnover, the 10th Circuit B.A.P. found that funds in a debtor's bank account used to pay checks issued pre-petition but that were not disbursed until a few days after the petition date were property of the estate. The B.A.P. reasoned that 1) the funds in the debtor's checking account were property of the estate at the time of filing, rather than merely a debt owed by the bank to the debtor; 2) although the bank had "possession" of the fund in the account both before and after the filing of the petition, until disbursement took place, the debtor maintained "control" over those funds; and 3) the debtor was in a better position than the trustee to prevent post-filing disbursements because debtors can delay filing of their petition until all issued checks are paid, stop payment on unpaid checks, close their account on the petition date, or immediately notify the bank of the bankruptcy. *In re Ruiz*, 455 B.R. 745 (B.A.P. 10th Cir. 2011).

Assets of a limited liability company that is wholly owned by the debtors are not property of the estate.

- The Bankruptcy Court found that a limited liability company, although wholly owned by the debtors, was a separate legal entity with its own debts and assets, and so assets of the limited liability company were not property of the debtor's estate. Therefore, the automatic stay did not apply to attempt to collect debts of the limited liability company. The Court also declined to grant a temporary injunction in favor of the limited liability company because there were no temporary and limited extraordinary circumstances to warrant such relief. *In re Biorge*, 2011 WL 1134109 (Bankr. D. Utah March 28, 2011).

Distributions made to a debtor post-petition on account of an employment agreements negotiated pre-petition are property of the estate.

- The debtor had an employment contract with his employer as of the petition date. The contract entitled him to a severance payment, which did not increase over time, if the employer terminated his employment within two years after a change in control. To receive the severance, the debtor had to waive claims against the employer and enter in a non-compete. After the debtor filed his petition, the employer was acquired, triggering debtor's right to severance. The Court found the severance payment was property of the estate because the debtor had a contingent right to the severance as of the petition date. Property of the estate includes property that is rooted in the pre-bankruptcy past but does not include earnings for post-petition services. Although the debtor had to continue working post-petition to receive the severance, the employer's severance obligation was more an incentive for the debtor to enter into the contract pre-petition than to continue working. Therefore, the Court pro-rated the severance payment between the debtor and the trustee based on the amount of time the debtor worked after the bankruptcy relative to the entire time he worked under the contract. *In re Jokiel*, 447 B.R. 868 (Bankr. N.D. Ill. 2011).

- In separate bankruptcy cases filed by former union employees of a commercial aircraft manufacturer, debtors received distributions post-petition pursuant to stock appreciation rights (SARs). The employer had agreed to the equity participation agreement under which the SARs were given in a pre-petition collective bargaining agreement negotiated with the debtors' union. The 10th Circuit found that the SARs were property of the estate and ordered turnover of the distributions because the debtors had a contingent property interest in the SARs at the time their respective bankruptcy cases were filed. The fact that the SARs were contingent on occurrence of certain post-petition events did not make the SARs mere expectancies. Rather, debtors' employer had a pre-petition contractual obligation to make payments if events occurred, making debtors' interest in the SARs sufficiently rooted in the pre-bankruptcy past and properly part of their bankruptcy estates. *In re Dittmar*, 618 F. 3d 1199 (10th Cir. 2010).

Judicial Estoppel

Judicial Estoppel does not apply to blameless trustee.

- The Fifth Circuit, en banc, reversed its earlier panel, holding that a "blameless trustee" was not barred by judicial estoppel from pursuing a cause of action omitted in the debtor's schedules. Prior to filing chapter 7, the debtor obtained a judgment in excess of $1 million under the Family Medical Leave Act, but failed to disclose the judgment on his schedules. When debtor's attorney learned of the judgment, he informed the chapter 7 trustee, who reopened the case, obtained revocation of discharge, and substituted herself as the real party in interest. The District Court applied judicial estoppel against the debtor and trustee, except to the extent the trustee could collect enough of the judgment to satisfy chapter 7 creditors. The Fifth Circuit panel reversed, applying complete judicial estoppel against the trustee. The panel's decision was vacated, with the en banc Court finding that absent unusual circumstances, an innocent trustee can pursue for the benefit of creditors a judgment or cause of action that the debtor fails to disclose. The Court found that the result accorded with its own precedent, as well as precedent from the Seventh, Eleventh and Tenth Circuits, citing *Eastman v. Union Pacific Railroad Co.,* 493 F.3d 1151, 1155 n. 3 (10th Cir. 2007)(applying judicial estoppel against the debtor, but indicating that it would not apply judicial estoppel against a trustee pursuing a debtor's personal injury claim discovered after the debtor's discharge) and *In re Riazuddin*, 363 B.R. 177 (B.A.P. 10th Cir. 2007)("The post-petition conduct of the Debtors, in omitting the claim from their schedules…does not relate to the merits of the personal injury claim and should not limit the Trustee's rights to pursue the claim…"). *Reed v. City of Arlington*, 650 F.3d 571 (5th Cir. 2011).

Debtor is judicially estopped from bringing claims she failed to disclose in her initial chapter 13 filings.

- The Sixth Circuit found that a debtor was judicially estopped from bringing a sexual harassment claim that she had not disclosed on her schedules and Statement of Financial Affairs. The Court found that there are two circumstances in the bankruptcy context that would make judicial estoppel inappropriate: (1) where the debtor lacks knowledge of the factual basis of the undisclosed claims, and (2) where the debtor has no motive for concealment. The Court found the debtor's failure to disclose the claim did not result from mistake or inadvertence under the circumstances as she had a motive to conceal and knowledge of the basis for her claim. The Court also rejected the debtor's argument that she had told her attorney of the suit and thus should not be held to the mistake of her attorney in failing to list the suit. The Court found the

debtor's attempts to advice the Bankruptcy Court and trustee of the claim did not excuse her initial omission. *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472 (6th Cir. 2010).

Section 548: Fraudulent Conveyance

Debtor fraudulently conveys assets to children's trust when debtor is aware of lien on assets, receives no consideration, and maintains control over assets.

- The Tenth Circuit found that under Kansas law, a debtor's transfer of assets to his children's trusts was fraudulent, and thus property held by trusts was subject to federal tax lien against the debtor, where taxpayer transferred money first to his wife who, in turn, transferred them to the children's trusts, all for no consideration. The debtor knew that the IRS was conducting audit of his taxes and transferred the property after the IRS issued notice disallowing certain of his claimed losses. Additionally, the debtor maintained control over the assets, using them to pay for his country-club memberships, car loans, and other personal expenses. *In re Krause*, 637 F.3d 1160 (10th Cir. 2011).

Section 727(a)(2): "Pre-bankruptcy Planning"

A debtor who knowingly engages in "pre-bankruptcy planning" is entitled to discharge and exemptions if there is no intent to hinder, delay or defraud creditors.

- Within the year prior to the petition date, the debtor took out an equity line against his home and placed that money in 529 education plans for his grandchildren and converted a CD into an annuity. Debtor acknowledged he did this with the purpose of turning a non-exempt asset, the equity and CD, into exempt assets. The Bankruptcy Court found that on its own, the desire to protect assets in a legitimate way is not evidence of fraudulent intent. Neither is the amount the debtor is attempting to exempt dispositive. Rather, there must be proof that the conversion of assets was part of debtor's scheme to hinder, delay, or defraud creditors. That is, what elevates exemption planning into an offense under § 727(a)(2) is the "extrinsic" conduct such as misrepresentation of facts, underhanded tactics, or other clandestine activities. The Court found the debtor had not engaged in such activities. Therefore, the debtor could claim the exemption as to the annuity. As for the funds in the 529 education plans, the Court found that under the Wisconsin exemption statute, they were not exempt as to the contributor, only as to the beneficiary, and so the debtor was ordered to turnover those funds. *In re Bronk*, 444 B.R. 902 (Bankr. W.D. Wis. 2011).

Section 525: Discrimination

Private employer does not violate § 525 by denial of employment.

- The Fifth Circuit ruled that section § 525(a) only prohibits governmental employees from denying employment because of bankruptcy, and private employers are not so restricted. *In re Burnett*, 635 F.3d 169 (5th Cir. 2011).
- The Eleventh Circuit ruled that § 525(a) only prohibits governmental employees from denying employment because of bankruptcy, and private employers are not so restricted. The Court also found that while a private employer may not fire based on a bankruptcy filing, a jury had

determined that the debtor failed to prove that he was ever hired by the private employer, and a judgment had been entered against the debtor based on wrongful termination. *Myers v. Toojay's Management Corp.*, 640 F.3d 1278 (11th Cir. 2011).

Section 522: Exemptions

Trustee may use powers under § 544(a) to object to exemptions.

- In construing Utah's exemption for proceeds of unmatured life insurance, the 10th Cir. B.A.P. also discussed two lines of authority when the trustee uses the hypothetical status under § 544(a) to object to the tenancy by entirety exemptions claimed by joint husband and wife debtors. Some case authority interprets § 544(a) as limited to avoidance transfers, but the Court adopted the second line of authority which holds that the powers given to a trustee under § 544(a) are not limited to avoidance transfers but specifically include broader rights and powers, and found the trustee could use its § 544(a) powers object to the tenancy by the entirety exemptions. The Court found that the 10th Circuit had rejected a narrow interpretation of § 544(a) powers in *Zilkha Energy Co. v. Leighton*, 920 F.3d 1520 (10th Cir. 1990), and the Court saw no conflict between § 544(a) and § 522(b). *In re Duffin*, -- B.R. --, 2011 WL 4351601 (B.A.P. 10th Cir. Sept. 19, 2011).

Under Wyoming law, there is no recognized tracing concept, and therefore, no exemption for portions of a tax refund attributable to exempt property.

- A debtor received a federal tax refund and scheduled as exemptions the portions of the refund withheld from exempt unemployment compensation and exempt retirement plan distributions. The 10th Circuit B.A.P. affirmed the Bankruptcy Court's granting of the trustee's exemption to such distributions. The Court found that while the Ohio Supreme Court has recognized the "tracing concept" and Utah's exemption statutes contain "tracing language," Wyoming law has not recognized the tracing concept nor made tracing language explicit in its statute. Therefore, under 10th Circuit precedent holding that withholdings are a "tax" under the Internal Revenue Code, the entire tax refund was non-exempt. *In re Hebert*, 2011 WL 1670898 (B.A.P. 10th Cir. May 03, 2011).

Under Colorado law, the portion of a federal tax refund attributable to the non-refundable portion of a child tax credit is exempt.

- The debtors claimed as exempt the portion of their federal tax refund attributable to the non-refundable portion of their child tax credit. The Colorado statute exempts the "full amount" of a debtor's refund that can be "attributed" to the child tax credit. The 10th Circuit B.A.P. overturned the Bankruptcy Court's order sustaining the trustee's objection to the exemption. All five Colorado bankruptcy judges had previously uniformly held that the Colorado child tax credit exemption is inapplicable to the non-refundable portion of a debtor's refund because a debtor was never legally entitled to claim a refund from the non-refundable credit, and thus no part of the refund could be attributed to it, and the credit itself cannot be a separate interest in property that becomes property of the estate. The B.A.P. disagreed, noting that 1) whether the credit itself is property of the estate is not the issue; 2) the Colorado legislature did not distinguish between the refundable and non-refundable portions of the credit; and 3) although the plain meaning of "attributed" means "caused or brought about," the bankruptcy courts erroneously narrowly

defined "attributed" to mean "directly attributable." The Court concluded that the application of the child tax credit invariably causes a debtor's tax refund to increase and that difference in the refund is "attributable" to the credit. *In re Dunckley*, 452 B.R. 241 (B.A.P. 10th Cir. 2011).

An inherited IRA is exempt under § 522(d)(12).

- The District Court followed *In re Nessa*, 426 B.R. 312 (B.A.P. 8th Cir. 2010), and other authorities, and found that an inherited IRA is exempt under § 522(d)(12). The Court reasoned that under § 522(d)(12), the exemption must constitute retirement funds that are exempt from taxation under the Internal Revenue Code, and the inherited IRA met both requirements. *Chilton v. Moser*, 444 B.R. 548 (E.D. Tex. 2011). *Accord In re Mathusa*, 446 B.R. 601 (Bankr. M.D. Fla. 2011).
- A SDNY Bankruptcy Court held that an IRA inherited by the debtor from his wife within 180 days of filing chapter 7 was exempt under § 522(d)(12). *In re Cutignola*, 450 B.R. 445 (Bankr. S.D.N.Y. 2011).
- A WD Wash. Bankruptcy Court held that an IRA inherited from the debtor's parents was exempt when the debtor had made a trustee-to-trustee transfer. *In re Johnson*, 452 B.R. 804 (Bankr. W.D. Wash. 2011).

Trustee may avoid a transfer of allegedly exempt property under § 548(a)(1).

- The debtor transferred interest in her homestead within two years of her bankruptcy filing. The 8th Circuit B.A.P. overturned the Bankruptcy Court's ruling that exempt property in Minnesota cannot be fraudulently transferred *per se* and thus cannot be avoided under § 548. The B.A.P. found that while state law determines the debtor's interest in the property, it does not determine whether a transfer of that interest is fraudulent under § 548. The debtor in this case undisputedly had an interest in the property transferred under state law. The exemption is personal to the debtor, and therefore may not be claimed by the recipient of a fraudulent transfer. Additionally, the Court noted that § 522(g) of the Code provides that if a trustee recovers property under § 550, the debtor may claim an exemption in the recovered property unless the transfer by the debtor was voluntary. Thus the Code anticipates recovery of property that was transferred fraudulently, even that which the debtor could have claimed as exempt. *In re Lumbar*, -- B.R. --, 2011 WL 4809870 (B.A.P. 8th Cir. October 12, 2011).

Section 521: Filing Requirements

Failure to file a creditor's matrix required by § 521(a)(1) is grounds for dismissal.

- The Tenth Circuit B.A.P. affirmed the Bankruptcy Court's order denying debtor's motion to reinstate his chapter 13 case, which was dismissed pursuant to § 512(i)(1) for failure to file a creditor's matrix as required by § 521(a)(1)(A). The Court found unpersuasive the debtor's argument that only the "information" required by § 521(a) is required, and that the debtor's creditors and addresses were provided in the filed schedules. The Court found that a creditor matrix must always be filed separately from the filed schedules under the plain language of the Bankruptcy Code. *In re Wilcox*, 2011 WL 3347772 (B.A.P. 10th Cir. August 4, 2011).

Section 523: Dischargeability

Fiduciary under § 523(a)(4)

In absence of express or technical trust, relative of creditors and manager of one of creditors' businesses was not a fiduciary.

- The Tenth Circuit B.A.P. affirmed denial of creditors' § 523(a)(4) defalcation by a fiduciary claim because debtor, who was a relative of the creditors and managed on of their gas stations was not a "fiduciary" under § 523(a)(4). Although the debtor was a "trusted agent," who was expected to operate the gas station, collect gas receipts, and make payments to the gasoline provider on creditors' behalf, the Court found these general duties of good faith and fair dealing are not sufficient to create a fiduciary relationship under § 523(a)(4). The Court also found the creditors failed to prove the existence of either an express trust or a technical trust, and so denial of their non-dischargeability complaint was proper. *In re Sawaged*, 2011 WL 880464 (B.A.P. 10th Cir. March 15, 2011).

Debtor was not in a fiduciary capacity to creditor of debtor's wholly owned corporation.

- The 7th Circuit found that although Illinois law places a fiduciary duty on a corporate officer or director to an insolvent corporation, that fiduciary status does not extend to creditors of the insolvent corporation for purposes of § 523(a)(4). Discussing the conflicting judicial authority on the issue, the Court declined in the absence of fraud to extend § 523(a)(4) so far as to make officers and directors of insolvent corporations personally liable without discharge for a wide range of corporate debts. The Court also found the creditor failed to show the existence of an express trust, and there was no implied fiduciary status, when the client of the corporation stood in an ordinary principal-agent or buyer-seller relationship with the corporation. *In re Berman*, 629 F.3d 761 (7th Cir. 2011).

Stated Income Loan Dischargeability

Creditor was not entitled to non-dischargeability on "stated income loan" where creditor had no reasonable reliance when it took no steps to verify income.

- The Bankruptcy Court ruled against creditor's complaint for non-dischargeability under § 523(a)(2)(B) on stated income loans. Debtors stated on their loan application that their combined monthly W–2 income was $18,400 with the wife debtor's dental hygienist income being $9,800/month and husband debtor's golf pro for Salt Lake County income being $8,600/month. The Court found the debtors did not materially misrepresent their income when they included K-1, self-employment and capital gains income in their figures. The Court also found creditor failed to show the Debtors prepared the application with an intent to deceive. Finally, finding that the reasonableness of reliance on stated income loans becomes more dubious as the amount of the stated income loan increases, the Court found that the creditor showed no reasonable reliance when it took no steps whatsoever to verify the stated income, but chose to remain willfully ignorant. *In re Dehlin*, 2011 WL 1261623 (Bankr. D. Utah March 31, 2011).

Pre-judgment Interest

Denial of post-judgment motion for pre-judgment interest appropriate where creditors delayed seeking recovery and loan agreement interest rate was usurious.

- The Tenth Circuit B.A.P. affirmed the Bankruptcy Court's denial of a post-judgment motion for pre-judgment interest on a non-dischargeable judgment against the debtor. Approximately five years after the debtor failed to repay a loan, he filed a chapter 7 bankruptcy. The creditors brought a nondischargeability complaint under § 523(a)(2) and received a non-dischargeable judgment against the debtor. The creditors then filed a motion to amend seeking prejudgment

interest, which the Bankruptcy Court denied. The Court affirmed, finding the Bankruptcy Court did not abuse its discretion in refusing the award on the grounds that 1) the creditors delayed seeking recovery from the debtor for approximately five years on a six month loan; and 2) the loan agreement contained a usurious interest rate 4.5 times the allowable rate in Colorado. *In re Bakay*, 2011 WL 2694718 (B.A.P. 10th Cir. July 12, 2011).

Student Loans

Dismissal of debtor's § 523(a)(8) undue hardship complaint proper where debtor repeatedly failed to comply with Bankruptcy Court orders directing him to apply for a federal loan consolidation program.

- The Eleventh Circuit affirmed the Bankruptcy Court's dismissal of the debtor's adversary proceeding to determine the dischargeability of his student loans due to undue hardship under § 523(a)(8) after the debtor repeatedly failed to comply with orders directing him to apply for the William D. Ford Program, a federal loan consolidation program under which the debtor's student loan payments could be as low as $0 per month depending on his income level. The Court found that the debtor's eligibility under the Ford Program would play a substantial role in whether he would be able to show undue hardship. The Court found the debtor's persistent refusal to comply with the Bankruptcy Court's orders warranted dismissal. *Wieckiewicz v. Education Credit Management Corp.*, 2011 WL 4912082 (11th Cir. October 17, 2011).

Discharge Injunction

Modification of discharge injunction appropriate to allow state court to determine validity and amount of debts.

- The Tenth Circuit B.A.P. affirmed the Bankruptcy Court's modification of the discharge injunction to allow a state court sit to continue to determine the validity and amount of debts under non-bankruptcy law while a complaint to determine dischargeability under § 523(a)(2) and (4) was pending in the Bankruptcy Court. A discharge had been entered, subject to the pending § 523 complaint, and while the Bankruptcy Court had exclusive jurisdiction over that complaint, it did not abuse its discretion in allowing the state suit to continue. *In re Eastburg*, 447 B.R. 624 (B.A.P. 10th Cir. 2011)

NEW CASE LAW MEANS TEST CHAPTER 7 & CHAPTER 13

WHAT CONSTITUTES INCOME UNDER THE MEANS TEST

Means test—Income: An inheritance received by the Chapter 13 debtors was included in their "current monthly income." *In re Melvin*, 2011 WL 1303307 (Bankr. C.D. Ill., April 6, 2011).

IN RE TINSLEY, 201 WL 1544171(Bankr.W.D.VA, April 19, 2010)-mileage reimbursement is income for purposes of the means test; but can also be deducted on Schedule J.

Where the debtors had included their adult daughter and her three children as household members, the daughter's regular contributions to household expenses would be considered income for purposes of calculating the debtors' current monthly income. In re Coverstone, 2011 WL 1541308 (Bankr. D. Idaho, April 21, 2011)

Where the debtor's wife's mortgage payments on the marital residence were paid "on a regular basis for the household expenses of the debtor or the debtor's dependents," and so were included in the debtor's "current monthly income" the payments could not be deducted via a marital adjustment, even though only the wife was liable on the debt, since this debt was incurred for a household purpose. The Court rationalized that only debts personal in nature to the non-filing spouse are deductible on line 17 of Form B-22A, thereby decreasing the DI figure. In re Rable, 445 B.R. 826 (Bankr. N.D. Ohio, March 4, 2011).

IN RE OLGUIN, 429 B.R. 346 (Bankr. D. Colo. April 29, 2010), Social security monies received by a third party and then paid to the Debtor on a regular basis are included in CMI.

IN RE WINKLES, 2010 WL 2680895 (BANKR.D.ILL. 2010), unemployment is not a benefit received under the Social Security Act and must be included in the CMI analyses. The Court distinguished unemployment (replacement of wages) with social security (old age income).

A $10711.14 union wage settlement was included in CMI even though it was a onetime non-reoccurring payment. IN RE COTTO, 2010 WL 847935 (Bankr. E. D. N.Y. march 12, 2010.)

Income received during the preceding 6 month period, regardless of when that income has been earned, shall be included in the Debtor's CMI. IN RE KATZ, 2011 WL 1990813 (bankr. C.D. Cal. May 20, 2011).

HOUSEHOLD SIZE

- **Means test—Household size:** Only a person dependant on the debtor is a member of the debtor's household. Under this approach, the debtor must have reasons to provide support for a dependant and the claimed dependant must have a reason to rely on the debtor. The following factors should be considered: (1) the length of time the claimed dependant resided in the household; (2) the reason the claimed dependant resides in the household; (3) the age of the alleged dependant; (4)

how much income or support the dependant receives from a third party; (5) whether the dependant is in school; and (6) whether the dependant could be claimed as an IRS deduction or qualify in another legal way, i.e. for purposes of medical insurance. See *In re Dunbar*, 99 B.R. 320 (Bankr. M.D. La. 1989). IN RE HEINZE, 2011 WL 143870 (BANK. D. WYO. JAN 12, 2011)

HOUSEHOLD SIZE

Debtor's adult son was not household member although claimed as dependant on tax return:

- **Means test—Household size:** Under the dependency approach adopted by the court for the determination of household size, the debtor's household size was one, even though the debtor claimed his adult son, who lived with him, as a dependent on the debtor's federal tax return. The adult child, the court said, was not contributing to the household income but seemed to substantially impact the debtor's expenses. As much as it empathized with a parent's desire to support an adult child, the court said--and under some circumstances it would be appropriate--this debtor's creditors should not have to bear the burden of debtor's son's expenses, where the son was not going to school, was not working but was capable of working, and did not appear to have any incentive to gain employment. IN RE KRAFT 2011 WL 996760 (BANK. D WYO. MARCH 16, 2011)

- Debtors' household size, for the purpose of determining their expenses under the means test, was two, not six, where the debtors' three adult children, and one grandchild, lived with them, but none of the four were dependants of the debtors. IN RE HEINZE SEE ABOVE.

Court adopts "economic unit" definition of "household": In re Robinson, 2011 WL 864937 (Bankr. E.D. Va., March 10, 2011)

Citing *In re Morrison*, 2011 WL 65737 (Bankr. M.D. N.C., Jan. 10, 2011), the court held that the term "household" as used in Code § 1325(b) includes the debtor and the persons who operate in the aggregate with the debtor as an economic unit. Here, where the debtor was wholly responsible for his four children for more than half of each week above and beyond the child support he was required to pay to the mothers of his children, the court determined that an economic unit of three best depicted the realities of the debtor's household size. The court said that this "household size" should be used in determining both whether a debtor is above- or below-median and the number of persons for whom the debtor may claim expenses under the means test.

SPECIAL CIRCUMSTANCES

HAMILTON V. LANNING, 130 S. Ct. 2464 (2010). The court may take into account known or virtually known information about the debtor's future income or expenses in determining "projected

disposable income." Taking the "forward looking" approach, the Court viewed the CMI figure as a starting point, which is susceptible to deviation based on special or other circumstances.

IN RE LIEHR, 439 B.R. 179 (B.A.P. 10th Circuit 2010) "Special circumstances" applies to expenses as well as income. Debtors cannot deduct mortgage payments for properties they are surrendering.

Possible additional medical expenses was not a special circumstances: In re Thompson, --- B.R. ----, 2011 WL 3799637 (Bankr. M.D. Fla., August 29, 2011.

The possibility that the debtor husband or the debtors' children would incur additional medical expenses in the future was not a special circumstance. Speculative expenses are not properly considered special circumstances.

The Court In In Re Thompson , also ruled that a Student loan debt was not special circumstance:

The debtors did not establish that their need to repay their student loan debt was a special circumstance. They did not establish that payment of the student loans could not be deferred or placed in forbearance; that the loans could not be consolidated to yield a lower monthly payment; or they could not lower their monthly payments through participation in the William D. Ford Federal Direct Loan Program for direct consolidation and income-contingent repayment. See also IN RE JOHNSON, 2011 WL 867498 (Bankr. E. D. Wis. March 11, 2011), where the Debtor could continue repayment of the student loan without the burden of proving special circumstances.

STUDENT LOAN DEBT WAS A SPECIAL CIRCUMSTANCE

Means test—Special circumstances—Student loan debt: Agreeing with the courts that take a more lenient view of those circumstances that constitute special circumstances for the purpose of the means test, the court held that, depending on the facts of a case, student loans payments may qualify as "special circumstances." Finding nothing in the plain language of Code § 707(b)(2)(B) requiring that the special circumstances be of an involuntary nature, the court also pointed to legislative history that demonstrated that the term "special circumstances" was chosen rather than "extraordinary circumstances." Here, the debtors met their burden of showing that their student loan payments constituted a special circumstance for which there was no reasonable alternative, where they had a monthly student loan payment of $2,041.61 but only $1,196.91 in monthly disposable income; it was unlikely that the debtors could establish undue hardship so as to discharge the debts (because the debtors' son was the primary obligor on the debts, and the debtors were only guarantors); and obtaining forbearance or deferment of the repayment obligations would leave the debtors in the same position as they were in now.

In re Sanders, —- B.R. ——, 2011 WL 2788950 (Bankr. M.D. Ala., July 12, 2011).

IN RE HARMON (BANKR E.D. PA 2011) The court addressed whether repayment of a student loan obligation constitutes a special circumstance under 11 U.S.C. Section 707(b)(2)(B). The Court noted that there are procedural & substantive requirements which a debtor must establish. That a debtor must itemize each additional expense or income adjustment, their impact on the debtor's finances & the means test, provide documentation, as well as an explanation that makes it a reasonable & necessary expense &

attest to this under oath. The statute only identifies two examples of special circumstances; a serious medical condition, or a call to active duty. 11 U.S.C. Section 707(b)(2)(B)(i).

The interpretation of the statute is divided.

(1) Narrow interpretation that there is no reasonable alternative other than payment. **IN RE SILER, 426 B.R. 167, 172 (BANKR. W.D.N.C.2010).**
(2) The presumption is rebuttable, and the standard is special, not extraordinary. **IN RE CARGO, 387 B.R. 225, 228 (E.D.WIS 2008).**

Childs college education was not a special circumstance. **IN RE LINVILLE,** 2001 WL 560421 (Bankr. D. N.M. Feb 15, 2011)

Child's college education expense is not special circumstance: After BAPCPA, the court is left with virtually no discretion with respect to expenses incurred by a debtor in assisting with a child's college education. It is well established that an adult child attending college is not a special circumstance that is out of the ordinary for an average family and leaves the debtor no reasonable alternative but to incur the expense. In re Wise, 2011 WL 2133843 (Bankr. S.D. Ill., May 27, 2011)

An anticipated expense of owning a home, auto & completing college education was not a special circumstance. **IN RE ROSS,** 2011 WL 482815 (Bankr M. D. Ala Feb 7, 2011).

Debtors who created need for additional transportation expenses could not claim expense as special circumstance:

Although the Chapter 7 debtors established that their actual transportation expenses greatly exceeded the standard allowance due to both debtors' extensive traveling to or for their employment, the debtors could not claim this additional expense as a special circumstance since they had created the circumstances that led to their additional transportation expenses by moving after they decided that they needed a bigger home to accommodate the needs of their two adult children, two minor children and one minor grandchild residing in their household. In re Pignotti, 2011 WL 1299616 (Bankr. S.D. Iowa, April 1, 2011)

- **Chapter 13—Confirmation of plan—Calculation of projected disposable income:** Where, during the six-month lookback period, the debtor received a one-time $50,000 bonus for enlisting in the Army, this was an occurrence for which an adjustment was appropriate under *Hamilton v. Lanning*, --- U.S. ----, 130 S.Ct. 2464, 2478, 177 L.Ed.2d 23 (2010). See IN RE MOORE, 2011 WL 242345 (Bankr. D. Colo. Jan 26, 2011)

- **Chapter 13—Confirmation of plan—Calculation of projected disposable income:** The Supreme Court's discussion in *Lanning* contains no suggestion that courts are free to abandon BAPCPA's statutory framework for calculating projected disposable income for above-median-income debtors when they account for changed circumstances. To the contrary, the most natural reading of its holding is that, within that established framework, courts shall take certain changes into account. Statutorily, that means disposable income must be calculated in accordance with Code § 1325(b)(2) and § 707(b)(2) while accounting for those changes. As a procedural matter, the most transparent method of demonstrating compliance with these sections is by filing an

amended Form 22C that reflects the debtor's changed circumstances as of the confirmation hearing date. The changed circumstances are not analyzed as "special circumstances," which must comply with the requirements stated in Code § 707(b0(2)(B).

Highly unusual amount of overtime worked might constitute special circumstance:

The Chapter 7 debtors' assertion that, during the six-month look-back period, the debtor husband was able to work an inordinate number of overtime hours, and that this magnitude of additional hours was only available once every 10 or 15 years, was sufficient to require an evidentiary hearing on whether the debtors established special circumstances rebutting the presumption of abuse .In re Bohnenblusch, 2011 WL 1102809 (Bankr. E.D. N.Y., March 21, 2011)

Debtor's age was not special circumstance: In re Anderson, 444 B.R. 505 (Bankr. W.D. N.Y., March 21, 2011)

The Chapter 7 debtor's age was not a special circumstance. The debtor, who was 67 years old, asserted that he was likely to retire sometime during the next 60 months, with a consequent substantial reduction in income. Meanwhile, prior to retirement, he proposed to pay his entire net disposable income into a pension account, with the consequence that he would have no resources for repayment of creditors.

Future loss of child support is not special circumstance: Because the determination of whether a presumption of abuse arises is not forward-looking, the debtor's future loss of child support income could not be taken into account. IN RE WISE, 2011 WL 2133843 (Bankr. S.D. Ill. May 27, 2011)

MEANS TEST MISCELLEANOUS EXPENSE & DEDUCTIONS

Means test—Expenses—Housing expense: *Ransom v. FIA Card Services, N.A.*, —— U.S. ——, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011), which held that a Chapter 13 debtor is not entitled to take the IRS local vehicle ownership expense deduction for a vehicle the debtor owns free and clear of any encumbrance, applies in Chapter 7 cases and to the IRS standard "mortgage/rent" expense. Thus, the debtor, who lived with his girlfriend and did not pay any rent, was not entitled to claim the expense. In re Wilson, 454 B.R. 155 (Bankr. D. Colo. Feb 25, 2011).

In the Wilson case the Debtor's claimed the mortgage rent expense under 22A & the non mortgage rent expense under 20A & 20B. The Debtor testified that he did not pay any rent. Judge Brown ruled that the Ransom analyses applied in a Chapter 7 bankruptcy as well as a chapter 13; and found that since the Debtor did not incur a rental expense, the B22A deduction was not available.

Debtors established employer-required educational expense: The debtors were permitted to deduct, under "other necessary expenses," an average monthly expense of $192 for employer-required, unreimbursed educational expense. In re Kulakowski, 2011 WL 3878386 (M. D. Fla. Sep 2, 2011)

The Chapter 7 debtors could not deduct a wage garnishment of $1,083.33 by the Iowa Department of Revenue as a "court-ordered payment" where the debtors testified that all tax obligations had now been satisfied and no garnishments were currently in place, although the garnishment apparently did not cease when the debtors filed their bankruptcy petition. IN RE CHAMBERS, 2011 WL 4479690 (BANKR.S.D.IOWA, JUNE 7, 2011)

IN RE LANCASTER, 2011 WL 477854 (BANKR. D. N.M., FEB. 3, 2011)

- **Means test—Expenses:** Voluntary contributions to retirement accounts are not deductible as "Other Necessary Expenses: involuntary deductions for employment."

- **Means test—Expenses:** Where the debtors claimed a telecommunications expense of $200, but this included basic telephone service, and that expense was already reflected in the local standards, the debtors would be allowed to claim only a $100 expense for Internet service.

- As of December 1. 2012 a proposed change to Official Form 22C (Chapter 13 Statement of Current Monthly Income and Calculations of Commitment Period and Disposable Income) (amended so as to expand the deduction of telecommunication services, as an "other necessary expense," to include expenses necessary for the production of income if not reimbursed by the debtor's employer; also amended to reflect the *Hamilton v. Lanning* decision; a new question asks above-median-income Chapter 13 debtors to list any changes in the income and expenses reported on the form that have already occurred or are virtually certain to occur during the 12 months following the filing of the petition)

- **Means test—Expenses:** The debtors could not claim a $100 expense for dance lessons for their child as an educational expense for dependent children on line 38 of Form 22A, as the debtors had not shown that this was a necessary expense not already accounted for in the IRS standards.

- **Means test—Expenses:** A student loan expense is not deductible as a priority debt expense.

IN RE THELEN, 431 B.R. 601 (Bankr. E.D.N.C. 2010) childcare expenses were allowed to be averaged over the same 6 month period as CMI even though the Debtors childcare expenses had been reduced due to a reduction in work hours.

IN RE BOYD, 414 B.R. 223, 228 (Bankr N.D. Ohio 2009), the Court determined that a tax lien was a non consensual debt, not contractually due & therefore disallowed a deduction under line 47 in the 22C Form. The Court did however allow a deduction under line 48 for the portion secured by the personal property of the Debtor necessary for the Debtors support.

Cure payments on second home are not deductible:

The Chapter 13 debtors could not deduct payments to cure a mortgage arrearage on their second home, which they described as investment property and the objecting creditor characterized as a vacation home, under Code § 707(b)(2)(A)(iii), which authorizes deductions for cure payments, spread over a period of 60 months, for a "debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents," as the second home was not necessary for the debtors' support. In re Amos, --- B.R. ----, 2011 WL 2550808 (Bankr. D. N.J., June 28, 2011)

- **Means test—Expenses:** The debtors' utility expenses were not even utility charges used by the debtors and would be disallowed, where the debtor wife testified that the Verizon Wireless bills were attributed to cell phones that the debtors "were going to use," but that "for the last couple years" the debtors' adult sons used those cell phones at a considerable expense, and that she had had to pay overage charges because of her son's calls to his girlfriend in the amount of $300-350 a month. IN RE HEINZE 2011 WL 143870 (BANKR. D. WYO JAN 12, 2011)

- **Means test—Expenses:** The debtors were not allowed to claim a monthly expense deduction of $1,000 for contributions to their children's college education on Line 35 of Form 22A, which instructs debtors to "[e]nter the actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses" and is based on Code § 707(b)(2)(A)(ii)(II). The plain meaning of this provision is that, for an expense to be allowable, (i) the expense must be the continuation of actual expenses paid by the debtor; (ii) the expense must be reasonable and necessary for care and support of an elderly, chronically ill, or disabled person; (iii) the person must be a member of the debtor's household or a member of the debtor's immediate family; and (iv) the person must be unable to pay the expense. Here, even if one of the debtors' children had a learning disability, the debtors did not show that the expense was attributable to the disability. IN RE LINVILLE 2011 WL 560421 (BANKR. D. N.M. FEB 15, 2011).

IN RE MELANCON, 400 B.R. 521 (Bankr. M.D. La. 2009) Debtor is entitled to the national health care standard, even if he or she spends less than that amount.

IN RE GREGORY, 452 B.R. 895 (BANKR. M.D. PA., JULY 13, 2011)The Debtors were entitled to a housing & utility adjustment, over & above the IRS allowance, however two of the expenses listed by the Debtors, TV & internet did not qualify as either a housing or utility expense. The debtor's 15 year old daughter had special needs, because she suffered from severe depression. At the recommendation of her psychologist, horseback riding, dance classes & piano lessons qualified as additional health care expense.

VEHICLE DEDUCTION/ OWNERSHIP EXPENSE & OPERATING EXPENSE

RANSOM V. FIA CARD SERVICES, N.A., 131 S. Ct. 716 (2011) In an above median Chapter 13 case, there is no vehicle ownership expenses deduction allowed under 1325(b)(3) for an unencumbered vehicle.

IN RE SCOTT, 2011 WL 3501835 (S.D. ILL AUGUST 9, 2011), a debtor may claim the standard IRS deduction for a motor vehicle ownership expense, even where the debtors actual payments were less than the standardized deduction. In this case Judge Grandy focused on Form B22C & found that because the Form permits the debtor to take the full allowance of the vehicle deduction, the Judge accepted the Form as an advisory opinion on how to calculate disposable income.

IN RE THIEL, 2011 WL 799779 (Bankr. D. Idaho Mar 1, 2011), above median Debtors transportation expense was capped at the IRS local standard. The Court stated that the rationale of Ransom, limited this expense.

However the $200 additional **operating expense** deduction for a vehicle older than 6 years or mileage in excess of 75000 may be still available. See IN RE BYRN, 410 B. R. 642 (Bankr. D. Mont. 2008) But See, **IN RE HARGIS, 2011 WL 1651235 (BANKR. D. UTAH MAY 3, 2011),** additional operating expense for an older vehicle was only allowed up to $100, as that was the figure disclosed in the Debtors Schedule J & **IN RE VANDYKE, 2011 WL 1833186 (BANKR C.D. ILL MAY 12, 2011),** the deduction was not available when the vehicle was not running.

Means test—Expenses—$200 "old car" additional operating expense: Two courts held that the debtor may not claim the $200 "old car" additional operating expense allowance recognized in certain IRS materials. See *In re Schultz*, 2011 WL 2443711 (Bankr. W.D. Mo., June 14, 2011) and *In re Dittrich*, 2011 WL 3471090 (Bankr. W.D. Wash., August 8, 2011). These Court's reasoned that the additional allowance is not contained in the code. Since the IRS guidelines are not incorporated into the Bankruptcy Code, the IRS guidelines are not controlling. The Courts also referred to the actual expenses in the Debtor's Schedule J.

Means test—Expenses—Operating expenses for three vehicles: While the IRS Local Standards only reference allowances for up to two cars, a debtor is not precluded from claiming an operating expense allowance for a third car, as the IRS Collection Financial Standards contained in the Internal Revenue Manual might permit an allowance for a third car if the operating expense is necessary to provide for the debtor's (or his family's) welfare or production of income. Thus, the debtors were entitled to an opportunity to show that an expense for their oldest minor daughter's operation of a third vehicle met this standard, where the daughter was enrolled in a dual high school/college program that required transportation between schools, and the daughter also used the vehicle to provide daily transportation for

her two younger sisters to and from school, medical appointments, and other activities. *In re Johnson*, —-B.R. ——, 2011 WL 2652467 (Bankr. M.D. Fla., July 8, 2011).

OTHER DEBT DEDUCTIONS SECURED DEBT

IN RE SONNTAG, 2011 WL 3902999 (N.D.W.VA SEP 6, 2011), chapter 7 case allowed a deduction of a secured debt contractually due on the petition date, even though the debtor intended to surrender the collateral. Contrast with **IN RE THOMPSON 2011 WL 3799637 (M.D. FLA AUG 29, 2011)** where the debtors were denied a deduction for their mortgage when they had moved out of their home, were paying rent at another residence & had ceased making the mortgage payments.

IN RE EDWARDS , 09-19071 ABC, The Court disallowed a deduction for a second mortgage which was successfully stripped.

PROJECTED DISPOSABLE INCOME

BAUD V CARROLL, 634 F.3rd 327 (6th Cir. 2011), Social security benefits were excluded from the calculation of projected disposable income. But See **IN RE HERRMANN** 2011 WL 576753 (Bankr. D. S.C. February 9, 2011) which stated although we will exclude SS income from CMI it still must be allocated to living expenses to satisfy the 1325(a)(3) good faith test.

Chapter 13—Calculation of projected disposable income—Inclusion of Social Security benefits: Two courts held that, since the statutory definition of "current monthly income" excludes Social Security benefits, a Chapter 13 debtor's projected disposable income likewise excludes these benefits. See *In re Ragos*, 2011 WL 3101436 (Bankr. E.D. La., July 21, 2011) and *In re Vandenbosch*, Case No. 2:11-cv-139 (M.D. Fla., Oct. 11, 2011)

IN RE CRANMER, 433 B.R. 391 (BANK. D. UTAH 2010), denied confirmation where the Debtors plan did not include SSI in the DI determination. **IN RE THOMPSON, 439 B.R. 140 (8TH CIR BAP 2010).** In this case the Trustee was precluded from arguing that excluding SS benefits from payments to unsecured creditors was bad faith pursuant to 11 U.S.C. Section 1325(a)(3).

MEYER V SCHOLZ, BAP No EC-10-1153-MkZJu (BAP 9th Circuit, March 22, 2011, Railroad Act Benefits are part of CMI, but not part of the calculation for projected disposable income.

- **BURDEN V SEAFORT, 437 B.R. 204, 211 (6TH CIR BAP 2010),** Relying on Lanning & Ransom, (which state that the calculation of a debtors projected disposable income must take into account any changes in the financial circumstances of the debtor reasonable certain to occur during the term of the plan), the majority of the courts now require that at the time a retirement loan is fully repaid, the funds used to pay this loan must be used to pay class IV creditors.

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Chapter 13—Calculation of projected disposable income—Effect of retirement account contributions: Disagreeing with *In re Seafort*, 437 B.R. 204 (6th Cir. B.A.P. 2010), the Bankruptcy Court for the Eastern District of Pennsylvania held that the effect of Code § 541(b)(7) is to exclude from a debtor's estate contributions to 401(k) accounts, which therefore may not be included in the calculation of the debtor's projected disposable income, and the debtor's contributions are not limited to the amount being contributed on the petition date. Had Congress intended such a limitation, the court reasoned, Congress could have inserted specific language into § 541(b)(7). *In re Egan*, 2011 WL 3902817 (Bankr. E.D. Pa., August 30, 2011).

In re McCullers, --- B.R. ----, 2011 WL 2358568 (Bankr. N.D. Cal., June 8, 2011).

- **Chapter 13—Confirmation of plan—Calculation of projected disposable income:** Finding *In re Prigge*, 441 B.R. 667 (Bankr. D. Mont. 2010) to be persuasive, the court said that a Chapter 13 debtor's voluntary contributions to the debtor's retirement fund are included in the debtor's projected disposable income.

- **Chapter 13—Confirmation of plan—Calculation of projected disposable income:** Where the Chapter 13 debtor's loan from his 401(k) plan would be fully repaid 32 months into his 60–month plan, at that time the income previously used to repay the loan became disposable income that must be used to repay creditors.

IN RE BRACE, (Bankr.N.D.Ill. 2010) payment of a loan against a 401K, is not an involuntary deduction, even thought the Debtors only method to stop the deduction is to quit his or her job.

Chapter 13—Calculation of projected disposable income: CHARITY EXPENSE A review of Code § 1325 supports the conclusion that bankruptcy courts are not to engage in a more thorough analysis of a Chapter 13 debtor's charitable contributions than what is required by the plain language of § 1325(b)(2)(A)(ii). If Congress had intended for courts to consider when a debtor began making charitable contributions, then the Bankruptcy Code would have been amended to address the issue explicitly. Thus, in evaluating the charitable contributions of an above-median debtor, the court may only consider whether the debtor is within the 15 percent cap imposed by § 1325(b)(2)(A)(ii). *In re Gamble*, 2011 WL 2971406 (Bankr. M.D. N.C., June 15, 2011).

APPLICABLE COMMITANT PERIOD

Neither of the Supreme Court cases above addressed the applicable commitment period, but see **IN RE TIMOTHY**. 442 B.R. 28 (B.A.P. 10th Cir 2010) above median debtor must propose a 60 month plan even though the Debtor has negative disposable income. See also **IN RE TENNYSON, 611 F.3RD 873 (11TH CIR. 2010),** Lanning does not control whether the ACP is a temporal requirement or a multiplier.

- **Chapter 13—Confirmation of plan—Plan term:** Amending its earlier opinion, found at *In re Reed*, --- B.R. ----, 2011 WL 2680938 (Bankr. D. Or., July 8, 2011), the court held that *Hamilton v. Lanning*, —— U.S. ——, 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010) did not overrule *In re Kagenveama*, 541 F.3d 868 (9th Cir. 2008) insofar as the latter case held that an above-median Chapter 13 debtor with negative projected disposable income has no application commitment period and is not required to propose a 60-month plan. See *In re Henderson*, 2011 WL 1467934 (Bankr. D. Idaho, April 18, 2011).

IN RE GRUTSCH, 2011 WL 2600638 (BANKR. D. KANSAS 2011), above median debtor who retired 6 months after confirmation of the plan & became below median was able to reduce his payments but unable to reduce the length of the plan from a 60 month plan.

Chapter 13—Plan length: Under the forward-looking approach embraced in *Hamilton v. Lanning*, 130 S.Ct. 2464 (2010), a debtor who demonstrates that she has below-median income at the time of confirmation can propose a plan with an applicable commitment period of 36 months, even if the debtor's current monthly income on Form 22C was above-median. Here, the debtor's current monthly income was above-median on the petition date but decreased significantly thereafter as her nonfiling husband left the family home and reduced his monthly contribution from $8,000 to $1,800. *In re Ducret*, 2011 WL 2621329 (Bankr. S.D. Fla., July 5, 2011).

IN RE REED, 2011 WL 2680938 (Bankr. D. Or. August 9, 2011), The Court held that voluntary payments by an above median income debtor were not required to be paid for the full five years of the plan. The ACP only applies to projected disposable income, not to voluntary payments in excess of that income. The Court determined that only in unusual circumstances where there is evidence of changes that are known or virtually certain will disposable income be adjusted before projecting that income over the plan period . The Court found that a mere difference in Form B22C and the numbers contained in schedules I & J is not enough to demonstrate a change. The Court held that neither LANNING or RANSOM overruled the IN RE KAGENVEAMA, 541 F. 3RD 868 (9TH CIR.) decision which stated that no ACP exists for an above median income debtor with zero or negative proejected disposable income.

MARITAL ADJUSTMENT

Debtor may take marital adjustment for spouse's contributions that benefit debtor:

Reversing the bankruptcy court, the district court held that the Chapter 7 debtor, a married woman filing individually, could deduct, as a martial adjustment, her husband's mortgage payments on the marital residence, where only he was liable on the mortgage debt. Code § 101(10A)(B) is explicit in allowing a deduction for *any* contributions not dedicated to the household expenses of the debtor and the debtor's

dependants, even where the debtor benefits from the contribution, as here, where the husband's mortgage payments provided the debtor with a home. The district court said that the bankruptcy court in *In re Trimarchi*, 421 B.R. 914 (Bankr. N.D. Ill. 2010) had made the same error as the bankruptcy court below.

U.S. Trustee has burden of proof on disallowance of marital adjustment:

The U.S. Trustee, who challenged the Chapter 7 debtor's claimed martial adjustment, had the burden of establishing that the credit card debts of the debtor's nonfiling husband were incurred for the debtor's household expenses.

Court may not assume that credit card debt was accumulated for household purposes:

Here, the bankruptcy court committed clear error in allowing the debtor to claim only $300 of her husband's $1,300 monthly credit card payments as a marital adjustment, where the bankruptcy court relied on the U.S. Trustee's assertion of "the fact that a credit card is ordinarily used for household expenses."

Sturm v. U.S. Trustee, ---- B.R. ----, 2011 WL 2746059 (N.D. Ohio, July 14, 2011)

Where the debtor's non filing husband had regularly contributed $5127.19 to the Debtor's household expenses, the debtor was not permitted, via the marital adjustment, to limit the husband's contribution to one-half of the total household expenses on the theory that the other half of the expenses was the debtor's "share," although she earned no income. *In re Kulakowski*, 2011 WL 3878386 (Bankr. M.D. Fla., Sept. 2, 2011)

OTHER CASES

IN RE BALAS AND MORALES, 2011 WL 2312169 (Bank C.D. Cal June 13, 2011) Legally married same sex couple were found eligible to file a joint petition. Rejecting the federal Defense of Marriage Act, the Court ruled that to deny a joint petition violated the equal protection rights of legally married persons under the Due Process Clause of the Fifth Amendment.

STANDIFERD V US TRUSTEE, 641 F.3rd 1209 (10th Cir. 2011), Debtors pre-conversion misconduct during a pending chapter 13 may support denial of a discharge in a post conversion case under 727(a)(6)(A). In this case the debtors did not keep the Trustee apprised of their post petition financial condition as required by the confirmed plan. Also the debtor's unsecured debt had tripled while in the chapter 13.

IN RE CHAPMAN, 447 B.R. 250 (8th Cir. BAP 2011) Section 707(b)(1) applies upon conversion of a chapter 13 case to a chapter 7.

CHAPTER 13 ISSUES

MORTGAGE FEES/CHARGES ISSUES RELATED TO CHAPTER 13

Jacks v. Wells Fargo Bank, N.A., 642 F.3d 1323 (11th Cir. 2011) – Fees recorded on a Chapter 13 Debtor account but not collected on from the Debtor or estate is not an "act" in violation of 11 U.S.C. § 362(a)(3).

(SEE NEW RULE 3002.1)

Home Funds Direct v. Monroy, 2011 U.S. App. LEXIS 12405 (9th Cir. 2011) – No provision in the bankruptcy code that grants creditors a "right" to decline to provide account statements or coupons.

In re Taylor, 2011 U.S. App. LEXIS 17651 (3rd Cir. 2011) – Rule 11 reasonable inquiry standard requires that an attorney do more than just rely on computerized forms given to them by third party (not the creditor) when there are indications that information may not be correct. Attorneys/firm sanctioned for filing inaccurate pleadings related to MFRS.

Wells Fargo Bank v. Collins, 2011 U.S. App. LEXIS 16980 (5th Cir. 2011) - Language in mortgage documents that allowed the creditor to do and pay for what is "reasonable or appropriate to protect lender's interest in the property" does not authorize the collection of fees for preparing POCs as preparing POC does not protect creditor's interest in property.

TOLLING PERIOD RE CHAPTER 13 FOR TAX DISCHARGEABLITY

Cal. Franchise Tax Bd. v. Kendall, 2011 U.S. App. LEXIS 14246 (9th Cir. 2011) – Upon Chapter 13 confirmation and property revesting the stay against collecting on tax debt ends and the statutory three year period is only suspended until 90 days after plan confirmation.

CONVERSION FROM 7 TO 13

In re Chapman, 447 B.R. 250, (B.A.P. 8th Cir. 2011) – Abuse provisions of 11 U.S.C. § 707(b) do apply to a Chapter 7 case converted from Chapter 13.

CHAPTER 13 PLAN LENGTH FOR ABOVE MEDIAN INCOME DEBTORS

Whaley v. Tennyson, 611 F.3d 873 (11th Cir. 2010); In re Timothy, 442 B.R. 28 (B.A.P. 10th Cir. 2010) – Above median income Debtors who do not pay unsecured creditors in full must propose a 60 month Chapter 13 Plan (even if there is zero or negative disposable income).

PLAN COMPLIANCE WITH LOCAL RULES

In re Butcher, Case No. 11-10545 HRT (Bankr.D.Colo. 9-20-2011) – Court may deny confirmation of a plan that fails to comply with local rules and local form plan.

ADDITIONAL PLAN LANGUAGE

In re Gordon, Case No. 11-13885 EEB (Bankr.D.Colo. 3-25-2011) – Non-standard language added to proposed plan is permissible and not inconsistent with the Code.

LIEN STRIP ALLOWED IN A NO DISCHARGE 13

In re Waterman, 2011 WL 1337151 (Bankr.D.Colo. 4-2-2011) – A Chapter 13 debtor may strip off a wholly unsecured second lien against his residence under 11 U.S.C. § 506 even after he has received a discharge of the debt under a Chapter 7 filed within four years of the Chapter 13. See also *In re Fisette,* No. 11-6012 (B.A.P. 8th Cir., August 29, 2011).

CHAPTER 13 AVOIDING POWERS

In re Hardcastle, 2011 WL 537862 (Bankr.D.Colo. 1-21-2011) – Only the Trustee has standing to assert avoidance claims under 11 U.S.C. §§ 544, 545, 547, 548 and 549.

CHAPTER 13 TREATMENT OF UNSECURED STUDENT LOAN DEBTS

In re Johnson, ____ B.R. ____ , 2011 WL 867498 (Bankr.E.D.Wis. 3-11-2011) – 11 U.S.C. § 1322(b)(5) permits a debtor with student loan payments that mature after the plan completion date to continue to make payments on the student loan.

AUTOMATIC STAY AND RELATED ISSUES

Generally

*Olick v. Northhampton County,*2011 U.S. Dist. Lexis 123683 (E.D. PA. October 26, 2011). **Automatic Stay and Taxes:** Debtor alleged numerous claims arising out of its mortgage lender's payment of tax assessments directly to taxing authorities during Chapter 13 case, including fraud, conversion, violation of the automatic stay, Breach of Contract and RICO violations. The Court dismissed each of the claims. The Court treated the payment as akin to sale of a claim. By paying the claim to the taxing authorities, the lender stepped into the shoes of the taxing authorities on their proofs of claim.

In re Jacks, (Jacks v. Wells Fargo Bank), 642 F.3d 1323 (11th Cir. June 7, 2011), **Automatic Stay and Claims:** Debtor's requested class certification for a class of debtors affected by charges imposed by Wells Fargo for the filing of Proofs of Claim and plan reviews. Prior to considering class certification, the Court reviewed the merits of the Debtors' claims. The Court of Appeals upheld the lower courts' holdings that the "mere recordation of fees incurred by Wells Fargo on its internal records without any attempt to collect these fees from the debtor or estate or to modify the mortgage" does not violate the stay. The Court dismissed any claims related to post-dismissal or post-discharge collection of those fees, as the issues were not ripe.

In re Shamus Holdings (Shamus Holdings v. LBM Financial), 642 F.3d 263 (!st Cir. June 9, 2011). **Automatic Stay and Tolling:** Where the statute of limitations for enforcement of a mortgage has not

passed at the time of filing bankruptcy, Mortgagee's rights to foreclose are protected and preserved by 11 U.S.C. § 108(c), until such time as the stay is terminated.

Garret v. Cook, 652 F.3d 1249 (10th Cir. June 24, 2011). **Application of the Stay:** The automatic stay does not stay actions that arise post-petition on claims that arise post-petition.

TW Telecom Holdings Inv. V. Carolina Internet Ltd, 2011 US App Lexis (10th Cir.): **Application of the Stay:** The Tenth Circuit reversed its prior holdings that a Debtor could file an appeal of a judgment while in bankruptcy.

> Accordingly, we overrule this circuit's prior interpretation of § **362**(a)(1), as stated in *In re Gindi*, 642 F.3d at 870, 875-76; *Morganroth & Morganroth*, 213 F.3d at 1310; *Mason*, 115 F.3d at 1450; *In re Lyngholm*, 24 F.3d at 91-92; and *Autoskill Inc.*, 994 F.2d at 1485-86. From this date forward, this Circuit will read section **362** . . . to stay all appeals in proceedings that were *originally brought* against the debtor, regardless of whether the debtor is the appellant or appellee. Thus, whether a case is subject to the **automatic stay** must be determined at its inception. That determination should not change depending on the particular stage of the litigation at which the filing of the petition in bankruptcy occurs. *Citing, Ass'n of St. Croix Condo. Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 449 (3d Cir. 1982).

Standing

In re Miller, 2011 WL 1807015 (10th Cir. BAP, 2011). Creditor Bank had

standing to pursue stay relief after state court determined that Bank had standing under Colorado foreclosure law. The Rooker-Feldman doctrine precluded review of state court judgment with regard to standing. The Debtors participated in state foreclosure proceedings, claiming that Bank lacked standing, and state court rejected defense.

In re Martinez, 444 B.R. 192 (Bankr. D. Kan. 2011). Following a long line of cases in the Tenth Circuit, the Court held that MERS had standing to seek stay relief. The state court judgment holding against MERS was not given *res judicata* effect.

In re Heating Oil Partners, LP (Church Mutual Insurance Co. v. American Home Assurance Company), 422 Fed. Appx. 15 2011 US App Lexis 9978 (1st Cir. May 26, 2011). **Standing:** Debtor's insurance company that was jointly liable on debt had standing to set aside default judgment against debtor entered in violation of automatic stay. **Automatic Stay: "**The stay is effective immediately upon the filing of the petition, and any proceedings or actions described in *section 362(a)(1)* are void and without vitality if they occur after the automatic stay takes effect."

Repeat Filers:

In re Antal, 2011 U.S. Dist. Lexis 121205 (E.D. Mich. October 20, 2011). **Automatic Stay and Repeat Filers:** In this Chapter 13 case, the automatic stay as to Debtor-husband was limited by the provisions of Section 362(c)(3)(b). Debtor-wife was not. Rather than filing a motion to extend the stay, the debtors filed a joint plan which did not vest the property of the estate into the debtors at confirmation, but rather, left all property as property of the estate. This allowed the debtors to retain the protection of the automatic stay throughout the case. The District Court reversed the finding that this was an illegal plan, but upheld the court's refusal to confirm the plan, holding that the Debtors had failed to meet the good faith test.

Sanctions – 362(k)

Harvey v. Allianceone Receivables Management, 2011 U.S. Dist. Lexis 77760 (E.D. WA. June 18, 2011). **Stay Violations:** Following the case of *Walls v. Wells Fargo Bank, N.A.,* 276 F.3d 502 (9th Cir. 2002), the Court held that a plaintiff could not assert claims under the FDCPA during a bankruptcy case. "Ultimately the Court concluded that 'while the FDCPA's purpose is to avoid bankruptcy, if bankruptcy nevertheless occurs, the debtor's protection and remedy remain under the Bankruptcy Code.'" In dismissing the debtors' claims, the court affirmed that there is no private right of action under 11 U.S.C. § 524, and claims under the FDCPA cannot be shoe-horned into the rights provided by 11 U.S.C. § 362. The court agreed with the prior Walls decision in holding that the Bankruptcy Code offers a comprehensive system to balance the rights of creditors and debtors alike and is exclusive of other remedies.

In re Johnson, 2011 US Dist. Lexis 54960 (E.D. Mich. May 23, 2011). **Automatic Stay and Discharge Violations**: although the discharge injunction does not specify an individual cause of action, like Section 362(k), the courts may fashion a remedy under 11 U.S.C. § 105, if the action raises to the level of a willful violation.

In re Ventura-Linenko (Page Ventures v. Ventura Linkenko), 2011 US Dist Lexis 40299 (D. Nev. April 1, 2011). **Violations of the Stay**: Debtor filed bankruptcy after foreclosure sale was complete but prior to eviction. Creditor's counsel failed to respond to notice of the pending bankruptcy and continued with the eviction. The District Court upheld award of damages under 11 U.S.C. § 362(k) for willful violation of the stay, emotional distress and punitive damages.

In re Taylor, 655 F.3d 274 (3rd Cir. August 24, 2011). **Motions for Relief- Sanctions**: Court of Appeals reversed District Court and reinstated decision by bankruptcy court to impose sanctions on law firm and Mortgagee for failing to ensure that information provided to the Court was accurate. The Court of Appeals found that the trial court had "issued sanctions thoughtfully chosen to prevent the recurrence of problems at the [law firm] based on what she had learned of practices there."

Stein v. US Bancorp and Wells Fargo, 2011 U.S.Dist. Lexis 18357 (E.D. Mich. February 24, 2011). **Violations of the Stay**: The District Court upheld a bankruptcy court ruling denying Debtors' argument that lender improperly foreclosed upon their home in violation of the automatic stay. Pursuant to state law, the Debtors rights in the property expired prior to the petition date, accordingly, there was no violation. The Court also rejected Debtors' arguments regarding the assignment of mortgage as they were not parties to the assignment.

Consumer Fin. Servs. Corp. V. Alexander, 2011 U.S. Dist. Lexis 19068 (N.D. Ill. Feb. 24, 2011). **Violations of the Stay**: Creditor did not timely return possession of a repossessed vehicle to the Debtor after learning of the bankruptcy filing. Instead, Creditor filed an emergency motion to annul the stay to protect its asset. The District Court upheld the award of damages, including an award of attorneys' fees to the Debtor.

In re Sturman, 2011 U.S. Dist. Lexis 109599 (S.D.N.Y. September 27, 2011). **Violations of the Stay**: In order to receive an award of damages pursuant to 11 U.S.C. § 362(k), plaintiff must show a cognizable injury. Punitive damages require a finding that the violations were malicious or in bad faith.

In re Laboy (Laboy v. Doral Mortgage Corp.), 647 F. 3d 367 (1st Cir. 2011). **Stay Violations:** Willful violation of the automatic stay is any intentional action taken with knowledge of the bankruptcy case. **Damages:** Where the court finds a willful violation, the aggrieved party is entitled to present evidence on the appropriate damage award. The statute mandates an award of actual damages.

Related Cases- Foreclosure

Jensen v. America's Wholesale Lender, et. al., 425 Fed. Appx. 761

(10th Cir. 2011). The Tenth Circuit, applying the *Iqbal* (129 S.Ct. 1937 (2009)) standards of pleading, affirmed the District Court's dismissal of homeowners' fraud and RICO claims against foreclosing lenders and their agents. Bare allegations of wrongdoing without any specificity were insufficient to prevail over a motion to dismiss.

Commonwealth Property Advocates, LLC v. MERS et. al., 2011 WL 2714429

(D. Utah 2011). The District Court affirms summary judgment against plaintiff on claims that securitization of note renders the note an unsecured obligation. The case law in the Tenth Circuit, specifically that out of Utah, has consistently rejected all attempts to argue the "split-note theory" as it is contrary to well-established law that the transfer of the note carries with it the security.

HOT TOPICS IN CONSUMER CASES

CASE LAW UPDATE

ABI ROCKY MOUNTAIN CONFERENCE

JANUARY, 2012

Hon. Joel T. Marker
Matt J. McCune
Deanna L. Westfall
Loretta A. Burnett

Material prepared with the assistance of Retired Judge William Houston Brown

of Carbondale, CO

INDEX OF MATERIALS

CHAPTER 5

Section 541: Property of the Estate

Funds in Debtor's bank account are property of the estate if checks written from account were issued pre-petition but have not cleared on the petition date.

- Reversing the Bankruptcy Court's denial of a chapter 7 trustee's motion for turnover, the 10th Circuit B.A.P. found that funds in a debtor's bank account used to pay checks issued pre-petition but that were not disbursed until a few days after the petition date were property of the estate. The B.A.P. reasoned that 1) the funds in the debtor's checking account were property of the estate at the time of filing, rather than merely a debt owed by the bank to the debtor; 2) although the bank had "possession" of the fund in the account both before and after the filing of the petition, until disbursement took place, the debtor maintained "control" over those funds; and 3) the debtor was in a better position than the trustee to prevent post-filing disbursements because debtors can delay filing of their petition until all issued checks are paid, stop payment on unpaid checks, close their account on the petition date, or immediately notify the bank of the bankruptcy. *In re Ruiz*, 455 B.R. 745 (B.A.P. 10th Cir. 2011).

Assets of a limited liability company that is wholly owned by the debtors are not property of the estate.

- The Bankruptcy Court found that a limited liability company, although wholly owned by the debtors, was a separate legal entity with its own debts and assets, and so assets of the limited liability company were not property of the debtor's estate. Therefore, the automatic stay did not apply to attempt to collect debts of the limited liability company. The Court also declined to grant a temporary injunction in favor of the limited liability company because there were no temporary and limited extraordinary circumstances to warrant such relief. *In re Biorge*, 2011 WL 1134109 (Bankr. D. Utah March 28, 2011).

Distributions made to a debtor post-petition on account of an employment agreements negotiated pre-petition are property of the estate.

- The debtor had an employment contract with his employer as of the petition date. The contract entitled him to a severance payment, which did not increase over time, if the employer terminated his employment within two years after a change in control. To receive the severance, the debtor had to waive claims against the employer and enter in a non-compete. After the debtor filed his petition, the employer was acquired, triggering debtor's right to severance. The Court found the severance payment was property of the estate because the debtor had a contingent right to the severance as of the petition date. Property of the estate includes property that is rooted in the pre-bankruptcy past but does not include earnings for post-petition services. Although the debtor had to continue working post-petition to receive the severance, the employer's severance obligation was more an incentive for the debtor to enter into the contract pre-petition than to continue working. Therefore, the Court pro-rated the severance payment between the debtor and the trustee based on the amount of time the debtor worked after the bankruptcy relative to the entire time he worked under the contract. *In re Jokiel*, 447 B.R. 868 (Bankr. N.D. Ill. 2011).

- In separate bankruptcy cases filed by former union employees of a commercial aircraft manufacturer, debtors received distributions post-petition pursuant to stock appreciation rights (SARs). The employer had agreed to the equity participation agreement under which the SARs were given in a pre-petition collective bargaining agreement negotiated with the debtors' union. The 10th Circuit found that the SARs were property of the estate and ordered turnover of the distributions because the debtors had a contingent property interest in the SARs at the time their respective bankruptcy cases were filed. The fact that the SARs were contingent on occurrence of certain post-petition events did not make the SARs mere expectancies. Rather, debtors' employer had a pre-petition contractual obligation to make payments if events occurred, making debtors' interest in the SARs sufficiently rooted in the pre-bankruptcy past and properly part of their bankruptcy estates. *In re Dittmar*, 618 F. 3d 1199 (10th Cir. 2010).

Judicial Estoppel

Judicial Estoppel does not apply to blameless trustee.

- The Fifth Circuit, en banc, reversed its earlier panel, holding that a "blameless trustee" was not barred by judicial estoppel from pursuing a cause of action omitted in the debtor's schedules. Prior to filing chapter 7, the debtor obtained a judgment in excess of $1 million under the Family Medical Leave Act, but failed to disclose the judgment on his schedules. When debtor's attorney learned of the judgment, he informed the chapter 7 trustee, who reopened the case, obtained revocation of discharge, and substituted herself as the real party in interest. The District Court applied judicial estoppel against the debtor and trustee, except to the extent the trustee could collect enough of the judgment to satisfy chapter 7 creditors. The Fifth Circuit panel reversed, applying complete judicial estoppel against the trustee. The panel's decision was vacated, with the en banc Court finding that absent unusual circumstances, an innocent trustee can pursue for the benefit of creditors a judgment or cause of action that the debtor fails to disclose. The Court found that the result accorded with its own precedent, as well as precedent from the Seventh, Eleventh and Tenth Circuits, citing *Eastman v. Union Pacific Railroad Co.,* 493 F.3d 1151, 1155 n. 3 (10th Cir. 2007)(applying judicial estoppel against the debtor, but indicating that it would not apply judicial estoppel against a trustee pursuing a debtor's personal injury claim discovered after the debtor's discharge) and *In re Riazuddin*, 363 B.R. 177 (B.A.P. 10th Cir. 2007)("The post-petition conduct of the Debtors, in omitting the claim from their schedules…does not relate to the merits of the personal injury claim and should not limit the Trustee's rights to pursue the claim…"). *Reed v. City of Arlington*, 650 F.3d 571 (5th Cir. 2011).

Debtor is judicially estopped from bringing claims she failed to disclose in her initial chapter 13 filings.

- The Sixth Circuit found that a debtor was judicially estopped from bringing a sexual harassment claim that she had not disclosed on her schedules and Statement of Financial Affairs. The Court found that there are two circumstances in the bankruptcy context that would make judicial estoppel inappropriate: (1) where the debtor lacks knowledge of the factual basis of the undisclosed claims, and (2) where the debtor has no motive for concealment. The Court found the debtor's failure to disclose the claim did not result from mistake or inadvertence under the circumstances as she had a motive to conceal and knowledge of the basis for her claim. The Court also rejected the debtor's argument that she had told her attorney of the suit and thus should not be held to the mistake of her attorney in failing to list the suit. The Court found the

debtor's attempts to advice the Bankruptcy Court and trustee of the claim did not excuse her initial omission. *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472 (6th Cir. 2010).

Section 548: Fraudulent Conveyance

Debtor fraudulently conveys assets to children's trust when debtor is aware of lien on assets, receives no consideration, and maintains control over assets.

- The Tenth Circuit found that under Kansas law, a debtor's transfer of assets to his children's trusts was fraudulent, and thus property held by trusts was subject to federal tax lien against the debtor, where taxpayer transferred money first to his wife who, in turn, transferred them to the children's trusts, all for no consideration. The debtor knew that the IRS was conducting audit of his taxes and transferred the property after the IRS issued notice disallowing certain of his claimed losses. Additionally, the debtor maintained control over the assets, using them to pay for his country-club memberships, car loans, and other personal expenses. *In re Krause*, 637 F.3d 1160 (10th Cir. 2011).

Section 727(a)(2): "Pre-bankruptcy Planning"

A debtor who knowingly engages in "pre-bankruptcy planning" is entitled to discharge and exemptions if there is no intent to hinder, delay or defraud creditors.

- Within the year prior to the petition date, the debtor took out an equity line against his home and placed that money in 529 education plans for his grandchildren and converted a CD into an annuity. Debtor acknowledged he did this with the purpose of turning a non-exempt asset, the equity and CD, into exempt assets. The Bankruptcy Court found that on its own, the desire to protect assets in a legitimate way is not evidence of fraudulent intent. Neither is the amount the debtor is attempting to exempt dispositive. Rather, there must be proof that the conversion of assets was part of debtor's scheme to hinder, delay, or defraud creditors. That is, what elevates exemption planning into an offense under § 727(a)(2) is the "extrinsic" conduct such as misrepresentation of facts, underhanded tactics, or other clandestine activities. The Court found the debtor had not engaged in such activities. Therefore, the debtor could claim the exemption as to the annuity. As for the funds in the 529 education plans, the Court found that under the Wisconsin exemption statute, they were not exempt as to the contributor, only as to the beneficiary, and so the debtor was ordered to turnover those funds. *In re Bronk*, 444 B.R. 902 (Bankr. W.D. Wis. 2011).

Section 525: Discrimination

Private employer does not violate § 525 by denial of employment.

- The Fifth Circuit ruled that section § 525(a) only prohibits governmental employees from denying employment because of bankruptcy, and private employers are not so restricted. *In re Burnett*, 635 F.3d 169 (5th Cir. 2011).
- The Eleventh Circuit ruled that § 525(a) only prohibits governmental employees from denying employment because of bankruptcy, and private employers are not so restricted. The Court also found that while a private employer may not fire based on a bankruptcy filing, a jury had

determined that the debtor failed to prove that he was ever hired by the private employer, and a judgment had been entered against the debtor based on wrongful termination. *Myers v. Toojay's Management Corp.*, 640 F.3d 1278 (11th Cir. 2011).

Section 522: Exemptions

Trustee may use powers under § 544(a) to object to exemptions.

- In construing Utah's exemption for proceeds of unmatured life insurance, the 10th Cir. B.A.P. also discussed two lines of authority when the trustee uses the hypothetical status under § 544(a) to object to the tenancy by entirety exemptions claimed by joint husband and wife debtors. Some case authority interprets § 544(a) as limited to avoidance transfers, but the Court adopted the second line of authority which holds that the powers given to a trustee under § 544(a) are not limited to avoidance transfers but specifically include broader rights and powers, and found the trustee could use its § 544(a) powers object to the tenancy by the entirety exemptions. The Court found that the 10th Circuit had rejected a narrow interpretation of § 544(a) powers in *Zilkha Energy Co. v. Leighton*, 920 F.3d 1520 (10th Cir. 1990), and the Court saw no conflict between § 544(a) and § 522(b). *In re Duffin*, -- B.R. --, 2011 WL 4351601 (B.A.P. 10th Cir. Sept. 19, 2011).

Under Wyoming law, there is no recognized tracing concept, and therefore, no exemption for portions of a tax refund attributable to exempt property.

- A debtor received a federal tax refund and scheduled as exemptions the portions of the refund withheld from exempt unemployment compensation and exempt retirement plan distributions. The 10th Circuit B.A.P. affirmed the Bankruptcy Court's granting of the trustee's exemption to such distributions. The Court found that while the Ohio Supreme Court has recognized the "tracing concept" and Utah's exemption statutes contain "tracing language," Wyoming law has not recognized the tracing concept nor made tracing language explicit in its statute. Therefore, under 10th Circuit precedent holding that withholdings are a "tax" under the Internal Revenue Code, the entire tax refund was non-exempt. *In re Hebert*, 2011 WL 1670898 (B.A.P. 10th Cir. May 03, 2011).

Under Colorado law, the portion of a federal tax refund attributable to the non-refundable portion of a child tax credit is exempt.

- The debtors claimed as exempt the portion of their federal tax refund attributable to the non-refundable portion of their child tax credit. The Colorado statute exempts the "full amount" of a debtor's refund that can be "attributed" to the child tax credit. The 10th Circuit B.A.P. overturned the Bankruptcy Court's order sustaining the trustee's objection to the exemption. All five Colorado bankruptcy judges had previously uniformly held that the Colorado child tax credit exemption is inapplicable to the non-refundable portion of a debtor's refund because a debtor was never legally entitled to claim a refund from the non-refundable credit, and thus no part of the refund could be attributed to it, and the credit itself cannot be a separate interest in property that becomes property of the estate. The B.A.P. disagreed, noting that 1) whether the credit itself is property of the estate is not the issue; 2) the Colorado legislature did not distinguish between the refundable and non-refundable portions of the credit; and 3) although the plain meaning of "attributed" means "caused or brought about," the bankruptcy courts erroneously narrowly

defined "attributed" to mean "directly attributable." The Court concluded that the application of the child tax credit invariably causes a debtor's tax refund to increase and that difference in the refund is "attributable" to the credit. *In re Dunckley*, 452 B.R. 241 (B.A.P. 10th Cir. 2011).

An inherited IRA is exempt under § 522(d)(12).

- The District Court followed *In re Nessa*, 426 B.R. 312 (B.A.P. 8th Cir. 2010), and other authorities, and found that an inherited IRA is exempt under § 522(d)(12). The Court reasoned that under § 522(d)(12), the exemption must constitute retirement funds that are exempt from taxation under the Internal Revenue Code, and the inherited IRA met both requirements. *Chilton v. Moser*, 444 B.R. 548 (E.D. Tex. 2011). *Accord In re Mathusa*, 446 B.R. 601 (Bankr. M.D. Fla. 2011).
- A SDNY Bankruptcy Court held that an IRA inherited by the debtor from his wife within 180 days of filing chapter 7 was exempt under § 522(d)(12). *In re Cutignola*, 450 B.R. 445 (Bankr. S.D.N.Y. 2011).
- A WD Wash. Bankruptcy Court held that an IRA inherited from the debtor's parents was exempt when the debtor had made a trustee-to-trustee transfer. *In re Johnson*, 452 B.R. 804 (Bankr. W.D. Wash. 2011).

Trustee may avoid a transfer of allegedly exempt property under § 548(a)(1).

- The debtor transferred interest in her homestead within two years of her bankruptcy filing. The 8th Circuit B.A.P. overturned the Bankruptcy Court's ruling that exempt property in Minnesota cannot be fraudulently transferred *per se* and thus cannot be avoided under § 548. The B.A.P. found that while state law determines the debtor's interest in the property, it does not determine whether a transfer of that interest is fraudulent under § 548. The debtor in this case undisputedly had an interest in the property transferred under state law. The exemption is personal to the debtor, and therefore may not be claimed by the recipient of a fraudulent transfer. Additionally, the Court noted that § 522(g) of the Code provides that if a trustee recovers property under § 550, the debtor may claim an exemption in the recovered property unless the transfer by the debtor was voluntary. Thus the Code anticipates recovery of property that was transferred fraudulently, even that which the debtor could have claimed as exempt. *In re Lumbar*, -- B.R. --, 2011 WL 4809870 (B.A.P. 8th Cir. October 12, 2011).

Section 521: Filing Requirements

Failure to file a creditor's matrix required by § 521(a)(1) is grounds for dismissal.

- The Tenth Circuit B.A.P. affirmed the Bankruptcy Court's order denying debtor's motion to reinstate his chapter 13 case, which was dismissed pursuant to § 512(i)(1) for failure to file a creditor's matrix as required by § 521(a)(1)(A). The Court found unpersuasive the debtor's argument that only the "information" required by § 521(a) is required, and that the debtor's creditors and addresses were provided in the filed schedules. The Court found that a creditor matrix must always be filed separately from the filed schedules under the plain language of the Bankruptcy Code. *In re Wilcox*, 2011 WL 3347772 (B.A.P. 10th Cir. August 4, 2011).

Section 523: Dischargeability

Fiduciary under § 523(a)(4)

In absence of express or technical trust, relative of creditors and manager of one of creditors' businesses was not a fiduciary.

- The Tenth Circuit B.A.P. affirmed denial of creditors' § 523(a)(4) defalcation by a fiduciary claim because debtor, who was a relative of the creditors and managed on of their gas stations was not a "fiduciary" under § 523(a)(4). Although the debtor was a "trusted agent," who was expected to operate the gas station, collect gas receipts, and make payments to the gasoline provider on creditors' behalf, the Court found these general duties of good faith and fair dealing are not sufficient to create a fiduciary relationship under § 523(a)(4). The Court also found the creditors failed to prove the existence of either an express trust or a technical trust, and so denial of their non-dischargeability complaint was proper. *In re Sawaged*, 2011 WL 880464 (B.A.P. 10th Cir. March 15, 2011).

Debtor was not in a fiduciary capacity to creditor of debtor's wholly owned corporation.

- The 7th Circuit found that although Illinois law places a fiduciary duty on a corporate officer or director to an insolvent corporation, that fiduciary status does not extend to creditors of the insolvent corporation for purposes of § 523(a)(4). Discussing the conflicting judicial authority on the issue, the Court declined in the absence of fraud to extend § 523(a)(4) so far as to make officers and directors of insolvent corporations personally liable without discharge for a wide range of corporate debts. The Court also found the creditor failed to show the existence of an express trust, and there was no implied fiduciary status, when the client of the corporation stood in an ordinary principal-agent or buyer-seller relationship with the corporation. *In re Berman*, 629 F.3d 761 (7th Cir. 2011).

Stated Income Loan Dischargeability

Creditor was not entitled to non-dischargeability on "stated income loan" where creditor had no reasonable reliance when it took no steps to verify income.

- The Bankruptcy Court ruled against creditor's complaint for non-dischargeability under § 523(a)(2)(B) on stated income loans. Debtors stated on their loan application that their combined monthly W–2 income was $18,400 with the wife debtor's dental hygienist income being $9,800/month and husband debtor's golf pro for Salt Lake County income being $8,600/month. The Court found the debtors did not materially misrepresent their income when they included K-1, self-employment and capital gains income in their figures. The Court also found creditor failed to show the Debtors prepared the application with an intent to deceive. Finally, finding that the reasonableness of reliance on stated income loans becomes more dubious as the amount of the stated income loan increases, the Court found that the creditor showed no reasonable reliance when it took no steps whatsoever to verify the stated income, but chose to remain willfully ignorant. *In re Dehlin*, 2011 WL 1261623 (Bankr. D. Utah March 31, 2011).

Pre-judgment Interest

Denial of post-judgment motion for pre-judgment interest appropriate where creditors delayed seeking recovery and loan agreement interest rate was usurious.

- The Tenth Circuit B.A.P. affirmed the Bankruptcy Court's denial of a post-judgment motion for pre-judgment interest on a non-dischargeable judgment against the debtor. Approximately five years after the debtor failed to repay a loan, he filed a chapter 7 bankruptcy. The creditors brought a nondischargeability complaint under § 523(a)(2) and received a non-dischargeable judgment against the debtor. The creditors then filed a motion to amend seeking prejudgment

interest, which the Bankruptcy Court denied. The Court affirmed, finding the Bankruptcy Court did not abuse its discretion in refusing the award on the grounds that 1) the creditors delayed seeking recovery from the debtor for approximately five years on a six month loan; and 2) the loan agreement contained a usurious interest rate 4.5 times the allowable rate in Colorado. *In re Bakay*, 2011 WL 2694718 (B.A.P. 10th Cir. July 12, 2011).

Student Loans

Dismissal of debtor's § 523(a)(8) undue hardship complaint proper where debtor repeatedly failed to comply with Bankruptcy Court orders directing him to apply for a federal loan consolidation program.

- The Eleventh Circuit affirmed the Bankruptcy Court's dismissal of the debtor's adversary proceeding to determine the dischargeability of his student loans due to undue hardship under § 523(a)(8) after the debtor repeatedly failed to comply with orders directing him to apply for the William D. Ford Program, a federal loan consolidation program under which the debtor's student loan payments could be as low as $0 per month depending on his income level. The Court found that the debtor's eligibility under the Ford Program would play a substantial role in whether he would be able to show undue hardship. The Court found the debtor's persistent refusal to comply with the Bankruptcy Court's orders warranted dismissal. *Wieckiewicz v. Education Credit Management Corp.*, 2011 WL 4912082 (11th Cir. October 17, 2011).

Discharge Injunction

Modification of discharge injunction appropriate to allow state court to determine validity and amount of debts.

- The Tenth Circuit B.A.P. affirmed the Bankruptcy Court's modification of the discharge injunction to allow a state court sit to continue to determine the validity and amount of debts under non-bankruptcy law while a complaint to determine dischargeability under § 523(a)(2) and (4) was pending in the Bankruptcy Court. A discharge had been entered, subject to the pending § 523 complaint, and while the Bankruptcy Court had exclusive jurisdiction over that complaint, it did not abuse its discretion in allowing the state suit to continue. *In re Eastburg*, 447 B.R. 624 (B.A.P. 10th Cir. 2011)

NEW CASE LAW MEANS TEST CHAPTER 7 & CHAPTER 13

WHAT CONSTITUTES INCOME UNDER THE MEANS TEST

Means test—Income: An inheritance received by the Chapter 13 debtors was included in their "current monthly income." *In re Melvin*, 2011 WL 1303307 (Bankr. C.D. Ill., April 6, 2011).

IN RE TINSLEY, 201 WL 1544171(Bankr.W.D.VA, April 19, 2010)-mileage reimbursement is income for purposes of the means test; but can also be deducted on Schedule J.

Where the debtors had included their adult daughter and her three children as household members, the daughter's regular contributions to household expenses would be considered income for purposes of calculating the debtors' current monthly income. In re Coverstone, 2011 WL 1541308 (Bankr. D. Idaho, April 21, 2011)

Where the debtor's wife's mortgage payments on the marital residence were paid "on a regular basis for the household expenses of the debtor or the debtor's dependents," and so were included in the debtor's "current monthly income" the payments could not be deducted via a marital adjustment, even though only the wife was liable on the debt, since this debt was incurred for a household purpose. The Court rationalized that only debts personal in nature to the non-filing spouse are deductible on line 17 of Form B-22A, thereby decreasing the DI figure. In re Rable, 445 B.R. 826 (Bankr. N.D. Ohio, March 4, 2011).

IN RE OLGUIN, 429 B.R. 346 (Bankr. D. Colo. April 29, 2010), Social security monies received by a third party and then paid to the Debtor on a regular basis are included in CMI.

IN RE WINKLES, 2010 WL 2680895 (BANKR.D.ILL. 2010), unemployment is not a benefit received under the Social Security Act and must be included in the CMI analyses. The Court distinguished unemployment (replacement of wages) with social security (old age income).

A $10711.14 union wage settlement was included in CMI even though it was a onetime non-reoccurring payment. IN RE COTTO, 2010 WL 847935 (Bankr. E. D. N.Y. march 12, 2010.)

Income received during the preceding 6 month period, regardless of when that income has been earned, shall be included in the Debtor's CMI. IN RE KATZ, 2011 WL 1990813 (Bankr. C.D. Cal. May 20, 2011).

HOUSEHOLD SIZE

- **Means test—Household size:** Only a person dependent on the debtor is a member of the debtor's household. Under this approach, the debtor must have reasons to provide support for a dependent and the claimed dependent must have a reason to rely on the debtor. The following factors should be considered: (1) the length of time the claimed dependent resided in the household; (2) the reason the claimed dependent resides in the household; (3) the age of the alleged dependent; (4)

how much income or support the dependent receives from a third party; (5) whether the dependent is in school; and (6) whether the dependent could be claimed as an IRS deduction or qualify in another legal way, i.e. for purposes of medical insurance. See *In re Dunbar*, 99 B.R. 320 (Bankr. M.D. La. 1989). IN RE HEINZE, 2011 WL 143870 (BANK. D. WYO. JAN 12, 2011)

HOUSEHOLD SIZE

Debtor's adult son was not household member although claimed as dependent on tax return:

- **Means test—Household size:** Under the dependency approach adopted by the court for the determination of household size, the debtor's household size was one, even though the debtor claimed his adult son, who lived with him, as a dependent on the debtor's federal tax return. The adult child, the court said, was not contributing to the household income but seemed to substantially impact the debtor's expenses. As much as it empathized with a parent's desire to support an adult child, the court said--and under some circumstances it would be appropriate--this debtor's creditors should not have to bear the burden of debtor's son's expenses, where the son was not going to school, was not working but was capable of working, and did not appear to have any incentive to gain employment. IN RE KRAFT 2011 WL 996760 (BANK. D WYO. MARCH 16, 2011)

- Debtors' household size, for the purpose of determining their expenses under the means test, was two, not six, where the debtors' three adult children, and one grandchild, lived with them, but none of the four were dependents of the debtors. IN RE HEINZE SEE ABOVE.

Court adopts "economic unit" definition of "household": In re Robinson, 2011 WL 864937 (Bankr. E.D. Va., March 10, 2011)

Citing *In re Morrison*, 2011 WL 65737 (Bankr. M.D. N.C., Jan. 10, 2011), the court held that the term "household" as used in Code § 1325(b) includes the debtor and the persons who operate in the aggregate with the debtor as an economic unit. Here, where the debtor was wholly responsible for his four children for more than half of each week above and beyond the child support he was required to pay to the mothers of his children, the court determined that an economic unit of three best depicted the realities of the debtor's household size. The court said that this "household size" should be used in determining both whether a debtor is above- or below-median and the number of persons for whom the debtor may claim expenses under the means test.

SPECIAL CIRCUMSTANCES

HAMILTON V. LANNING, 130 S. Ct. 2464 (2010). The court may take into account known or virtually known information about the debtor's future income or expenses in determining "projected

disposable income." Taking the "forward looking" approach, the Court viewed the CMI figure as a starting point, which is susceptible to deviation based on special or other circumstances.

IN RE LIEHR, 439 B.R. 179 (B.A.P. 10th Circuit 2010) "Special circumstances" applies to expenses as well as income. Debtors cannot deduct mortgage payments for properties they are surrendering.

Possible additional medical expenses was not a special circumstances: In re Thompson, --- B.R. ----, 2011 WL 3799637 (Bankr. M.D. Fla., August 29, 2011.

The possibility that the debtor husband or the debtors' children would incur additional medical expenses in the future was not a special circumstance. Speculative expenses are not properly considered special circumstances.

The Court In In Re Thompson , also ruled that a Student loan debt was not special circumstance:

The debtors did not establish that their need to repay their student loan debt was a special circumstance. They did not establish that payment of the student loans could not be deferred or placed in forbearance; that the loans could not be consolidated to yield a lower monthly payment; or they could not lower their monthly payments through participation in the William D. Ford Federal Direct Loan Program for direct consolidation and income-contingent repayment. See also IN RE JOHNSON, 2011 WL 867498 (Bankr. E. D. Wis. March 11, 2011), where the Debtor could continue repayment of the student loan without the burden of proving special circumstances.

STUDENT LOAN DEBT WAS A SPECIAL CIRCUMSTANCE

Means test—Special circumstances—Student loan debt: Agreeing with the courts that take a more lenient view of those circumstances that constitute special circumstances for the purpose of the means test, the court held that, depending on the facts of a case, student loans payments may qualify as "special circumstances." Finding nothing in the plain language of Code § 707(b)(2)(B) requiring that the special circumstances be of an involuntary nature, the court also pointed to legislative history that demonstrated that the term "special circumstances" was chosen rather than "extraordinary circumstances." Here, the debtors met their burden of showing that their student loan payments constituted a special circumstance for which there was no reasonable alternative, where they had a monthly student loan payment of $2,041.61 but only $1,196.91 in monthly disposable income; it was unlikely that the debtors could establish undue hardship so as to discharge the debts (because the debtors' son was the primary obligor on the debts, and the debtors were only guarantors); and obtaining forbearance or deferment of the repayment obligations would leave the debtors in the same position as they were in now.

In re Sanders, —- B.R. ——, 2011 WL 2788950 (Bankr. M.D. Ala., July 12, 2011).

IN RE HARMON (BANKR E.D. PA 2011) The court addressed whether repayment of a student loan obligation constitutes a special circumstance under 11 U.S.C. Section 707(b)(2)(B). The Court noted that there are procedural & substantive requirements which a debtor must establish. That a debtor must itemize each additional expense or income adjustment, their impact on the debtor's finances & the means test, provide documentation, as well as an explanation that makes it a reasonable & necessary expense &

attest to this under oath. The statute only identifies two examples of special circumstances; a serious medical condition, or a call to active duty. 11 U.S.C. Section 707(b)(2)(B)(i).

The interpretation of the statute is divided.

(1) Narrow interpretation that there is no reasonable alternative other than payment. **IN RE SILER, 426 B.R. 167, 172 (BANKR. W.D.N.C.2010).**
(2) The presumption is rebuttable, and the standard is special, not extraordinary. **IN RE CARGO, 387 B.R. 225, 228 (E.D.WIS 2008).**

Childs college education was not a special circumstance. **IN RE LINVILLE,** 2001 WL 560421 (Bankr. D. N.M. Feb 15, 2011)

Child's college education expense is not special circumstance: After BAPCPA, the court is left with virtually no discretion with respect to expenses incurred by a debtor in assisting with a child's college education. It is well established that an adult child attending college is not a special circumstance that is out of the ordinary for an average family and leaves the debtor no reasonable alternative but to incur the expense. In re Wise, 2011 WL 2133843 (Bankr. S.D. Ill., May 27, 2011)

An anticipated expense of owning a home, auto & completing college education was not a special circumstance. **IN RE ROSS,** 2011 WL 482815 (Bankr M. D. Ala Feb 7, 2011).

Debtors who created need for additional transportation expenses could not claim expense as special circumstance:

Although the Chapter 7 debtors established that their actual transportation expenses greatly exceeded the standard allowance due to both debtors' extensive traveling to or for their employment, the debtors could not claim this additional expense as a special circumstance since they had created the circumstances that led to their additional transportation expenses by moving after they decided that they needed a bigger home to accommodate the needs of their two adult children, two minor children and one minor grandchild residing in their household. In re Pignotti, 2011 WL 1299616 (Bankr. S.D. Iowa, April 1, 2011)

- **Chapter 13—Confirmation of plan—Calculation of projected disposable income:** Where, during the six-month lookback period, the debtor received a one-time $50,000 bonus for enlisting in the Army, this was an occurrence for which an adjustment was appropriate under *Hamilton v. Lanning*, --- U.S. ----, 130 S.Ct. 2464, 2478, 177 L.Ed.2d 23 (2010). See IN RE MOORE, 2011 WL 242345 (Bankr. D. Colo. Jan 26, 2011)

- **Chapter 13—Confirmation of plan—Calculation of projected disposable income:** The Supreme Court's discussion in *Lanning* contains no suggestion that courts are free to abandon BAPCPA's statutory framework for calculating projected disposable income for above-median-income debtors when they account for changed circumstances. To the contrary, the most natural reading of its holding is that, within that established framework, courts shall take certain changes into account. Statutorily, that means disposable income must be calculated in accordance with Code § 1325(b)(2) and § 707(b)(2) while accounting for those changes. As a procedural matter, the most transparent method of demonstrating compliance with these sections is by filing an

amended Form 22C that reflects the debtor's changed circumstances as of the confirmation hearing date. The changed circumstances are not analyzed as "special circumstances," which must comply with the requirements stated in Code § 707(b0(2)(B).

Highly unusual amount of overtime worked might constitute special circumstance:

The Chapter 7 debtors' assertion that, during the six-month look-back period, the debtor husband was able to work an inordinate number of overtime hours, and that this magnitude of additional hours was only available once every 10 or 15 years, was sufficient to require an evidentiary hearing on whether the debtors established special circumstances rebutting the presumption of abuse .In re Bohnenblusch, 2011 WL 1102809 (Bankr. E.D. N.Y., March 21, 2011)

Debtor's age was not special circumstance: In re Anderson, 444 B.R. 505 (Bankr. W.D. N.Y., March 21, 2011)

The Chapter 7 debtor's age was not a special circumstance. The debtor, who was 67 years old, asserted that he was likely to retire sometime during the next 60 months, with a consequent substantial reduction in income. Meanwhile, prior to retirement, he proposed to pay his entire net disposable income into a pension account, with the consequence that he would have no resources for repayment of creditors.

Future loss of child support is not special circumstance: Because the determination of whether a presumption of abuse arises is not forward-looking, the debtor's future loss of child support income could not be taken into account. IN RE WISE, 2011 WL 2133843 (Bankr. S.D. Ill. May 27, 2011)

MEANS TEST MISCELLEANOUS EXPENSE & DEDUCTIONS

Means test—Expenses—Housing expense: *Ransom v. FIA Card Services, N.A.*, —— U.S. ——, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011), which held that a Chapter 13 debtor is not entitled to take the IRS local vehicle ownership expense deduction for a vehicle the debtor owns free and clear of any encumbrance, applies in Chapter 7 cases and to the IRS standard "mortgage/rent" expense. Thus, the debtor, who lived with his girlfriend and did not pay any rent, was not entitled to claim the expense. In re Wilson, 454 B.R. 155 (Bankr. D. Colo. Feb 25, 2011).

In the Wilson case the Debtor's claimed the mortgage rent expense under 22A & the non mortgage rent expense under 20A & 20B. The Debtor testified that he did not pay any rent. Judge Brown ruled that the Ransom analyses applied in a Chapter 7 bankruptcy as well as a chapter 13; and found that since the Debtor did not incur a rental expense, the B22A deduction was not available.

Debtors established employer-required educational expense: The debtors were permitted to deduct, under "other necessary expenses," an average monthly expense of $192 for employer-required, unreimbursed educational expense. In re Kulakowski, 2011 WL 3878386 (M. D. Fla. Sep 2, 2011)

The Chapter 7 debtors could not deduct a wage garnishment of $1,083.33 by the Iowa Department of Revenue as a "court-ordered payment" where the debtors testified that all tax obligations had now been satisfied and no garnishments were currently in place, although the garnishment apparently did not cease when the debtors filed their bankruptcy petition. IN RE CHAMBERS, 2011 WL 4479690 (BANKR.S.D.IOWA, JUNE 7, 2011)

IN RE LANCASTER, 2011 WL 477854 (BANKR. D. N.M., FEB. 3, 2011)

- **Means test—Expenses:** Voluntary contributions to retirement accounts are not deductible as "Other Necessary Expenses: involuntary deductions for employment."

- **Means test—Expenses:** Where the debtors claimed a telecommunications expense of $200, but this included basic telephone service, and that expense was already reflected in the local standards, the debtors would be allowed to claim only a $100 expense for Internet service.

- As of December 1. 2012 a proposed change to Official Form 22C (Chapter 13 Statement of Current Monthly Income and Calculations of Commitment Period and Disposable Income) (amended so as to expand the deduction of telecommunication services, as an "other necessary expense," to include expenses necessary for the production of income if not reimbursed by the debtor's employer; also amended to reflect the *Hamilton v. Lanning* decision; a new question asks above-median-income Chapter 13 debtors to list any changes in the income and expenses reported on the form that have already occurred or are virtually certain to occur during the 12 months following the filing of the petition)

- **Means test—Expenses:** The debtors could not claim a $100 expense for dance lessons for their child as an educational expense for dependent children on line 38 of Form 22A, as the debtors had not shown that this was a necessary expense not already accounted for in the IRS standards.

- **Means test—Expenses:** A student loan expense is not deductible as a priority debt expense.

IN RE THELEN, 431 B.R. 601 (Bankr. E.D.N.C. 2010) childcare expenses were allowed to be averaged over the same 6 month period as CMI even though the Debtors childcare expenses had been reduced due to a reduction in work hours.

IN RE BOYD, 414 B.R. 223, 228 (Bankr N.D. Ohio 2009), the Court determined that a tax lien was a non consensual debt, not contractually due & therefore disallowed a deduction under line 47 in the 22C Form. The Court did however allow a deduction under line 48 for the portion secured by the personal property of the Debtor necessary for the Debtors support.

Cure payments on second home are not deductible:

The Chapter 13 debtors could not deduct payments to cure a mortgage arrearage on their second home, which they described as investment property and the objecting creditor characterized as a vacation home, under Code § 707(b)(2)(A)(iii), which authorizes deductions for cure payments, spread over a period of 60 months, for a "debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents," as the second home was not necessary for the debtors' support. In re Amos, --- B.R. ----, 2011 WL 2550808 (Bankr. D. N.J., June 28, 2011)

- **Means test—Expenses:** The debtors' utility expenses were not even utility charges used by the debtors and would be disallowed, where the debtor wife testified that the Verizon Wireless bills were attributed to cell phones that the debtors "were going to use," but that "for the last couple years" the debtors' adult sons used those cell phones at a considerable expense, and that she had had to pay overage charges because of her son's calls to his girlfriend in the amount of $300-350 a month. IN RE HEINZE 2011 WL 143870 (BANKR. D. WYO JAN 12, 2011)

- **Means test—Expenses:** The debtors were not allowed to claim a monthly expense deduction of $1,000 for contributions to their children's college education on Line 35 of Form 22A, which instructs debtors to "[e]nter the actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses" and is based on Code § 707(b)(2)(A)(ii)(II). The plain meaning of this provision is that, for an expense to be allowable, (i) the expense must be the continuation of actual expenses paid by the debtor; (ii) the expense must be reasonable and necessary for care and support of an elderly, chronically ill, or disabled person; (iii) the person must be a member of the debtor's household or a member of the debtor's immediate family; and (iv) the person must be unable to pay the expense. Here, even if one of the debtors' children had a learning disability, the debtors did not show that the expense was attributable to the disability. IN RE LINVILLE 2011 WL 560421 (BANKR. D. N.M. FEB 15, 2011).

IN RE MELANCON, 400 B.R. 521 (Bankr. M.D. La. 2009) Debtor is entitled to the national health care standard, even if he or she spends less than that amount.

IN RE GREGORY, 452 B.R. 895 (BANKR. M.D. PA., JULY 13, 2011)The Debtors were entitled to a housing & utility adjustment, over & above the IRS allowance, however two of the expenses listed by the Debtors, TV & internet did not qualify as either a housing or utility expense. The debtor's 15 year old daughter had special needs, because she suffered from severe depression. At the recommendation of her psychologist, horseback riding, dance classes & piano lessons qualified as additional health care expense.

VEHICLE DEDUCTION/ OWNERSHIP EXPENSE & OPERATING EXPENSE

RANSOM V. FIA CARD SERVICES, N.A., 131 S. Ct. 716 (2011) In an above median Chapter 13 case, there is no vehicle ownership expenses deduction allowed under 1325(b)(3) for an unencumbered vehicle.

IN RE SCOTT, 2011 WL 3501835 (S.D. ILL AUGUST 9, 2011), a debtor may claim the standard IRS deduction for a motor vehicle ownership expense, even where the debtors actual payments were less than the standardized deduction. In this case Judge Grandy focused on Form B22C & found that because the Form permits the debtor to take the full allowance of the vehicle deduction, the Judge accepted the Form as an advisory opinion on how to calculate disposable income.

IN RE THIEL, 2011 WL 799779 (Bankr. D. Idaho Mar 1, 2011), above median Debtors transportation expense was capped at the IRS local standard. The Court stated that the rationale of Ransom, limited this expense.

However the $200 additional **operating expense** deduction for a vehicle older than 6 years or mileage in excess of 75000 may be still available. See IN RE BYRN, 410 B. R. 642 (Bankr. D. Mont. 2008) But See, **IN RE HARGIS, 2011 WL 1651235 (BANKR. D. UTAH MAY 3, 2011),** additional operating expense for an older vehicle was only allowed up to $100, as that was the figure disclosed in the Debtors Schedule J & **IN RE VANDYKE, 2011 WL 1833186 (BANKR C.D. ILL MAY 12, 2011),** the deduction was not available when the vehicle was not running.

Means test—Expenses—$200 "old car" additional operating expense: Two courts held that the debtor may not claim the $200 "old car" additional operating expense allowance recognized in certain IRS materials. See *In re Schultz*, 2011 WL 2443711 (Bankr. W.D. Mo., June 14, 2011) and *In re Dittrich*, 2011 WL 3471090 (Bankr. W.D. Wash., August 8, 2011). These Court's reasoned that the additional allowance is not contained in the code. Since the IRS guidelines are not incorporated into the Bankruptcy Code, the IRS guidelines are not controlling. The Courts also referred to the actual expenses in the Debtor's Schedule J.

Means test—Expenses—Operating expenses for three vehicles: While the IRS Local Standards only reference allowances for up to two cars, a debtor is not precluded from claiming an operating expense allowance for a third car, as the IRS Collection Financial Standards contained in the Internal Revenue Manual might permit an allowance for a third car if the operating expense is necessary to provide for the debtor's (or his family's) welfare or production of income. Thus, the debtors were entitled to an opportunity to show that an expense for their oldest minor daughter's operation of a third vehicle met this standard, where the daughter was enrolled in a dual high school/college program that required transportation between schools, and the daughter also used the vehicle to provide daily transportation for

her two younger sisters to and from school, medical appointments, and other activities. *In re Johnson*, —- B.R. ——, 2011 WL 2652467 (Bankr. M.D. Fla., July 8, 2011).

OTHER DEBT DEDUCTIONS SECURED DEBT

IN RE SONNTAG, 2011 WL 3902999 (N.D.W.VA SEP 6, 2011), chapter 7 case allowed a deduction of a secured debt contractually due on the petition date, even though the debtor intended to surrender the collateral. Contrast with **IN RE THOMPSON 2011 WL 3799637 (M.D. FLA AUG 29, 2011)** where the debtors were denied a deduction for their mortgage when they had moved out of their home, were paying rent at another residence & had ceased making the mortgage payments.

IN RE EDWARDS , 09-19071 ABC, The Court disallowed a deduction for a second mortgage which was successfully stripped.

PROJECTED DISPOSABLE INCOME

BAUD V CARROLL, 634 F.3rd 327 (6th Cir. 2011), Social security benefits were excluded from the calculation of projected disposable income. But See **IN RE HERRMANN** 2011 WL 576753 (Bankr. D. S.C. February 9, 2011) which stated although we will exclude SS income from CMI it still must be allocated to living expenses to satisfy the 1325(a)(3) good faith test.

Chapter 13—Calculation of projected disposable income—Inclusion of Social Security benefits: Two courts held that, since the statutory definition of "current monthly income" excludes Social Security benefits, a Chapter 13 debtor's projected disposable income likewise excludes these benefits. See *In re Ragos*, 2011 WL 3101436 (Bankr. E.D. La., July 21, 2011) and *In re Vandenbosch*, Case No. 2:11-cv-139 (M.D. Fla., Oct. 11, 2011)

IN RE CRANMER, 433 B.R. 391 (BANK. D. UTAH 2010), denied confirmation where the Debtors plan did not include SSI in the DI determination. **IN RE THOMPSON, 439 B.R. 140 (8TH CIR BAP 2010).** In this case the Trustee was precluded from arguing that excluding SS benefits from payments to unsecured creditors was bad faith pursuant to 11 U.S.C. Section 1325(a)(3).

MEYER V SCHOLZ, BAP No EC-10-1153-MkZJu (BAP 9th Circuit, March 22, 2011, Railroad Act Benefits are part of CMI, but not part of the calculation for projected disposable income.

- **BURDEN V SEAFORT, 437 B.R. 204, 211 (6TH CIR BAP 2010),** Relying on Lanning & Ransom, (which state that the calculation of a debtors projected disposable income must take into account any changes in the financial circumstances of the debtor reasonable certain to occur during the term of the plan), the majority of the courts now require that at the time a retirement loan is fully repaid, the funds used to pay this loan must be used to pay class IV creditors.

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Chapter 13—Calculation of projected disposable income—Effect of retirement account contributions: Disagreeing with *In re Seafort*, 437 B.R. 204 (6th Cir. B.A.P. 2010), the Bankruptcy Court for the Eastern District of Pennsylvania held that the effect of Code § 541(b)(7) is to exclude from a debtor's estate contributions to 401(k) accounts, which therefore may not be included in the calculation of the debtor's projected disposable income, and the debtor's contributions are not limited to the amount being contributed on the petition date. Had Congress intended such a limitation, the court reasoned, Congress could have inserted specific language into § 541(b)(7). *In re Egan*, 2011 WL 3902817 (Bankr. E.D. Pa., August 30, 2011).

In re McCullers, --- B.R. ----, 2011 WL 2358568 (Bankr. N.D. Cal., June 8, 2011).

- **Chapter 13—Confirmation of plan—Calculation of projected disposable income:** Finding *In re Prigge*, 441 B.R. 667 (Bankr. D. Mont. 2010) to be persuasive, the court said that a Chapter 13 debtor's voluntary contributions to the debtor's retirement fund are included in the debtor's projected disposable income.

- **Chapter 13—Confirmation of plan—Calculation of projected disposable income:** Where the Chapter 13 debtor's loan from his 401(k) plan would be fully repaid 32 months into his 60–month plan, at that time the income previously used to repay the loan became disposable income that must be used to repay creditors.

IN RE BRACE, (Bankr.N.D.Ill. 2010) payment of a loan against a 401K, is not an involuntary deduction, even thought the Debtors only method to stop the deduction is to quit his or her job.

Chapter 13—Calculation of projected disposable income: CHARITY EXPENSE A review of Code § 1325 supports the conclusion that bankruptcy courts are not to engage in a more thorough analysis of a Chapter 13 debtor's charitable contributions than what is required by the plain language of § 1325(b)(2)(A)(ii). If Congress had intended for courts to consider when a debtor began making charitable contributions, then the Bankruptcy Code would have been amended to address the issue explicitly. Thus, in evaluating the charitable contributions of an above-median debtor, the court may only consider whether the debtor is within the 15 percent cap imposed by § 1325(b)(2)(A)(ii). *In re Gamble*, 2011 WL 2971406 (Bankr. M.D. N.C., June 15, 2011).

APPLICABLE COMMITANT PERIOD

Neither of the Supreme Court cases above addressed the applicable commitment period, but see **IN RE TIMOTHY**. 442 B.R. 28 (B.A.P. 10th Cir 2010) above median debtor must propose a 60 month plan even though the Debtor has negative disposable income. See also **IN RE TENNYSON, 611 F.3RD 873 (11TH CIR. 2010),** Lanning does not control whether the ACP is a temporal requirement or a multiplier.

- **Chapter 13—Confirmation of plan—Plan term:** Amending its earlier opinion, found at *In re Reed*, --- B.R. ----, 2011 WL 2680938 (Bankr. D. Or., July 8, 2011), the court held that *Hamilton v. Lanning*, —— U.S. ——, 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010) did not overrule *In re Kagenveama*, 541 F.3d 868 (9th Cir. 2008) insofar as the latter case held that an above-median Chapter 13 debtor with negative projected disposable income has no application commitment period and is not required to propose a 60-month plan. See *In re Henderson*, 2011 WL 1467934 (Bankr. D. Idaho, April 18, 2011).

IN RE GRUTSCH, 2011 WL 2600638 (BANKR. D. KANSAS 2011), above median debtor who retired 6 months after confirmation of the plan & became below median was able to reduce his payments but unable to reduce the length of the plan from a 60 month plan.

Chapter 13—Plan length: Under the forward-looking approach embraced in *Hamilton v. Lanning*, 130 S.Ct. 2464 (2010), a debtor who demonstrates that she has below-median income at the time of confirmation can propose a plan with an applicable commitment period of 36 months, even if the debtor's current monthly income on Form 22C was above-median. Here, the debtor's current monthly income was above-median on the petition date but decreased significantly thereafter as her nonfiling husband left the family home and reduced his monthly contribution from $8,000 to $1,800. *In re Ducret*, 2011 WL 2621329 (Bankr. S.D. Fla., July 5, 2011).

IN RE REED, 2011 WL 2680938 (Bankr. D. Or. August 9, 2011), The Court held that voluntary payments by an above median income debtor were not required to be paid for the full five years of the plan. The ACP only applies to projected disposable income, not to voluntary payments in excess of that income. The Court determined that only in unusual circumstances where there is evidence of changes that are known or virtually certain will disposable income be adjusted before projecting that income over the plan period . The Court found that a mere difference in Form B22C and the numbers contained in schedules I & J is not enough to demonstrate a change. The Court held that neither LANNING or RANSOM overruled the IN RE KAGENVEAMA, 541 F. 3RD 868 (9TH CIR.) decision which stated that no ACP exists for an above median income debtor with zero or negative proejected disposable income.

MARITAL ADJUSTMENT

Debtor may take marital adjustment for spouse's contributions that benefit debtor:

Reversing the bankruptcy court, the district court held that the Chapter 7 debtor, a married woman filing individually, could deduct, as a martial adjustment, her husband's mortgage payments on the marital residence, where only he was liable on the mortgage debt. Code § 101(10A)(B) is explicit in allowing a deduction for *any* contributions not dedicated to the household expenses of the debtor and the debtor's

dependents, even where the debtor benefits from the contribution, as here, where the husband's mortgage payments provided the debtor with a home. The district court said that the bankruptcy court in *In re Trimarchi*, 421 B.R. 914 (Bankr. N.D. Ill. 2010) had made the same error as the bankruptcy court below.

U.S. Trustee has burden of proof on disallowance of marital adjustment:

The U.S. Trustee, who challenged the Chapter 7 debtor's claimed martial adjustment, had the burden of establishing that the credit card debts of the debtor's nonfiling husband were incurred for the debtor's household expenses.

Court may not assume that credit card debt was accumulated for household purposes:

Here, the bankruptcy court committed clear error in allowing the debtor to claim only $300 of her husband's $1,300 monthly credit card payments as a marital adjustment, where the bankruptcy court relied on the U.S. Trustee's assertion of "the fact that a credit card is ordinarily used for household expenses."

Sturm v. U.S. Trustee, ---- B.R. ----, 2011 WL 2746059 (N.D. Ohio, July 14, 2011)

Where the debtor's non filing husband had regularly contributed $5127.19 to the Debtor's household expenses, the debtor was not permitted, via the marital adjustment, to limit the husband's contribution to one-half of the total household expenses on the theory that the other half of the expenses was the debtor's "share," although she earned no income. *In re Kulakowski*, 2011 WL 3878386 (Bankr. M.D. Fla., Sept. 2, 2011)

OTHER CASES

IN RE BALAS AND MORALES, 2011 WL 2312169 (Bank C.D. Cal June 13, 2011) Legally married same sex couple were found eligible to file a joint petition. Rejecting the federal Defense of Marriage Act, the Court ruled that to deny a joint petition violated the equal protection rights of legally married persons under the Due Process Clause of the Fifth Amendment.

STANDIFERD V US TRUSTEE, 641 F.3rd 1209 (10th Cir. 2011), Debtors pre-conversion misconduct during a pending chapter 13 may support denial of a discharge in a post conversion case under 727(a)(6)(A). In this case the debtors did not keep the Trustee apprised of their post petition financial condition as required by the confirmed plan. Also the debtor's unsecured debt had tripled while in the chapter 13.

IN RE CHAPMAN, 447 B.R. 250 (8th Cir. BAP 2011) Section 707(b)(1) applies upon conversion of a chapter 13 case to a chapter 7.

CHAPTER 13 ISSUES

MORTGAGE FEES/CHARGES ISSUES RELATED TO CHAPTER 13

Jacks v. Wells Fargo Bank, N.A., 642 F.3d 1323 (11th Cir. 2011) – Fees recorded on a Chapter 13 Debtor account but not collected on from the Debtor or estate is not an "act" in violation of 11 U.S.C. § 362(a)(3).

(SEE NEW RULE 3002.1)

Home Funds Direct v. Monroy, 2011 U.S. App. LEXIS 12405 (9th Cir. 2011) – No provision in the bankruptcy code that grants creditors a "right" to decline to provide account statements or coupons.

In re Taylor, 2011 U.S. App. LEXIS 17651 (3rd Cir. 2011) – Rule 11 reasonable inquiry standard requires that an attorney do more than just rely on computerized forms given to them by third party (not the creditor) when there are indications that information may not be correct. Attorneys/firm sanctioned for filing inaccurate pleadings related to MFRS.

Wells Fargo Bank v. Collins, 2011 U.S. App. LEXIS 16980 (5th Cir. 2011) - Language in mortgage documents that allowed the creditor to do and pay for what is "reasonable or appropriate to protect lender's interest in the property" does not authorize the collection of fees for preparing POCs as preparing POC does not protect creditor's interest in property.

TOLLING PERIOD RE CHAPTER 13 FOR TAX DISCHARGEABLITY

Cal. Franchise Tax Bd. v. Kendall, 2011 U.S. App. LEXIS 14246 (9th Cir. 2011) – Upon Chapter 13 confirmation and property revesting the stay against collecting on tax debt ends and the statutory three year period is only suspended until 90 days after plan confirmation.

CONVERSION FROM 7 TO 13

In re Chapman, 447 B.R. 250, (B.A.P. 8th Cir. 2011) – Abuse provisions of 11 U.S.C. § 707(b) do apply to a Chapter 7 case converted from Chapter 13.

CHAPTER 13 PLAN LENGTH FOR ABOVE MEDIAN INCOME DEBTORS

Whaley v. Tennyson, 611 F.3d 873 (11th Cir. 2010); In re Timothy, 442 B.R. 28 (B.A.P. 10th Cir. 2010) – Above median income Debtors who do not pay unsecured creditors in full must propose a 60 month Chapter 13 Plan (even if there is zero or negative disposable income).

PLAN COMPLIANCE WITH LOCAL RULES

In re Butcher, Case No. 11-10545 HRT (Bankr.D.Colo. 9-20-2011) – Court may deny confirmation of a plan that fails to comply with local rules and local form plan.

ADDITIONAL PLAN LANGUAGE

In re Gordon, Case No. 11-13885 EEB (Bankr.D.Colo. 3-25-2011) – Non-standard language added to proposed plan is permissible and not inconsistent with the Code.

LIEN STRIP ALLOWED IN A NO DISCHARGE 13

In re Waterman, 2011 WL 1337151 (Bankr.D.Colo. 4-2-2011) – A Chapter 13 debtor may strip off a wholly unsecured second lien against his residence under 11 U.S.C. § 506 even after he has received a discharge of the debt under a Chapter 7 filed within four years of the Chapter 13. See also *In re Fisette,* No. 11-6012 (B.A.P. 8th Cir., August 29, 2011).

CHAPTER 13 AVOIDING POWERS

In re Hardcastle, 2011 WL 537862 (Bankr.D.Colo. 1-21-2011) – Only the Trustee has standing to assert avoidance claims under 11 U.S.C. §§ 544, 545, 547, 548 and 549.

CHAPTER 13 TREATMENT OF UNSECURED STUDENT LOAN DEBTS

In re Johnson, ____ B.R. ____ , 2011 WL 867498 (Bankr.E.D.Wis. 3-11-2011) – 11 U.S.C. § 1322(b)(5) permits a debtor with student loan payments that mature after the plan completion date to continue to make payments on the student loan.

AUTOMATIC STAY AND RELATED ISSUES

Generally

*Olick v. Northhampton County,*2011 U.S. Dist. Lexis 123683 (E.D. PA. October 26, 2011). **Automatic Stay and Taxes:** Debtor alleged numerous claims arising out of its mortgage lender's payment of tax assessments directly to taxing authorities during Chapter 13 case, including fraud, conversion, violation of the automatic stay, Breach of Contract and RICO violations. The Court dismissed each of the claims. The Court treated the payment as akin to sale of a claim. By paying the claim to the taxing authorities, the lender stepped into the shoes of the taxing authorities on their proofs of claim.

In re Jacks, (Jacks v. Wells Fargo Bank), 642 F.3d 1323 (11th Cir. June 7, 2011), **Automatic Stay and Claims:** Debtor's requested class certification for a class of debtors affected by charges imposed by Wells Fargo for the filing of Proofs of Claim and plan reviews. Prior to considering class certification, the Court reviewed the merits of the Debtors' claims. The Court of Appeals upheld the lower courts' holdings that the "mere recordation of fees incurred by Wells Fargo on its internal records without any attempt to collect these fees from the debtor or estate or to modify the mortgage" does not violate the stay. The Court dismissed any claims related to post-dismissal or post-discharge collection of those fees, as the issues were not ripe.

In re Shamus Holdings (Shamus Holdings v. LBM Financial), 642 F.3d 263 (!st Cir. June 9, 2011). **Automatic Stay and Tolling:** Where the statute of limitations for enforcement of a mortgage has not

passed at the time of filing bankruptcy, Mortgagee's rights to foreclose are protected and preserved by 11 U.S.C. § 108(c), until such time as the stay is terminated.

Garret v. Cook, 652 F.3d 1249 (10th Cir. June 24, 2011). **Application of the Stay:** The automatic stay does not stay actions that arise post-petition on claims that arise post-petition.

TW Telecom Holdings Inv. V. Carolina Internet Ltd, 2011 US App Lexis (10th Cir.): **Application of the Stay:** The Tenth Circuit reversed its prior holdings that a Debtor could file an appeal of a judgment while in bankruptcy.

> Accordingly, we overrule this circuit's prior interpretation of § **362**(a)(1), as stated in *In re Gindi*, 642 F.3d at 870, 875-76; *Morganroth & Morganroth*, 213 F.3d at 1310; *Mason*, 115 F.3d at 1450; *In re Lyngholm*, 24 F.3d at 91-92; and *Autoskill Inc.*, 994 F.2d at 1485-86. From this date forward, this Circuit will read section **362** . . . to stay all appeals in proceedings that were *originally brought* against the debtor, regardless of whether the debtor is the appellant or appellee. Thus, whether a case is subject to the **automatic stay** must be determined at its inception. That determination should not change depending on the particular stage of the litigation at which the filing of the petition in bankruptcy occurs. *Citing, Ass'n of St. Croix Condo. Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 449 (3d Cir. 1982).

Standing

In re Miller, 2011 WL 1807015 (10th Cir. BAP, 2011). Creditor Bank had

standing to pursue stay relief after state court determined that Bank had standing under Colorado foreclosure law. The Rooker-Feldman doctrine precluded review of state court judgment with regard to standing. The Debtors participated in state foreclosure proceedings, claiming that Bank lacked standing, and state court rejected defense.

In re Martinez, 444 B.R. 192 (Bankr. D. Kan. 2011). Following a long line of cases in the Tenth Circuit, the Court held that MERS had standing to seek stay relief. The state court judgment holding against MERS was not given *res judicata* effect.

In re Heating Oil Partners, LP (Church Mutual Insurance Co. v. American Home Assurance Company), 422 Fed. Appx. 15 2011 US App Lexis 9978 (1st Cir. May 26, 2011). **Standing:** Debtor's insurance company that was jointly liable on debt had standing to set aside default judgment against debtor entered in violation of automatic stay. **Automatic Stay: "**The stay is effective immediately upon the filing of the petition, and any proceedings or actions described in *section 362(a)(1)* are void and without vitality if they occur after the automatic stay takes effect."

Repeat Filers:

In re Antal, 2011 U.S. Dist. Lexis 121205 (E.D. Mich. October 20, 2011). **Automatic Stay and Repeat Filers:** In this Chapter 13 case, the automatic stay as to Debtor-husband was limited by the provisions of Section 362(c)(3)(b). Debtor-wife was not. Rather than filing a motion to extend the stay, the debtors filed a joint plan which did not vest the property of the estate into the debtors at confirmation, but rather, left all property as property of the estate. This allowed the debtors to retain the protection of the automatic stay throughout the case. The District Court reversed the finding that this was an illegal plan, but upheld the court's refusal to confirm the plan, holding that the Debtors had failed to meet the good faith test.

Sanctions – 362(k)

Harvey v. Allianceone Receivables Management, 2011 U.S. Dist. Lexis 77760 (E.D. WA. June 18, 2011). **Stay Violations:** Following the case of *Walls v. Wells Fargo Bank, N.A.,* 276 F.3d 502 (9th Cir. 2002), the Court held that a plaintiff could not assert claims under the FDCPA during a bankruptcy case. "Ultimately the Court concluded that 'while the FDCPA's purpose is to avoid bankruptcy, if bankruptcy nevertheless occurs, the debtor's protection and remedy remain under the Bankruptcy Code.'" In dismissing the debtors' claims, the court affirmed that there is no private right of action under 11 U.S.C. § 524, and claims under the FDCPA cannot be shoe-horned into the rights provided by 11 U.S.C. § 362. The court agreed with the prior Walls decision in holding that the Bankruptcy Code offers a comprehensive system to balance the rights of creditors and debtors alike and is exclusive of other remedies.

In re Johnson, 2011 US Dist. Lexis 54960 (E.D. Mich. May 23, 2011). **Automatic Stay and Discharge Violations**: although the discharge injunction does not specify an individual cause of action, like Section 362(k), the courts may fashion a remedy under 11 U.S.C. § 105, if the action raises to the level of a willful violation.

In re Ventura-Linenko (Page Ventures v. Ventura Linkenko), 2011 US Dist Lexis 40299 (D. Nev. April 1, 2011). **Violations of the Stay**: Debtor filed bankruptcy after foreclosure sale was complete but prior to eviction. Creditor's counsel failed to respond to notice of the pending bankruptcy and continued with the eviction. The District Court upheld award of damages under 11 U.S.C. § 362(k) for willful violation of the stay, emotional distress and punitive damages.

In re Taylor, 655 F.3d 274 (3rd Cir. August 24, 2011). **Motions for Relief- Sanctions**: Court of Appeals reversed District Court and reinstated decision by bankruptcy court to impose sanctions on law firm and Mortgagee for failing to ensure that information provided to the Court was accurate. The Court of Appeals found that the trial court had "issued sanctions thoughtfully chosen to prevent the recurrence of problems at the [law firm] based on what she had learned of practices there."

Stein v. US Bancorp and Wells Fargo, 2011 U.S.Dist. Lexis 18357 (E.D. Mich. February 24, 2011). **Violations of the Stay**: The District Court upheld a bankruptcy court ruling denying Debtors' argument that lender improperly foreclosed upon their home in violation of the automatic stay. Pursuant to state law, the Debtors rights in the property expired prior to the petition date, accordingly, there was no violation. The Court also rejected Debtors' arguments regarding the assignment of mortgage as they were not parties to the assignment.

Consumer Fin. Servs. Corp. V. Alexander, 2011 U.S. Dist. Lexis 19068 (N.D. Ill. Feb. 24, 2011). **Violations of the Stay**: Creditor did not timely return possession of a repossessed vehicle to the Debtor after learning of the bankruptcy filing. Instead, Creditor filed an emergency motion to annul the stay to protect its asset. The District Court upheld the award of damages, including an award of attorneys' fees to the Debtor.

In re Sturman, 2011 U.S. Dist. Lexis 109599 (S.D.N.Y. September 27, 2011). **Violations of the Stay**: In order to receive an award of damages pursuant to 11 U.S.C. § 362(k), plaintiff must show a cognizable injury. Punitive damages require a finding that the violations were malicious or in bad faith.

In re Laboy (Laboy v. Doral Mortgage Corp.), 647 F. 3d 367 (1st Cir. 2011). **Stay Violations:** Willful violation of the automatic stay is any intentional action taken with knowledge of the bankruptcy case. **Damages:** Where the court finds a willful violation, the aggrieved party is entitled to present evidence on the appropriate damage award. The statute mandates an award of actual damages.

Related Cases- Foreclosure

Jensen v. America's Wholesale Lender, et. al., 425 Fed. Appx. 761

(10th Cir. 2011). The Tenth Circuit, applying the *Iqbal* (129 S.Ct. 1937 (2009)) standards of pleading, affirmed the District Court's dismissal of homeowners' fraud and RICO claims against foreclosing lenders and their agents. Bare allegations of wrongdoing without any specificity were insufficient to prevail over a motion to dismiss.

Commonwealth Property Advocates, LLC v. MERS et. al., 2011 WL 2714429

(D. Utah 2011). The District Court affirms summary judgment against plaintiff on claims that securitization of note renders the note an unsecured obligation. The case law in the Tenth Circuit, specifically that out of Utah, has consistently rejected all attempts to argue the "split-note theory" as it is contrary to well-established law that the transfer of the note carries with it the security.