Consumer Update 2012

PLENARY SESSION

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CONSUMER LAW UPDATE

Selected Cases Reported from January 1, 2011 Through December 31, 2011

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Jurisdiction

Bankruptcy court lacked constitutional authority to enter final judgment on counterclaim. Although the bankruptcy court had statutory authority under 28 U.S.C. § 157(b)(2)(C) over counterclaim filed by the debtor in a Chapter 11 case, and although the party filing proof of claim had consented to bankruptcy court jurisdiction over his claim against the debtor, court did not have Article III authority to enter a final judgment on the debtor's tort counterclaim. The counterclaim was state-law based, and it was not necessary that counterclaim be decided in order to determine if the proof of claim would be allowed. *Stern v. Marshall,* 131 S.Ct. 2594 (2011).

Appeals

Debtor not aggrieved for appeal. When the Chapter 13 debtors had admitted in Rule 9024 examination that they had no legitimate claim to ownership of funds subject of an interpleader action in state court, they were not aggrieved by judgment in their favor. Bankruptcy court had found, notwithstanding lack of ownership interest, that third party violated automatic stay by removing the funds from state court, resulting in $1,020 actual damages in debtors' favor. *In re Dugas,* 2011 WL 2391728 (5th Cir. June 15, 2011), slip copy.

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

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

Automatic Stay

State agency did not waive sovereign immunity for alleged stay violation. Reviewing current law on state sovereign immunity in bankruptcy proceedings, the Eleventh Circuit held that the state agency had not waived its immunity when the debtor initiated the alleged stay violation litigation four years after discharge had been entered. The "consent by ratification theory" of waiver did not apply to contempt proceedings for alleged stay violation when the violation no longer fell within the realm of "proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts." And, the "litigation waiver" theory did not apply when the debtor's litigation over the alleged violation, which was caused by the agency's post-discharge collection attempt of nondischargeable interest on child support, had no direct relationship to the bankruptcy court's earlier disallowance of a portion of the agency's child support claim. Note that the Circuit also held that since child support and the interest accruing postpetition were never dischargeable, the fact that the bankruptcy court had disallowed a portion of the claim when the agency failed to respond to the debtor's claim objection had no effect on the nondischargeability of the disallowed portion. *In re Diaz,* 647 F.3d 1073 (11th Cir. 2011).

Automatic stay did not protect debtor from fees and costs for improper removal. Although arising in an individual's Chapter 11 case, the holding would have application for all chapters, with the Tenth Circuit concluding that the individual debtor was liable for fees and costs incurred as a result of an untimely and improper removal of state court litigation. Discussing 28 U.S.C. § 1447(c), when a removal was objectively unreasonable and was untimely, on remand of the removed suit, the statute permitted recovery of the other parties' fees and costs, and the automatic stay in the debtor's case provided no protection to the debtor, whose removal was an action arising postpetition. *Garrett v. Cook,* 652 F.3d 1249 (10th Cir. 2011).

Internal recordation of fees by mortgage creditor did not violate stay. Wells Fargo's entry of $310 in bankruptcy-related fees on its internal records did not violate §§ 362(a)(3), (a)(5), or (a)(6), when no collection effort had been made in the Chapter 13 case. The postpetition monthly mortgage statements had not been changed to reflect the fees, and Wells Fargo had made no attempt to modify the mortgage obligation. "Neither possession nor control of the property was affected by Wells Fargo's entry of the fees on its internal records. Absent some other overt attempt by Wells Fargo to recover these fees from the estate or to gain advantage over other creditors, the entries on the Customer Account Activity Statement do not constitute a violation of the automatic stay." *In re Jacks,* 642 F3d. 1323 (11th Cir. 2011).

Debtors entitled to evidentiary hearing on damages for stay violation. After finding that a creditor violated the stay by recording a mortgage postpetition, the bankruptcy court had ordered the withdrawal and cancellation of the deed, with no monetary damages, but the circuit court remanded, holding that the debtors "have a statutory right to prove damages after a willful violation of the automatic stay." *In re Vazquez Laboy,* 647 F.3d 367 (1st Cir. 2011).

Assignee of secured vehicle lender had standing for stay relief motion. Applying Ohio law, the secured vehicle lender was named on the certificate of title as lienholder, and when that lienholder transferred the security interest, the assignee was a "party in interest" with standing to file for stay relief. Although the original lender was still noted on the certificate of title, the BAP observed that for purposes of § 362(d), "courts tend to focus the definition [of party in interest] on parties who are entitled to enforce the obligation." State law determined whether a party had an enforceable right to the property, and if the original security interest was properly perfected under state law, the assignee of a security interest in a motor vehicle was not required to note its assignment or lien on the certificate of title to maintain its secured status. *In re Rice,* ___ B.R. ___, 2011 WL 6016229 (BAP 6th Cir. Dec. 5, 2011).

Standing for stay relief explored. The Ninth Circuit Bankruptcy Appellate Panel has reviewed the requirements for standing to file a motion for stay relief, as well as for filing a proof of claim, remanding for the bankruptcy court to make findings about the standing of an assignee and servicer of a mortgage. The assignee had presented proof only of the mortgage assignment, but not of the underlying note, and did not show that it had possession of the note. The panel examined constitutional and prudential standing, as well as real party in interest status, in light of Articles 3 and 9 of the Uniform Commercial Code, concluding that an assignee and servicer of a mortgage, which were not initial payees of the note, must demonstrate facts to support standing, and that proof may be different for a servicer and an assignee. The assignee was required to show that it had some interest in the note, either as holder, a party entitled to enforce the note, or with some ownership or other interest in the note, and an assignment of the mortgage was not sufficient, under applicable state law (Article 9) to show that the assignee had an interest in the note. The mortgage servicer failed to show that it had standing to file a proof of claim, when it did not demonstrate that it was the agent of the mortgage assignee. *In re Veal,* 449 B.R. 542 (BAP 9th Cir. 2011). See also *In re Alcide,* 450 B.R. 526 (Bankr. E.D. Pa. 2011), reviewing case authority on standing to file stay relief motion, authority of servicer and of MERS to file for relief, as well as the creditor's rights as holder and non-holder of note under Article 3 of UCC. The *Alcide* court held that the mortgage servicer failed to establish that it had authority from the party with the right to enforce the mortgage to file a motion—the mere label as servicer was not enough to grant authority. A mortgage servicer must demonstrate that the stay relief motion was initiated within the scope of authority delegated to the servicer by a principal and that the principal is a party in interest, with the right to enforce the mortgage. See also *In re Martinez,* 444 B.R. 192 (Bankr. D. Kan. 2011), where the court examined the relationship of MERS, as nominee on the deed of trust, with the note holder, finding that an agency relationship existed and that MERS was acting as agent of, and under direction of, the note holder, giving MERS authority to file a stay relief motion.

Holder of recorded trustee's deed had standing to seek stay relief. Affirming the bankruptcy court, the Ninth Circuit Bankruptcy Appellate Panel discussed prudential standing and real party in interest for purposes of who may move for stay relief, holding that Wells Fargo's recorded trustee's deed and its unlawful detainer judgment gave it sufficient property interest to have a "colorable claim" required for standing to move for

stay relief. As the purchaser at a foreclosure sale, Wells Fargo also was entitled to stay relief. *In re Edwards,* 454 B.R. 100 (BAP 9th Cir. 2011). *Compare In re Deamicis*, 454 B.R. 756 (Bankr. E.D. Cal. 2011), where the purchaser at a prepetition foreclosure sale failed to prove that it was the real party in interest for purposes of stay relief, because of defects and discrepancies in the name of the moving party.

Section 362(b)(2)(A)(ii) permitted state court to determine $80,000 attorney fees nondischargeable. After the debtor filed Chapter 13, the state court entered its order finding that $80,000 attorney fees previously awarded in a child custody case were excepted from discharge by § 523(a)(5). The district court held that § 362(b)(2)(A)(ii) applied as an exception to the stay to permit the fixing of a domestic support obligation, giving the state court jurisdiction to make the § 523(a)(5) determination. The *Rooker-Feldman* Doctrine prevented the bankruptcy court from reviewing the state court determination, although the bankruptcy court had agreed that the attorney fee award was a domestic support obligation. The fact that the parents had never been married was irrelevant under § 523(a)(5), since the obligation for fees was a debt owed to or recoverable by the parent of the debtor's child. *Rugiero v. Dinardo (In re Rugiero),* 2011 WL 6004576 (E.D. Mich. Nov. 30, 2011), slip copy.

Police power exception to stay explored. In a Chapter 11 case, the district court discusses the scope of the § 362(b)(4) exception to the automatic stay, holding that the bankruptcy court should not consider the merits or legitimacy of the state's enforcement action. The bankruptcy court's role is to determine by an objective and case-specific inquiry whether an action is exempt from the stay, but it is up to the court with jurisdiction over the enforcement action to determine whether the government's action is legitimate. *California v. Villalobos,* 453 B.R. 404 (D. Nev. 2011).

Holder of negotiable instrument had standing for stay relief. Applying North Carolina's UCC Article 3, a person in possession of negotiable instrument that is payable to bearer or to an identified person in possession has the right to enforce the instrument. The holder of a note endorsed in blank, who entered the original note into evidence with the blank endorsement, had standing to move for stay relief. Also, under that state's law, the deed of trust follows the note. *In re Robinson,* 2011 WL 5854905 (Bankr. E.D. N.C. Nov. 22, 2011), slip copy.

Fees of child representative were covered by § 523(a)(5) and § 362(b)(2)(B). A person appointed as child representative by the state court during the marriage dissolution proceedings between the Chapter 7 debtor and former spouse held a domestic support obligation claim under §§ 101(14A) and 523(a)(5). The child representative was a form of "legal guardian" as that term is found in § 101(14A), following the reasoning of the district court in *Levin v. Greco,* 415 B.R. 663 (N.D. Ill. 2009). Since the debt was a domestic support obligation, § 362(b)(2)(B) excepted it from the automatic stay's protection, and the the child representative was free to collect the fees "without restriction of the automatic stay so long as such collection is from property that is not part of the estate available to creditors generally." *In re Anderson,* ___ B.R. ____, 2011 WL 4987017 (Bankr. N.D. Ill. Oct. 17, 2011).

Section 362(b)(2) exception explored. Holding that relief from the automatic stay for the purpose of pursuing equitable distribution of marital assets was not a matter of absolute right, as distinguished from those specific exceptions listed in § 362(b)(2), the statutory exception "does not exclude from the stay every aspect of domestic relations practice." The exception specifically excludes proceedings "to determine the division of property that is property of the [bankruptcy] estate." 11 U.S.C. § 362(b)(2)(A)(iv). Factors to be considered in whether stay relief is appropriate are: (1) the extent to which state law applies; (2) judicial economy and the efficient administration of the bankruptcy estate; and (3) protection of the bankruptcy estate. Although state law was predominate, the court found that the other factors weighed against granting complete relief, since there were assets in the bankruptcy estate that the trustee could sell. The state court could proceed, except to the extent it would be administering assets of the bankruptcy estate. *In re Secrest,* 453 B.R. 623 (Bankr. E.D. Va. 2011).

Bankruptcy court had jurisdiction to enter final order on automatic stay violation when bank froze account. Concluding that the automatic stay is a "public right," an exception noted by the Supreme Court in *Stern v. Marshall,* 131 S.Ct. 2594 (2011), the bankruptcy court had jurisdiction to enter a final order finding a stay violation when the bank froze the debtor's account and did not promptly move for stay relief to effect setoff. Moreover, the debtor's suit against the bank was a counter-claim to the bank's proof of claim, with the issue directly arising out of the Bankruptcy Code's § 362. *In re Turner,* ___ B.R. ___, 2011 WL 2708907 (Bankr. S.D. Tex. July 11, 2011).

Stay lifted as to all personal property when debtor did not file statement of intent. When the Chapter 7 debtor failed to timely file a statement of intent as to personal property and perform obligations under § 521(a)(2), the automatic stay terminated as to all personal property under § 362(h), not simply that properly specifically scheduled. The trustee had argued that the stay lifted only as to property identified on the schedules, but the BAP construed § 362(h) as applying to all personal property of the debtor and estate, when that property secured a claim. Property of the estate, as defined in § 541(a), is not limited to that property scheduled by the debtor, and § 521(a)(2) requires the debtor to schedule secured debt, but does not address a requirement to schedule all property securing the debt. "The combined effect of §§ 326(h) and 521(a)(2) is to lift the stay and remove personal property from the estate when no timely statement of intention is filed and a trustee fails to timely file a motion to determine the value or benefit of the property." *In re Blixseth*, 454 B.R. 92 (BAP 9th Cir. 2011). Compare *In re Heflin,* ___ B.R. ___, 2011 WL 1656094 (Bankr. D. Conn. May 2, 2011), holding that postpetition repossession of vehicle did not violate stay, when the debtor had failed to timely perform entry into reaffirmation agreement or redemption, and the stay terminated under § 362(h). Although neither the debtor nor creditor submitted a proposed reaffirmation agreement, § 521(a)(2)(A) requires the debtor to file a statement of intention, and § 521(a)(2)(B) requires the debtor to timely perform the intention.

Automatic stay did not go into effect under § 362(c)(4). Prior to filing the current Chapter 13 case, the debtor had two prior cases dismissed within the prior year, and the bankruptcy appellate panel rejected the debtor's argument that the language of § 362(c)(3) concerning "with respect to the debtor" should be read into § 362(c)(4). The latter Code section is unambiguous and courts have all held that when the debtor files a third case in a one-year period, with the two prior cases dismissed (and neither was refiled under a chapter other than chapter 7 after dismissal under § 707(b)), no automatic stay goes into effect. Section 362(c)(4) makes no exception for property of the bankruptcy estate. *Bates v. BAC Home Loans (In re Bates),* 446 B.R. 301 (BAP 8th Cir. 2011).

Postpetition garnishment did not violate stay that expired under § 362(c)(3)(A). The Chapter 13 debtor had one prior case pending and dismissed within the year before filing, and no motion was filed within the first thirty days to continue the automatic stay. The bankruptcy appellate panel adopted the position that the stay termination under § 362(c)(3)(A) was effective entirely as to the debtor, the debtor's property and property of the estate. The conflicting judicial views were reviewed. As a result of the complete termination of the stay, the postpetition garnishment issued by the debtor's former spouse could not violate the stay. *Reswick v. Reswick (In re Reswick),* 446 B.R. 362 (BAP 9th Cir. 2011).

Chapter 7 debtors' prepetition law firm willfully violated stay. A law firm that represented the debtors prepetition in landlord-tenant litigation had sued for unpaid fees, and while the firm's dischargeability complaint was pending, the firm sent four invoices that were collection efforts in violation of § 362(a)(6), and the violations were willful since the firm had actual knowledge of the bankruptcy filing. Notwithstanding the finding of willfulness, the debtors suffered no injury—"no fear; no apprehension; no anxiety; no nausea; no concerns; no monetary distress; no emotional distress; no harm." Without injury, no damages were recoverable. As to attorney fees, while recoverable even without other actual damages to the debtors, the fees must be reasonable and necessary. The firm unilaterally had ceased sending invoices, and the contempt litigation initiated by the debtors five months later was needless. "Debtors were litigating something that did not need litigating. No attorneys' fees were necessary; no attorney's fees are reasonable." *In re Miller,* 447 B.R. 425 (Bankr. E.D. Pa. 2011).

Former spouse's attorney willfully violated stay. The attorney for the Chapter 13 debtor's former husband willfully violated the automatic stay by obtaining an order setting status hearing on enforcement of a marital settlement agreement that had established prepetition debt. The status hearing was a collection effort barred by the stay. The debtor's attorney had entered into a settlement agreement with the former spouse's attorney for payment of $5,000 damages, which the court found to be binding on the debtor, who also happened to be an attorney. *In re Hall-Walker,* 445 B.R. 873 (Bankr. N.D. Ill. 2011).

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

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

Avoidance actions

Not necessary for debtor to claim exemption in order to avoid lien under § 522(f). The Fourth Circuit Court of Appeals held that it was not necessary for the debtor to claim an exemption in order to avoid a lien under § 522(f). The debtor owned residential real property subject to a purchase money deed of trust and the Credit Union's judicial lien, but the Chapter 7 debtor did not claim an exemption on Schedule C for the residential real property. *Botkin v. Dupont Community Credit Union,* 650 F.3d 396 (4th Cir. 2011). See also *In re Wallace,* 453 B.R. 78 (Bankr. W.D. N.Y. 2011), holding that Chapter 7 debtors were not required to have equity in their homestead, over and above senior mortgage debt, to avoid a judicial lien under § 522(f). Impairment under that section's formula was applied to a hypothetical homestead exemption that would be available if there was equity.

Joint tenants in separate cases could avoid judicial lien. A mother and son filing separate Chapter 13 cases could avoid a judicial lien on property they co-owned as joint tenants with survivorship rights. Although the application of § 522(f)'s formula resulted in different avoidance amounts, since one debtor had a tax lien and the other did not, they each could avoid the judicial lien to the extent it impaired their separate homestead exemptions. *In re LaVictoire,* 2011 WL 1168288 (Bankr. D. Vt. Mar. 29, 2011), slip copy.

Turnover

Turnover not appropriate to collect disputed debt based on unjust enrichment. Section 542(b), rather than § 542(a), governs collection of debts owed to the bankruptcy estate, and such debts must be "matured, payable on demand, or payable on order." Therefore, the Chapter 7 trustee's action to obtain collection of a disputed debt based on unjust enrichment was not viable under § 542(b). *In re Falzerano,* 454 B.R. 81 (BAP 8th Cir. 2011).

Chapter 7 debtors required to turn over funds in checking account. When the Chapter 7 debtors had funds in their checking account at the time of filing petition, with checks written and mailed for those funds but not cleared at the time of filing, the debtors had control over the funds and were subject to turning them over to the trustee. The funds in the account became property of the estate at filing. It was not necessary that the debtors have current possession of the funds for purposes of § 542(a), so long as they had the required control. The problem was that checks did clear within four days after the petition filing, so turnover required the debtors to pay out the funds twice, but the panel noted that the debtors had choices—they could have waited to file until the checks cleared, or they could have stopped payment on the checks or closed the account before filing. The panel also discussed the practical problems for the trustee to recover against the bank or the payees on the checks, as well as the difficulties turnover imposed on the debtors. *In re Ruiz,* 455 B.R. 745 (BAP 10th Cir. 2011).

Debt relief agent

Requirement for written fee agreement within five days is not material requirement. Reversing the bankruptcy court, the district court held that an attorney's failure to provide a written fee agreement within five business days of providing bankruptcy assistance, as required under § 528(a)(1), was not a material requirement for purposes of § 526(c)(1), and attorney fees should not be denied solely on that basis. Remedies are provided under § 526(c)(2), and the failure to provide the written fee agreement within five business days did not render the fee agreement void. *In re Humphries,* 2011 WL 1519165 (E.D. Mich. Apr. 19, 2011), slip copy.

Discrimination

Section 525 does not prevent private employer from hiring discrimination. While § 525(a) prohibits a governmental employer from refusing to hire based on bankruptcy, § 525(b) does not similarly prohibit a private employer from such discrimination based on bankruptcy filing. The Eleventh Circuit agreed with holdings from the Third and Fifth Circuits. 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/defendant, 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). *Accord Burnett v. Stewart Title, Inc. (In re Burnett),* 635 F.3d 169 (5th Cir. 2011).

Eligibility

Legally married, same sex couple eligible to file joint petition. Rejecting the federal Defense of Marriage Act (DOMA) argument of the United States Trustee, the bankruptcy court in the Central District of California, in an *en banc* decision, held that "no legally married couple should be entitled to fewer bankruptcy rights than any other legally married couple." The legally married males filed Chapter 13 and the U.S. Trustee moved to dismiss, asserting that DOMA, 1 U.S.C. § 7, defined "spouse" for federal law purposes as "a person of the opposite sex who is a husband or a wife," but the court held that the DOMA violated equal protection rights of legally married persons, as recognized under the Due Process Clause of the Fifth Amendment. *In re Balas and Morales,* 449 B.R. 567 (Bankr. C.D. Cal. 2011). See also *In re Somers,* 448 B.R. 677 (Bankr. S.D. N.Y. 2011) (no cause to dismiss case of same-sex, legally married couple, based on DOMA).

Property of Estate

Judicial estoppel not applied to blameless trustee. The Fifth Circuit, *en banc*, has reversed its earlier panel, holding that a "blameless trustee" is not barred by judicial estoppel from pursuing a cause of action that was omitted in the debtor's schedules. Prior to filing chapter 7, the debtor had obtained a $1,000,000 judgment under the Family Medical Leave Act, and the judgment was not disclosed in the bankruptcy schedules. When the 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 both the debtor and trustee, except to the extent that the trustee could collect enough of the judgment to satisfy the Chapter 7 creditors. The Fifth Circuit panel, in *Reed v. City of Arlington,* 620 F.3d 477 (5th Cir. 2010), reversed, applying judicial estoppel completely against the trustee. The panel's decision was vacated, with the *en banc* court stating "a general rule 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 in bankruptcy." In doing so, the opinion reviews the law on judicial estoppel in the context of bankruptcy, concluding that its opinion was consistent with *Kane v. Nat'l Union Fire Ins. Co.,* 535 F.3d 380 (5th Cir. 2008) (per curiam), where the Chapter 7 trustee was not judicially estopped from pursuing a personal injury claim for the benefit of innocent creditors, and the panel found its result in accord with recent authority from the Seventh, Tenth and Eleventh Circuits. *Reed v. City of Arlington,* 650 F.3d 571 (5th Cir. 2011).

Spendthrift trust provision enforced. The debtor's beneficiary interest in a testamentary trust, which contained a spendthrift provision, did not become property of her bankruptcy estate. Although the debtor was also executrix of her deceased husband's probate estate, which contained assets that would become assets of the trust, there was no proof that the debtor's actions as executrix exercised improper control over assets earmarked for the trust. The spendthrift provision was enforceable under applicable Arkansas law. *Wetzel v. Regions Bank,* 649 F.3d 831 (8th Cir. 2011).

See also In re Allan, 2011 WL 1496468 (11th Cir. 2011), *aff'g* 449 B.R. 628 (Bankr. S.D. Ga. 2009). It was not bad faith for Chapter 13 debtor to not schedule beneficial interest in spendthrift trust that was valid under Florida law.

Discharged Chapter 7 trustee improperly obtained turnover from debtor. When the Chapter 7 trustee had been discharged on closing of the no-asset case, the trustee properly moved to reopen the case when he learned of a possible inheritance but he was never reappointed as trustee and lacked the authority to act. The United States Trustee did not reappoint the trustee, and the former trustee had no authority to demand turnover from the debtor. The debtor had paid $18,240.46 to the former trustee on demand, but there were no claims for distribution, and the former trustee sought approval to refund the money to the debtor. The court noted that there had been frequent reopening of closed cases without reappointment of the trustee, and the court had no authority to direct refund by the trustee (although in an individual capacity the former trustee should refund to the debtor). The former trustee and United States Trustee must pay attention to Rule 5010 and reappoint a case trustee on reopening of closed cases when appropriate. *In re Trahan,* 460 B.R. 207 (Bankr. C.D. Ill. 2011).

Exemptions

Unenforceable judgment lien did not become enforceable because of § 522(p). When the Chapter 7 was filed by only one spouse, a creditor held a prepetition judgment against the debtor but not against the non-filing spouse, whose residence was scheduled in the petition as community property, with the debtor claiming homestead exemption of $125,000. Prior to bankruptcy, the spouses had agreed in writing that the non-debtor wife was entitled to proceeds from sale of the residence. The trustee sold the residence, with excess proceeds held after payment of the mortgage and expenses. The trustee wrote a check for the homestead exemption, $125,000, jointly payable to the debtor and the spouse, and the trustee also sold a unimproved lot, with excess proceeds held. Although Texas law governed the homestead, it was not disputed that § 522(p) capped the debtor's homestead at $125,000, but at the time of the prepetition judgment, the judgment creditor had an unenforceable lien under state homestead law as to the entire homestead, including the excess non-exempt proceeds, after application of § 522(p). "In the absence of controlling federal interests, the state characterization of the property prevails. The non-exempt excess proceeds from the subsequent sale of the homestead property during the bankruptcy proceeding became non-exempt by virtue of federal law, not state law. The bankruptcy laws that place a cap on the value of a homestead did not convert a lien *on the homestead* from one that was unenforceable pre-petition to one that was enforceable *as to the homestead* post-petition. . . .[The lienholder] should be accorded the same priority as a creditor that it would have enjoyed had the bankruptcy not occurred." *McCombs v. H.D. Smith Wholesale Drug Co. (In re McCombs),* 659 F.3d 503 (5th Cir. 2011).

Debtor moving within 730 days was eligible for federal exemptions. A Chapter 7 debtor who moved from Florida to Texas within the 730 days before filing bankruptcy was not eligible for the Texas state-law exemptions and Florida's opt out was only

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

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

Judicial lien impaired debtors' Arkansas homestead. Under Arkansas law, a bank's judicial lien fixed to property when the judgment was entered, but the debtors (in separate Chapter 7 cases) acquired the property years before. Dissolution of their tenancy by entirety as a result of divorce, with the former spouses' interests converted to tenancy in common, "did not result in a break in the chain of title; instead, it merely acted as a change of the manner in which debtors held title to the property." Since each debtor acquired ownership interest before the judgment lien attached to the property, the lien impaired each debtor's exemption, and the lien was avoidable. *White v. Commercial Bank and Trust Co. (In re White),* 460 B.R. 744 (BAP 8th Cir. 2011).

Inherited IRA is exempt. The district court followed judicial authority subsequent to the bankruptcy court's decision, holding that an inherited IRA is exempt under § 522(d)(12), adopting reasoning of *In re Nessa,* 426 B.R. 312 (BAP 8th Cir. 2010), and citing other authority in accord. Under § 522(d)(12), the exemption must constitute retirement funds that are exempt from taxation under the Internal Revenue Code, and the inherited IRA met both requirements. *Chilton v. Moser,* 2011 WL 938310 (E.D. Tex. Mar. 16, 2011), slip copy. *Accord In re Mathusa,* 446 B.R. 601 (Bankr. M.D. Fla. 2011) (adopting *Nessa*); *In re Cutignola,* 450 B.R. 445 (Bankr. S.D. N.Y. 2011) (An IRA inherited by the debtor from his wife within 180 days of filing Chapter 7 was exempt.); and *In re Johnson,* 452 B.R. 804 (Bankr. W.D. Wash. 2011) (An IRA inherited from the debtor's parents was exempt, when the debtor had made a trustee-to-trustee transfer.).

IRA was disqualified from tax exempt status. Sustaining the Chapter 7 trustee's objection to the debtor's claim of exemption in an IRA account, the debtor had entered into an agreement with the account issuer, a brokerage firm, that the firm would have a lien against the account for any payment obligation, and this agreement, despite the fact that the debtor did not borrow against the IRA, was a prohibited transaction under 26 U.S.C. § 4975, disqualifying the IRA from tax exempt status. Although the brokerage firm had received a favorable determination from IRS on the tax exempt nature of accounts into which persons rolled over an IRA, the trustee overcame the rebuttable presumption of tax exempt status by the evidence of the lien agreement. The debtor was unable to exempt $61,646.00 in the IRA under § 522(b)(4) or Tennessee law. *In re Daley,* 459 B.R. 270 (Bankr. E.D. Tenn. 2011).

Trustee properly objected to debtors' claim of 100% fair market value. In an analysis of the proper way for debtors to claim the value of exempt assets, subsequent to the Supreme Court's *Schwab v. Riley,* 130 S.Ct. 2652 (2010), the bankruptcy court observed that the debtors were only entitled to exempt their interest in property under applicable statutes. When the statute limited the exemption to a dollar amount, "the value of the property itself is relevant only to the extent that there is sufficient value to support the amount of the exemptible interest. If, as suggested by the Supreme Court, the debtor is trying to exempt the property in-kind rather than an interest in property, such goal may be thwarted if, for example, the property subsequently appreciates in value." The court summarized the effect of the *Schwab* holding:

Schwab instructs debtors and other parties in interest that if a debtor selects the federal exemptions (exempting only an interest in property) and states an amount for the exemption that is within the statutory limitation, such debtor has successfully claimed his exempt interest but has not exempted the property in-kind. The property remains in the estate subject to the trustee's administration and potential disposition. The trustee does not have to object to the exemption because the property itself is not the subject of the exemption and the value of the property is not relevant to the exemption claim. *Schwab* then predicts that debtors, as a way to make clear their desire to retain the asset in-kind, will state their exemption claim as "100% of FMV." Accordingly, if no objection is filed, then the debtor's exemption claim stands. But the important distinction to be made, as learned from *Schwab*, is that the debtor's exemption claim is still limited to his interest in the property. *Schwab* suggests that title to the property does not pass to the debtor even if no objection is filed. See *Schwab*, 130 S.Ct. at 2668 n. 21.

The court held that the trustees' objections to debtors' claimed exemptions of 100% FMV were valid, requiring the debtors to amend the exemptions to claim a specific amount. *In re Salazar,* 449 B.R. 890 (Bankr. N.D. Tex. 2011).

Debtors follow Supreme Court advice claiming exemption in 100% FMV. The Chapter 7 trustee objected to the debtor's claim of exemption in "100% FMV" of the assets claimed as exempt under § 522(d), but the court noted that this is exactly what the Supreme Court suggested that debtors do in *Schwab v. Reilly,* 130 S.Ct. 2652 (2010). The trustee argued that claiming exemptions in this manner was improper, but there was no gaming of the system, and the exemption claim did exactly what it should,

by triggering the trustee's objection and setting up an evidentiary hearing on value of the exempt assets. However, as to other debtors' exemptions under Texas statutes, which refer to property itself and not to the debtor's interest in property, even if the debtor did not say "100% FMV," the trustee would be required to object timely to exemption claims within the Rule 4003 time limit. The trustee's objection was timely. *In re Moore,* 442 B.R. 865 (Bankr. N.D. Tex. 2010). *See also In re Winchell,* 2010 WL 5338054 (Bankr. E.D. Wash. Dec. 20, 2010), slip copy.

Section 544(a) as basis for exemption objection. In construing Utah's exemption for proceeds of unmatured life insurance, the Bankruptcy Appellate Panel also discussed two lines of authority when the trustee uses the hypothetical status under § 544(a) to object to tenancy by entirety exemptions claimed by joint husband and wife debtors. Some case authority interprets § 544(a) as limited to avoidance transfers, and an exemption is not a transfer, The second line of authority permits the trustee to use § 544(a) to object to the joint tenancy by entirety exemption, and the BAP adopted that approach, holding that "the powers given to a trustee under § 544(a) are not limited to avoidance of transfers but specifically include broader 'rights and powers.'" The Tenth Circuit had rejected a narrow interpretation of § 544(a) powers in *Zilkha Energy Co. v. Leighton,* 920 F.3d 1520 (10th Cir. 1990). The BAP did not see a conflict between use of § 544(a) and § 522(b). *In re Duffin,* 457 B.R. 820 (BAP 10th Cir. 2011).

Bankruptcy court had jurisdiction to enter final order on approval of settlement of state court suit involving debtor's exemption claim. Concluding that exemptions under the Bankruptcy Code are "public rights," an exception noted by the Supreme Court in *Stern v. Marshall,* 131 S.Ct. 2594 (2011), the bankruptcy court had jurisdiction to enter a final order approving settlement of a state court suit between the debtor and an insurance carrier over hurricane damage, when a portion of the settlement would be exempt. Notwithstanding the exemption, the mortgage creditor held a lien on the funds, requiring them to be used for repair of the property. *In re Ok-Wonna-Felix,* 2011 WL 3421561 (Bankr. S.D. Tex. Aug. 3, 2011), slip opinion.

Debtor entitled to homestead exemption that increased subsequent to prior filing. Although the debtor had filed a prior Chapter 7 case and claimed the New York $10,000 homestead, in a subsequent Chapter 13 case, the debtor was entitled to claim the amended $50,000 homestead. Res judicata did not bar the increased exemption, because the two cases were separate, each governed by the exemptions in effect at the time of filing. Unlike § 362(c)(3) and (4), the Code's exemption scheme provides no qualifications for repeat filers. *In re Magee,* 444 B.R. 254 (Bankr. S.D. N.Y. 2011).

Iowa homestead has extraterritorial effect. A debtor claiming homestead exemption in a home in California could use the Iowa homestead. The Chapter 7 trustee objected too late, but the district court held that as a matter of law, the Iowa homestead had extraterritorial effect. *In re Roberts,* 450 B.R. 159 (N.D. Iowa 2011). Compare *In re Fernandez,* 445 B.R. 790 (Bankr. W.D. Tex. 2011), holding that Nevada's homestead is implicitly limited to property located in that state.

Debtor's failure to schedule exempt Social Security benefit survives trustee's exemption objection. Although a debtor has an obligation to schedule and claim exemption in Social Security disability benefits, even if the exemption seems unquestionable, the Chapter 7 trustee did not show that the debtor acted with intent to conceal estate property. The debtor was awarded disability benefits one week after the petition was filed and her prepetition claim for benefits had become property of the estate, even though they ultimately would be exempt, absent a valid objection. The debtor established that she was told by her attorney that the benefits, if awarded, would be exempt; her intent to conceal was not proven. *In re Varney,* 449 B.R. 411 (Bankr. D. Idaho 2011).

Chapter 7 Issues

Eligibility

Debtor was entitled to marital deduction for home mortgage payment. When the home was solely owned by the debtor's non-filing spouse, who was solely liable on debt, the debtor was entitled to a full marital deduction for that monthly mortgage payment in the current monthly income analysis for Chapter 7 eligibility. *Sturm v. U.S. Trustee,* 455 B.R. 130 (N.D. Ohio 2011).

Lien Stripping

Dewsnup prevents lien strip off. The Chapter 7 debtor was prevented from stripping off a wholly unsecured second mortgage lien by *Dewsnup v. Timm,* 502 U.S. 410 (1992). Although *Dewsnup* dealt with strip down, there was no distinction in the Supreme Court's holding between strip down and strip off. *In re Cook,* 449 B.R. 664 (D. N.J. 2011).

Conversion

Section 707(b) abuse test applies upon conversion from Chapter 13 to 7. The debtors are deemed to have filed Chapter 7 at the time of filing of a Chapter 13 for purposes of § 707(b); thus, the abuse test applies upon conversion. *Fokkena v. Chapman (In re Chapman),* 447 B.R. 250 (BAP 8th Cir. 2011).

Discharge, Exceptions and Objections

Assignee of judgment is real party in interest with standing under § 523(a). Under California law, a judgment creditor may assign the judgment to a third party, who acquires the rights of the assignor, and under federal law, an assignee has standing to prosecute discharge exceptions. However, the bankruptcy court properly required the assignee to produce the assignment agreement as a part of a pretrial scheduling order, and the party was warned that failure to comply would result in dismissal of the proceeding with prejudice. The bankruptcy court did not abuse its discretion in entering

judgment in favor of the debtor. *Carter v. Brooms (In re Brooms),* 447 B.R. 258 (BAP 9th Cir. 2011).

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

Default judgment not given preclusive effect. Under New Jersey law, although the debtor had participated in state court libel and defamation suit by filing an answer, the fact that the debtor then did not participate in discovery, allowing a default judgment to be entered meant that willful and malicious nature of the injury was never actually litigated. There was no showing that the debtor's failure to contest the judgment was abusive, merely that the debtor "simply stopped participating." *In re Lamphere*, 2011 WL 1667169 (10th Cir. 2011), slip copy.

Section 507(a)(8)(A)(i) three-year lookback not tolled by prior Chapter 13. Affirming its BAP, the Ninth Circuit held that the Chapter 7 debtor's tax debt arising more than three years before filing the Chapter 7 case was dischargeable, unless the three-year lookback was tolled, and the prior Chapter 13 filing did not toll the time. The debtor had filed Chapter 13 in 2002 and her plan was confirmed, revesting property in her and terminating the automatic stay as to the state tax board's collection efforts. After the dismissal of that case, the debtor filed Chapter 7 and received a discharge. The tax return and delinquent tax was for a tax year within three years of the Chapter 7 filing. The Chapter 7 case was reopened to determine the discharge of the tax. Under § 507(a)(8)(A)(i), the three-year lookback is defined by three years before the Chapter 7 filing (the petition at issue) in 2007, and the tax came due in 2003, outside the three year period. Section 507(a)(8) suspends the lookback period only when the creditor is precluded from collection efforts, and the tax at issue was a postpetition tax in the prior Chapter 13, with the stay in that case not preventing collection from the debtor. Moreover, by revesting in the debtor at confirmation, the stay terminated as to collection against property of the estate that was not essential for plan purposes. Also, equitable tolling did not apply, since the tax entity could have attempted collection at any time before the Chapter 7 was filed. *In re Jones,* 657 F.3d 921 (9th Cir. 2011).

Failure to pay taxes was not knowing or deliberate. The Chapter 7 debtor, a physician, had filed tax returns for ten out of twelve years but did not pay the taxes due. Under § 523(a)(1)(C), the government must show that the debtor avoided or evaded tax

payment or collection "through acts of omission, such as failure to file returns and failure to pay taxes, or through acts of commission, such as affirmative acts of evasion. Non-payment of tax alone is not sufficient to avoid discharge of a tax obligation, but it is a relevant consideration in the overall analysis." The debtor had filed tax returns, and the only evidence about conduct was her failure to pay the taxes, falling short of proof of knowing and deliberate evasion. There was no evidence of lavish lifestyle. Although the bankruptcy court had separately denied discharge of student loans, that was not relevant to the tax discharge, since the exception from discharge of student loans is presumed, with a heavy burden on the debtor. *United States v. Storey,* 640 F.3d 739 (6th Cir. 2011).

State tax report was sufficiently similar to a return for purposes of § 523(a)(1)(B). When the debtor failed to report to the Maryland tax authority the amount of changes to the federal adjusted income, the report was found to be sufficiently similar to a tax return to trigger § 523(a)(1)(B)'s failure to file exception. The exception from discharge was affirmed. *State of Maryland v. Ciotti (In re Ciotti),* 638 F.3d 276 (4th Cir. 2011).

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

Debtor lacked intent to deceive or defraud under § 523(a)(2)(A). The bankruptcy court properly determined that the debtor did not have the requisite intent to deceive or defraud. The parties had different understandings of what was included in a contract to renovate the creditor's home, and the bankruptcy court found that the debtor never intended to include the building of a porch in the contract. *Reeves v. Davis (In re Davis),* 638 F.3d 549 (7th Cir. 2011).

Bankruptcy court must consider all damage elements before entering judgment for debtor on § 523(a)(2) complaint. The plaintiffs had been friends and joint venturers with the debtor in a real estate limited liability company, and the plaintiffs contended that they were unaware that the debtor was taking money out of the LLC for personal expense, and that they would not have continued to invest in a real estate project had they known of these withdrawals. In Missouri, the primary measure of damages for fraud is the benefit of the bargain, but an alternative measure of damages may be available, and the bankruptcy court should have considered "out of pocket" damages before granting judgment for the debtor. Remand was ordered. *Bauer v. Gilmartin (In re Gilmartin),* 459 B.R. 720 (BAP 8th Cir. 2011).

Unsophisticated investor justifiably relied and bankruptcy court could liquidate debt and enter judgment under § 523(a)(2)(A). An investor who was unsophisticated in American stock investing justifiably relied on the debtor's false statements regarding profits, and the bankruptcy court had jurisdiction to find the debt nondischargeable, as well as to liquidate the debt and enter final judgment. The authorities agreeing on the

court's entry of judgment are reviewed. *Islamov v. Ungar (In re Ungar),* 633 F.3d 675 (8th Cir. 2011).

Concealment of unrecorded mortgage was not misrepresentation. Although the Chapter 7 debtor concealed an unrecorded mortgage from a third party lender, that concealment was not a misrepresentation to the creditors holding the unrecorded mortgage. At the time the debtor obtained loans from a new lender, giving a mortgage that was recorded, the debtor did not obtain money, credit, or extension of credit from the original lenders who held the unrecorded mortgage. The reduction in equity resulting from the new loan and mortgage did not satisfy § 523(a)(2)(A)'s requirement. *In re Glen,* 639 F.3d 530 (8th Cir. 2011).

Creditor failed to prove that misrepresentations caused damages. Reversing the bankruptcy court, the First Circuit Bankruptcy Appellate Panel held that a judgment creditor failed to prove that the debtor's misrepresentations about the status of obtaining a construction permit caused the creditor to enter into a construction contract and the damages resulting when the debtor was unable to complete the construction contract. Stating that it was appropriate to look to the Restatement (Second) of Torts in analysis of § 523(a)(2)(A)'s causation requirement, the creditor did not prove that the debtor's misrepresentations about delays in obtaining a permit induced the creditor to enter into the construction contract. The misrepresentations occurred after the parties had entered into a contract, and it was not reasonable that the debtor could have foreseen that misrepresentations about the status of the permit (which was ultimately obtained) would result in the creditor paying $88,000 more than the contract price to obtain completion by another contractor. Legal causation of damages was simply missing. *In re Goguen,* 453 B.R. 452 (BAP 1st Cir. 2011).

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

Debtor acted in fiduciary capacity. Under § 523(a)(4), the debtor acted in a fiduciary capacity when he obtained loans for himself from a limited partnership, and defalcation was properly found for the debtor's willful violation of a duty to the partnership by failure to secure those loans. The partnership's entrustment to the debtor of management and his complete control over that management was sufficient to establish a fiduciary capacity. Defalcation was found, when the fiduciary was not permitted to put himself in a position of benefit that violated duty to the partnership. *FNFS, Ltd. v. Harwood (In re Harwood),* 637 F.3d 615 (5th Cir. 2011).

Violation of attorney rules of professional conduct given preclusive effect for § 523(a)(4). A state court judgment finding that the Chapter 11 debtor/attorney had violated New Jersey's rules of professional conduct by withdrawing money from a client trust account was given preclusive effect, and a finding that the attorney was in a

fiduciary capacity to the client was an essential part of the judgment. *In re Leonelli-Spina,* 2011 WL 1667369 (3d Cir. 2011), slip copy.

Debtor was not fiduciary to mortgage lender. Although mortgage contained an assignment of "miscellaneous proceeds" to the lender, the proceeds from the debtor's settlement of building defects were not sufficiently described to be validly assigned under Arkansas law, and even if they were, the debtor was not a fiduciary to the lender as to those proceeds. *In re Nail*, 446 B.R. 292 (BAP 8th Cir. 2011).

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

Licensed real estate agent was not in fiduciary capacity, and state court judgment was not given preclusive effect. A state court jury verdict had been entered against the debtor for negligent and intentional breach of the debtor's fiduciary duty to a client in a failed real estate purchase, but that judgment was not entitled to preclusive effect, since the state's broad definition of fiduciary was not controlling under § 523(a)(4), which requires an express or technical trust. Reviewing prior appellate authority on whether real estate agents stand in a fiduciary capacity, under *In re Cantrell,* 329 F.3d 1119 (9th Cir. 2003), a California real estate licensee does not meet fiduciary requirements for § 523(a)(4), solely because of holding the license. The debtor never held property in trust for the client; there was no trust *res*. Preclusion did not attach to the state court verdict, since the jury did not necessarily find the actual fraud required for § 523(a)(4). *Honkanen v. Hopper (In re Honkanen),* 446 B.R. 373 (BAP 9th Cir. 2011).

Labels don't control whether debt is domestic support obligation. Reaffirming pre-BACPA case authority, the Eleventh Circuit held that a court must look beyond labels, and an obligation is domestic support if intended to function as alimony or support, regardless of the label. Under the particular facts, an obligation to pay a mortgage was domestic support if when the agreement contained a waiver of alimony. *Benson v. Benson (In re Benson),* 441 Fed Appx 650, 2011 WL 4435560 (11th Cir. 2011).

Reimbursement of child support wrongfully paid was not excepted from discharge by § 523(a)(5) or (a)(15). The state court had awarded recovery to an individual who had paid child support to the mother of a child before a paternity test

determined that the individual was not the father, but that recovery did not fall within §§ 523(a)(5) or (15), since the award was not child support but the return of funds that should not have been paid. The award was not issued as part of a separation agreement, divorce decree or property settlement, since the parties were never married. The issue of whether the mother had induced the payments by fraud was not before the court. *In re Kloeppner,* 460 B.R. 759 (D. Minn. 2011).

Attorney fees for protecting child support award are nondischargeable. Reviewing decisions on whether an attorney fee award that is payable directly to the attorney is excepted from discharge under §§ 523(a)(5) and (15), the court found the weight of authority and most recent decisions to hold that the fees are nondischargeable as a domestic support obligation or, if incurred in connection with a divorce decree or separation agreement, under § 523(a)(15). The court applied pre-BAPCPA authority from the First Circuit, *In re Macy,* 114 F.3d 1 (1st Cir. 1997), to hold that "attorney's fees incurred in protecting a child support award are nondischargeable under 11 U.S.C. § 523(a)(5)." Also, collateral estoppel prevented the Chapter 7 debtor from challenging that the state court found the attorney fees to be connected to the debtor's attempt to reduce child support, causing the former spouse to needlessly incur fees and making the fee obligation an excepted debt under § 523(a)(6). The debtor also could not avoid a judgment lien for the fees, under § 522(f)(1)(A), since it was a domestic support obligation. *In re Johnson,* 445 B.R. 50 (Bankr. D. Mass. 2011).

Barroom glass throwing did not cause willful and malicious injury. Although the debtor had pled guilty to a state criminal charge of second degree battery, resulting from a glass throwing incident in a bar, and had stipulated to a civil liability finding, with a jury verdict on damages of $204,204.11, neither the criminal nor civil verdict was given collateral estoppel effect. The criminal plea to battery could be based either on purposeful or reckless acts, and under Arkansas law, the debtor's stipulation to civil liability was not given collateral estoppel effect. The evidence before the bankruptcy court was insufficient to find that the glass was intentionally thrown toward the creditor—it could have been thrown at a table. *In re Bullard,* 449 B.R. 379 (BAP 8th Cir. 2011).
Attorney fees and collection costs incurred in § 523(a)(8) discharge litigation were contractual damages. First agreeing that loan funds were "educational" by looking to the purpose of the loan, the imposition of costs and attorney fees was permitted under the contract or loan, and such fees are allowable unless the Bankruptcy Code provides otherwise. Although § 523(a)(8) does not refer to fee recovery, the contract may so provides. *Busson-Sokolik v. Milwaukee School of Engineering (In re Busson-Sokolik),* 635 F.3d 261 (7th Cir. 2011).

Debtor's financial situation between filing case and adversary proceeding is relevant to student loan discharge. Affirming its BAP and the bankruptcy court, the Eighth Circuit held that the bankruptcy court properly considered the Chapter 7 debtor's financial circumstances existing between the filing of the case and the § 523(a)(8) complaint. Although the Circuit panel questioned the bankruptcy court's consideration of voluntary withholdings from one debtor's pay stubs, the creditor failed to object to the pay stub evidence at trial, leaving the Circuit panel with no means of reviewing the

alleged double-counting of payroll deductions. Even if the disputed payroll deductions were excluded from consideration, the debtors' expenses left a deficit over income, and the size and special needs of the debtor's family (five children, two autistic) left the panel with a realty that the debtor could not make payments on the student loan and maintain a minimal standard of living. *In re Walker,* 650 F.3d 1227 (8th Cir. 2011).

Debtor failed to show undue hardship. Under the *Brunner* test, the *pro se* debtor failed to prove undue hardship under § 523(a)(8), when the debtor had previously been able to work under the same medical conditions now existing: depression, sleep disorder, ADHD, and bipolar disorder. *Traversa v. Educational Credit Management Corp. (In re Traversa),* 2011 WL 5110214 (2d Cir. Oct. 28, 2011), slip copy.

There was no error in dismissing debtor's § 523(a)(8) complaint for failure to comply with orders. The bankruptcy court had ordered the debtor to apply for the William D. Ford Program, and on the debtor's failure to comply, the court dismissed his § 523(a)(8) complaint. The debtor's potential qualification for the Ford program was a factor in the undue hardship determination, and the debtor was not free to ignore the bankruptcy court's orders. Dismissal of the complaint was not an abuse of discretion. *Wiechkiewicz v. Educational Credit Management Corp. (In re Wiechkiewicz),* 2011 WL 4912082 (11th Cir. Oct. 17, 2011), slip copy.

Failure of former spouse to plead "hold harmless" agreement was not fatal to § 523(a)(15) complaint. As part of the parties' divorce, debts were allocated between them, and they waived any maintenance. When the former wife filed Chapter 7, the former husband filed a complaint to determine dischargeability, and while the parties' agreement did not contain "hold harmless" language, the court found that immaterial to the issue of whether the plaintiff held a § 523(a)(15) debt for indemnification. Under Wisconsin law, a property division debt can be enforced by contempt, with the court commenting that although § 523(a)(15) applies to a debt "to a spouse," whether the debt is owed directly to the spouse or is recoverable by the spouse is a "distinction without a difference." There was no allegation that the debt was a domestic support obligation, so § 523(a)(5) was not at play. *Hebel v. Georgi (In re Georgi),* 459 B.R. 716 (Bankr. E.D. Wis. 2011).

Fees and costs for successfully prosecuting § 523(a)(14) complaint are nondischargeable. Under the statute excepting from discharge a debt incurred to pay a nondischargeable tax obligation, the attorney fees and costs incurred by the creditor were part of the nondischargeable debt, if the fees and costs would be recoverable under applicable nonbankruptcy law. Applying Nevada law, the loan proceeds that were used to pay the tax obligation were given under a note providing for reasonable attorney fees and costs. Applying *Cohen v. de la Cruz,* 523 U.S. 213 (1998), those contractual fees and costs were part of the debt excepted from discharge. *In re Dinan,* 448 B.R. 775 (BAP 9th Cir. 2011).

Former domestic partner was creditor with standing to object to discharge. The debtor's former domestic partner was a creditor for purposes of § 727(c), and it is not

necessary that a claim be allowed for creditor-standing purposes. The First Circuit Bankruptcy Appellate Panel also affirmed a denial of discharge, based on false oath, when, among other things, the debtor did not schedule a Rolex watch and under-valued a bank account and vehicle. *In re Sullivan,* 455 B.R. 829 (BAP 1st Cir. 2011).

Granting of mortgages to hinder arbitration award triggered § 727(a)(2)(A). The Chapter 7 debtor, who was a contractor, lost an arbitration award of $234,599.03 and granted mortgages to creditors other than the arbitration creditor while insolvent. Withholding funds from one creditor to pay another does not prevent application of § 727(a)(2)(A), and there was sufficient evidence for the bankruptcy court to find that the debtor intended to hinder, delay or defraud collection of the arbitration award. The evidence established the granting of mortgages to entities with whom the debtor had no prior business relationship, while insolvent, with the debtor consuming substantially all equity in property that would otherwise be available for arbitration award collection. *In re Barry,* 451 B.R. 654 (BAP 1st Cir. 2011).

Reckless disregard for truth supports § 727(a)(4) objection. When the debtor failed to disclose past business interests, property transfers and income, the reckless disregard for truthfulness supported a finding of intent, sufficient to deny the discharge. *Stamat v. Neary,* 635 F.3d 974 (7th Cir. 2011).

False statements justified denial of discharge. Affirming, the Eighth Circuit BAP found sufficient evidence of the debtor's false answers in the Schedules and Statement of Financial Affairs to deny discharge under § 727(a)(4). The debtor omitted information about a livestock business, gross income from that business, transfers of equipment, and co-ownership of a vehicle. "The Debtor effectively asks us to adopt a subjective standard that would allow each individual debtor to make his or her own individual determination of what is meant by the questions on the Schedules and Statements and make disclosures accordingly. Such a subjective standard for disclosure is simply not the law." *Lincoln Savings Bank v. Freese (In re Freese),* 460 B.R. 733 (BAP 8th Cir. 2011). *See also Allred v. Vilhauer (In re Vilhauer),* 458 B.R. 511 (BAP 8th Cir. 2011) (Affirming, debtor's explanation of loss of 117 cattle over four months between bankruptcy filing and sale of herd was unsatisfactory, with discharge denied under § 727(a)(5)).

Failure to obey Chapter 13 confirmation order grounds for denial of discharge under § 727(a)(6)(A). On the U.S. Trustee's complaint, after the debtors voluntarily converted from Chapter 13 to Chapter 7, the Tenth Circuit held that a confirmation order is a "lawful order of the court" within the meaning of § 727(a)(6)(A), for purposes of denial of discharge. In Chapter 13, the debtors had obtained confirmation of their plan, providing for 100% payment of allowed unsecured claims, and requiring the debtors to contribute tax refunds and $400,000 from receivables to the plan. By the time they converted to Chapter 7, not only had the unsecured claims been unpaid, unsecured debt had tripled. The Circuit Court had no difficulty in concluding that a Chapter 13 confirmation order was a lawful order of the bankruptcy court. The debtors' pre-conversion conduct could be a basis for denial of the subsequent Chapter 7 discharge;

§ 348(a) provides that conversion does not create a new case. The debtors concealed postpetition income increases during the Chapter 13 case, spending money from the increases for home improvements, and converted when the concealment was discovered. *In re Standiferd,* 641 F.3d 1209 (10th Cir. 2011).

Discharge Injunction

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

Mortgagee did not violate discharge injunction by refusing to foreclose after surrender. The Chapter 7 debtors' § 521(a)(2)(A) statement of intention was to surrender their residence, but under *Pratt v. General Motors Acceptance Corp. (In re Pratt),* 462 F.3d 14 (1st Cir. 2006), "surrender" doesn't require the creditor to accept possession, repossess, or foreclose, only meaning that the debtor makes the collateral "available" to the creditor. The bankruptcy court correctly concluded that the mortgagee did not violate the discharge injunction by refusing to foreclose; although *in personam* liability had been discharged, the *in rem* lien survived. The bankruptcy court had found that the lender did violate the discharge injunction by the post-discharge mailing of two letters, and the BAP affirmed. *Canning v. Beneficial Marine, Inc. (In re Canning),* ___ B.R. ____, 2011 WL 6181206 (BAP 1st Cir. Dec. 12, 2011).

Bankruptcy court properly modified discharge injunction. The discharge injunction may be modified by the bankruptcy court to allow a state-court suit to continue to determine the validity and amount of debts under nonbankruptcy 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(a) complaint, and while the bankruptcy court had exclusive jurisdiction over that complaint, the bankruptcy court did not abuse its discretion in allowing the state suit to continue. *In re Eastburg,* 447 B.R. 624 (BAP 10th Cir. 2011).

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

Reaffirmation

Reaffirmation based on mutual mistake was void. Although the Chapter 7 debtors filed a reaffirmation agreement, the bank soon learned that its personal property collateral, a truck, had a blown engine and had been stolen (the Circuit opinion noted that the thief may have gotten what he deserved), and the bank filed an unsecured proof of claim, for which it was paid $2,400 from the bankruptcy estate. The Circuit Court held that the bank had waived any claim that it was secured. As to real property collateral, the Chapter 7 trustee litigated with the bank, resulting in an agreed judgment that permitted the trustee to sell the property, with proceeds going to the bankruptcy estate. The bank filed an unsecured claim for the real estate portion of the debt, receiving a distribution of $35,000 on that claim. Again, the bank waived its secured claim, and the agreed judgment precluded any revisiting of the assertion of secured status. As a result, the reaffirmation agreement entered into within a month of the Chapter 7 filing was based on mutual mistake of the bank's secured position, and the reaffirmation was void. The debtors did not know that they were reaffirming on unsecured debts, and reaffirmation of unsecured debt was not the bargain made by the debtors and bank. The bank had sued the debtors after their discharge on the reaffirmed debt. *Salyersville Nat'l Bank v. Bailey (In re Bailey),* ___ F.3d ___, 2011 WL 6141644 (6th Cir. Dec. 12, 2011).

Discharged debtor could not reopen case to reaffirm. Construing § 350(b), a Chapter 7 debtor who had received discharge and had no personal liability on mortgage debt was not allowed to reopen a closed case to attempt to reaffirm the debt. The debtor was attempting to modify the mortgage loan, and the former debtor contended that reaffirmation was a precondition to HAMP eligibility, but the court found the Treasury Department's directive about HAMP to indicate otherwise. The court reviewed judicial authority that a reaffirmation agreement entered into post-discharge was unenforceable, and the exception to that rule when the parties had reached agreement for reaffirmation prior to discharge. Here, no such exception applied. *In re Bellano,* 456 B.R. 220 (Bankr. E.D. Pa. 2011).

Revocation of discharge

Revocation of discharge based on failure to report acquisition of estate property. The bankruptcy court properly revoked the Chapter 7 debtor's discharge, on the Chapter 7 trustee's complaint, when it found that the debtor had deceived the trustee by representing that alimony being received was subject to liens and withholding information that some of the alimony payments were accelerated. A pattern of evasion was established. *In re Thunberg,* 641 F.3d 559 (1st Cir. 2011).

Sanctions

Attorney violated Rule 9011 by not scheduling promissory note. The Chapter 7 debtor's attorney had been made aware of a settlement under which the debtor

received monthly payments on a note, with a payoff of $61,500, but the note payable was not scheduled in the petition. The bankruptcy court found that the schedules were "patently false" and that the attorney violated Rule 9011(b) and § 707(b)(4)(D), and an attorney who fails to conduct a reasonable investigation into facts underlying the schedules and statement of financial affairs is subject to sanction. The bankruptcy court did not abuse its discretion in a $20,000 sanction. *In re Kayne,* 453 B.R. 372 (BAP 9th Cir. 2011).

Dismissal

Order denying motion to dismiss is final. The Fourth Circuit held that an order denying the U.S. Trustee's motion to dismiss a Chapter 7 case for abuse under § 707(b) is a final, appealable order. The case started as a Chapter 13, converted to Chapter 7 by the debtors when the Chapter 13 trustee moved to dismiss or convert, and then the U.S. Trustee moved to dismiss the Chapter 7 as abusive under § 707(b)(3), asserting both that the debtors failed to satisfy the means test and that the totality of circumstances demonstrated abuse. The bankruptcy court denied that motion, holding that § 707(b) did not apply to a case converted to Chapter 7, only to cases filed originally under that Chapter. The Circuit remanded, not deciding the issue of whether § 707(b) applied in converted cases. *McDow v. Dudley,* 662 F.3d 284 (4th Cir. 2011).

Dismissal appropriate when debtors were able to pay creditors. The Chapter 7 debtors' fixed income, including Social Security benefits, was above the median income for South Carolina, and net income after deduction of allowable expenses was insufficient to trigger a presumption of abuse under § 707(b)(2), but applying the totality of circumstances test of § 707(b)(3), the bankruptcy court properly found that the debtors were able to make substantial payments to creditors. The circuit court did not decide whether Social Security benefits were necessarily included within the analysis, since there were sufficient findings under the totality of circumstances analysis to support dismissal, including that the debtors had made $2,638 monthly payments to unsecured creditors for twenty-two months before filing bankruptcy and that their expenses "border[ed] on the extravagant." *Calhoun v. United States Trustee,* 650 F.3d 338 (4th Cir. 2011).

Following conversion from Chapter 13 to 7, debtor did not have absolute right to dismiss. The bankruptcy court had converted a Chapter 13 case to 7 and the debtor did not appeal, and the trustee liquidated assets, generating $380,000 for creditors. The debtor filed a motion to dismiss the case, and the trustee consented, with conditions to protect creditors and professional fees. The bankruptcy court dismissed the case with prejudice, allowing $252,433.57 in fees to the trustee and professionals. There was no abuse of discretion. *In re Fleurantin*, 2011 WL 1108246 (3d Cir. Mar. 28, 2011), slip copy.

Reconversion

Reconversion from Chapter 7 to 13 was not abuse of discretion. Applying § 707(b)(1) to a converted case, when the case had originally been filed under Chapter 13, then converted to Chapter 7, the bankruptcy court had authority to recovert the case to Chapter 13. There was an unrebutted presumption that the Chapter 7 case would be an abuse. *Advance Control Solutions, Inc. v. Justice,* 639 F.3d 838 (8th Cir. 2011).

Reopening case

Reopening of closed Chapter 7 case to pursue claim against trustee was properly denied. The bankruptcy court did not abuse its discretion in denying the debtors' motion to reopen a case, so that the debtors could pursue a cause of action against the trustee for alleged negligence. The Chapter 7 trustee had declined, in his business judgment, to pursue the cause of action arising out of a business dispute, and the bankruptcy court had authorized the trustee to abandon the cause of action. The Circuit Court *sua sponte* found the appeal frivolous, and ordered a show cause why the appellants and their attorney should not be sanctioned $5,000 jointly and severally. *In re Smith,* 645 F.3d 186 (2d Cir. 2011).

Chapter 13 Issues

Business debtor

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

Eligibility

Undersecured debt bifurcated for eligibility. Applying *In re Scovis,* 249 F.3d 975 (9th Cir. 2011), the undersecured portion of a recourse mortgage on rental property was treated as unsecured debt, making the debtors ineligible. The debt was not contingent, since the contractual obligation was fixed at the time of the mortgage. *In re Silva,* 2011 WL 5593040 (Bankr. N.D. Cal. Nov. 16, 2011), slip copy. *Accord In re Thompson,* 2011 WL 5520963 (Bankr. D. Kan. Nov. 14, 2011), slip copy, bifurcating for eligibility but holding that this did not permanently fix the lender's lien for purposes of § 1322(b)(2).

Each spouse is eligible for Chapter 13, even though combined debts exceed limits. Citing opinions in agreement, the court held that even though married debtors' combined debts would exceed the statutory limits for eligibility, each debtor would be eligible if their individual debts were within the limits, concluding that a joint filing consists of two separate estates administered jointly, under § 302(b). *In re Hannon,* 455 B.R. 814 (Bankr. S.D. Fla. 2011).

One joint debtor not eligible because of § 109(g)(2). Although expressing sympathy for a flexible approach to whether § 109(g)(2) makes a debtor ineligible when in a prior case the voluntary dismissal followed the withdrawal, dismissal or denial of a motion for stay relief, the "focus is better directed on whether imposition of a new automatic stay has an adverse effect on any creditor who moved for stay relief prior to the filing of the motion for voluntary dismissal." The first case filed by the wife individually was voluntarily dismissed after filing of a stay relief motion, and in the present case filed by joint debtors, the husband's eligibility was not affected by § 109(g)(2), but the court found the wife ineligible, with eligibility determined for each debtor individually. *In re Riekena,* 2011 WL 4102875 (Bankr. C.D. Ill. Sept. 15, 2011), slip opinion. *See also In re Durham,* 2011 WL 5079503 (Banrk. D. Mass. Oct. 25, 2011), slip opinion, discussing views of § 109(g)(2), and adopting "causal connection" approach.

Avoidance actions

Debtor had standing to avoid preference. When a creditor secured by a mobile home obtained a judgment in state court within the 90-day preference period, converting the creditor's personal property lien on a mobile home into a real estate lien, an involuntary "transfer" occurred for preference purposes at the time of judgment, giving the debtor standing under § 522(g)(1)(A), to seek avoidance of the transfer. *In re Dickson,* 655 F.3d 585 (6th Cir. Aug. 26, 2011). *Compare Beaulieu v. The CIT Group Sales/Finance, Inc. (In re Beaulieu),* 2011 WL 4595275 (BAP 1st Cir. Oct. 3, 2011), slip copy (Debtors lacked standing under § 522(g) and (h) to avoid the re-perfection of a lien on their mobile home because the grant of the security interest was a voluntary transfer.).

Derivative standing of debtor in avoidance action. A Sixth Circuit BAP panel followed the lead of a prior panel, in *Countrywide Home Loans v. Dickson (In re Dickson),* 427 B.R. 399 (BAP 6th Cir. 2010), holding that a Chapter 13 debtor had derivative standing to avoid a bank's unperfected lien on a mobile home under Kentucky law. The Sixth Circuit in the *Dickson* appeal, 655 F.3d 585 (6th Cir. 2011), had not decided the specific issue of the debtor's derivative standing, holding instead that the transfer at issue in *Dickson* was involuntary, giving the debtor direct standing in that case. *U.S. Bank N.A. v. Barbee (In re Barbee),* ___ B.R. ___, 2011 WL 6141648 (BAP 6th Cir. Dec. 12, 2012).

Priority claims

Postpetition child support and interest accrual were not provided for in confirmed plan. The Eighth Circuit reviewed interest accrual, making a distinction between the unusual confirmed plan's provisions for partial payment of child and spousal support arrearages and the postpetition accrual of interest that was not provided for in the plan. The plan's language permitted the debtor's former spouse to return to state court to litigate accrued interest on the prepetition child support but did not provide for the same right as to interest on the prepetition spousal support, and the Circuit held that the res judicata effect of confirmation bound the former spouse. However, the accrual of interest postpetition on nondischargeable support obligations continued and was not affected by the confirmed plan, since that interest was not a part of prepetition debt. *In re Burnett,* 646 F.3d 575 (8th Cir. 2011). *See also In re Diaz,* 647 F.3d 1073 (11th Cir. 2011), holding that interest accruing postpetition on child support obligation was not dischargeable, and state agency did not violate discharge injunction by collection effort; and *In re Kreps,* 2011 WL 2749584 (Bankr. C.D. Ill. July 13, 2011), slip opinion, a pre-BAPCPA Chapter 13 case, with the court agreeing with *In re Foster,* 319 F.3d 495 (9th Cir. 2002), that postpetition interest on child support obligation was not subject to discharge and the state family services department did not violate the automatic stay by collection efforts on the interest. Confirmation did not affect the debtor's personal and continuing liability on postpetition interest. The *Kreps* court also noted that BAPCPA's changes would not alter this result.

Obligation to hold harmless not domestic support. The former spouses' stipulated judgment left it unclear that the parties intended a hold harmless on joint mortgage debt to be in the nature of support. The judgment contained a waiver of support, which was contradictory to another provision that the assumption of debt was in the nature of support, while the obligation to assume and pay the mortgage debt did not terminate on death or remarriage. Since the parties' intent was unclear, the court considered other factors, including that this was a marriage lasting less than two years. Since § 523(a)(15) is not an exception to discharge in Chapter 13, the court considered only § 523(a)(5), finding that the hold harmless was not in the nature of support. *In re Nelson,* 451 B.R. 918 (Bankr. D. Or. 2011).

Preconfirmation Modification

Modification prior to confirmation must be noticed to all creditors. Although practice had developed in the district permitting interested and objecting parties to negotiate modifications to plans up to the time of the confirmation hearing, such a practice did not comply with Bankruptcy Rule 2002(a)(5), which requires 21 days notice to parties in interest of a time fixed to accept or reject proposed modifications, or Rule 2002(b), which requires 28 notice of the time fixed for filing objections and of the hearing on confirmation. Even if negotiated preconfirmation modifications did not adversely affect parties who were not involved in those negotiations, these two Rules require that all preconfirmation modifications be noticed to all parties in interest. The

court could not confirm a plan knowing that the plan proponent had not complied with the Rules' notice requirements. *In re Franklin,* 459 B.R. 463 (Bankr. D. Nev. 2011).

Confirmation Issues

Local plan provision requiring modification to treat timely claims filed after confirmation considered. In two opinions from bankruptcy judges in Colorado, a local plan provision providing that "the debtor must file and serve upon all parties in interest a modified plan which will provide for allowed priority and allowed secured claims which were not filed and/or liquidated at the time of confirmation," was found to be appropriate, but in a third opinion, the judge sustained an objection to the provision as "amounting to a bankruptcy court order to modify a confirmed plan, . . .inconsistent with the Bankruptcy Code [§1329]." *See In re Gordon,* 10-13885—EEB (Bankr. D. Colo. March 25, 2011), cited in *In re Diaz,* ___ B.R. ___, 2011 WL 5041766 (Bankr. D. Colo. Oct. 24, 2011); *In re Butcher,* 459 B.R. 115 (Bankr. D. Colo. 2011). *Diaz* and *Butcher* overruled a debtor attorney's objection to the provision, concluding that it implemented Code and Rule provisions for timely filed claims and did not violate § 1329's provision that only a debtor, trustee or holder of an allowed unsecured claim may request post-confirmation modification.

Classification

Debt co-signed by debtor's mother for legal fees was entitled to separate classification and favorable treatment. The debtor's obligation for legal fees incurred to represent the debtor in family violence and paternity litigation was a consumer debt, that was co-signed and guaranteed by the debtor's mother, and the debt may be separately classified and treated more favorably than other unsecured debt, which was receiving no distribution in the plan. The unfair discrimination test did not apply under § 1322(b)(1), and the plan was proposed in good faith. *In re Renteria,* 456 B.R. 444 (Bankr. E.D. Cal. 2011).

Separate classification of joint debt with non-filing spouse was approved. Although admittedly a close call, the sole debtor's classification of joint debt with his non-filing spouse, paying that debt 100%, while paying 6% to other unsecured debt, was approved, as within congressional intent to permit some discrimination in favor of co-signed consumer debt. *In re Linton,* 2011 WL 3207366 (Bankr. E.D. Va. July 27, 2011), slip opinion.

Disposable Income and Applicable Commitment Period

Debtor may not deduct vehicle ownership costs when there is no debt or lease. By 8 to 1, the Court, in an opinion by Justice Kagan, held that an above-median income debtor may not deduct the IRS local standards transportation ownership costs for a vehicle that was owned free of any debt or lease obligation. *Ransom v. FIA Card Services,* 131 S.Ct. 716 (2011).

Applicable commitment period is temporal term. Section 1325(b) imposes a temporal requirement for debtors with positive projected disposable income, as well as for debtors with negative or zero projected disposable income. The Sixth Circuit joined the Eighth, Ninth and Eleventh Circuits in holding that an objection to confirmation triggers the applicable commitment period requirement; when a plan does not propose to pay unsecured claim in full, all of the debtor's projected disposable income must be dedicated over the entire applicable commitment period. For debtors with negative or zero projected disposable income as of the confirmation date, the applicable commitment period also applies. *Baud v. Carroll,* 634 F.3d 327 (6th Cir. 2011). *See also Timothy v. Anderson (In re Timothy),* 442 B.R. 28 (BAP 10th Cir. 2010) (A debtor is not permitted to propose a plan that does contain a minimum term; in the case of an above-median income debtor, unless all of the unsecured claims were paid in full, the plan must include a five year term, even though the debtor had negative disposable income.); *In re Filion,* 452 B.R. 329 (Bankr. D. Mass. 2011) (Although the debtors tendered in the 58th month funds to pay the 16.35% dividend to unsecured creditors required by confirmation, the debtors with above median income must remain in the plan for full 60 months before being eligible for discharge, or comply with § 1329 modification requirements.); *In re Carlson,* 2011 WL 1334388 (Bankr. D. Wyo. Apr. 6, 2011), slip copy (discussing modification of 60-month plan); *In re Eaton,* 2011 WL 1302144 (Bankr. N.D. N.Y. Apr. 5, 2011), slip copy (above median income debtors must pay 100% of unsecured debt or have 60-month plan).

Voluntary payments, in excess of projected disposable income, are not required for five years. Holding that part of *In re Kagenveama,* 541 F.3d 868 (9th Cir. 2008), remained good law after *Hamilton v. Lanning,* 130 S.Ct. 2464 (2010), and *Ransom v. FIA Card Services, N.A.,* 131 S.Ct. 716 (2011), the court held that voluntary payments by an above-median income debtor were not required to be paid for full five years of plan. The applicable commitment period only applies to projected disposable income, not to voluntary payments in excess of that income. *In re Reed,* 454 B.R. 790 (Bankr. D. Or. 2011).

Oversecured creditor entitled to contract interest only to confirmation. The Eleventh Circuit held that under § 506(b) the oversecured creditor (secured by vehicles and trailers) was entitled to contract interest only to confirmation, with that Code section "inapplicable following confirmation." After confirmation, § 1325(a)(5)(B)(ii) present-value interest applies. "Interpreting Section 506(b) to only apply post-petition, pre-confirmation is also consistent with decisions of our sister circuits that address the temporal scope of Section 506(b) in relation to Section 1325(a)(5)(B)(ii)." *First United Security Bank v. Garner (In re Garner),* 663 F.3d 1218 (11th Cir. 2011).

Secured tax claim could not be modified and paid over longer term than plan. Debtor's plan proposed to use §§ 1322(b)(2) and 1322(b)(5) to modify the $18,000 secured IRS claim, paying it over a fifteen year period, but the Fifth Circuit held that § 1322(b)(5) only applies to long-term debts, such as home mortgages, that have original terms with a final payment due after the conclusion of a Chapter 13 plan. Tax deficiency debts are not long-term in nature. Allowing the reading of § 1322(b) as the

debtor proposed would render § 1322(d)'s cap on plans to five years never applicable to a secured claim subject to modification under § 1322(b)(2). "We interpret § 1322(b)(5) to apply only to a debt whose pre-bankruptcy terms establish that the final payment is not due until after the end of a Chapter 13 plan's maximum term." *In re Pierrotti,* 645 F.3d 277 (5th Cir. 2011).

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

Proposed new note was not proper modification. In the context of a mortgage not protected from modification by § 1322(b)(2), if the debtor modifies the terms of the note, it must be paid within the plan life; otherwise, the debtor must cure prepetition default and make the regular mortgage payments. Giving a new note that changed the terms of the loan was not a proper modification. *In re Bell,* 2011 WL 2712755 (Bankr. D. Mass. July 12, 2011), slip copy; *accord In re Agustin,* 451 B.R. 617 (Bankr. S.D. Fla. 2011).

Home with rental unit was subject to modification. Section 1322(b)(2) was not amended nor altered by BAPCPA's definition of "debtor's principal residence" or "incidental property," and § 1322(b)(2) still requires the property to be secured by real property that is the debtor's principal residence. Pre-BAPCPA authority on modification of a mortgage on a multi-unit dwelling remains binding. See *Lomas Mortgage, Inc. v. Louis,* 82 F.3d 1 (1st Cir. 1996). *In re Picchi,* 448 B.R. 870 (BAP 1st Cir. 2011); *See also In re Zaldivar,* 441 B.R. 389 (Bankr. S.D. Fla. 2011) (The court discusses the split of authority on modification of a mortgage securing in part the debtor's residence and in part rental property. Rejecting a bright-line rule in favor of totality-of-circumstances, the court looked to the substance of the bargain at the time of the mortgage transaction, and where the mortgage documents did not require the debtor to occupy the property as a residence, the "predominate character" of the transaction was a commercial loan, permitting the mortgage to be stripped down under § 1322(b)(2).).

Remedies under §§ 1322(b)(2) and 1325(b)(5). Taking the minority position, the bankruptcy court held that a mortgage not protected by § 1322(b)(2) may be modified, with the arrearage cured and the regular contractual monthly payments maintained beyond the life of the plan, until the modified secured amount is paid in full. The interest rate and contractual monthly payments may not be modified. *In re Elibo,* 447 B.R. 359 (Bankr. S.D. Fla. 2011). *Contrast In re Pires,* ___ B.R. ___, 2011 WL 5330772 (Bankr. D. Mass. Nov. 7, 2011), holding that hybrid plan violated § 1322(d) 5-year limitation, and that § 1325(b)(5) did not permit modified mortgage claims to be paid beyond plan life.

***Kagenveama* not completely overruled**. The bankruptcy court held that *In re Kagenveama,* 541 F.3d 868 (9th Cir. 2008), was still good law concerning the time that a debtor without projected disposable income must remain in Chapter 13, holding that neither *Lanning* nor *Ransom* directly addressed the applicable commitment period issue decided by *Kagenveama. In re Henderson,* 455 B.R. 203 (Bankr. D. Idaho 2011).

Additional operating expense for old, high-mileage car not automatically allowed. Notwithstanding the Internal Revenue Manual, a $200 additional operating expense for a high-mileage, older vehicle is not automatically allowed, but is subject to the trustee's and unsecured creditor's objection. $100 that was disclosed on Schedule J was allowed. *In re Hargis,* 451 B.R. 174 (Bankr. D. Utah 2011). See also *In re Vandyke,* 450 B.R. 836 (Bankr. C.D. Ill. 2011) ($200 additional expense was not available when the vehicle was not operable).

Social Security benefits are excluded from calculation of projected disposable income. The Sixth Circuit held that the definition of disposable income, which incorporates the definition of current monthly income, excluded Social Security benefits. By these definitions, Congress indicated that Social Security benefits are treated differently post-BAPCPA than they were treated by most courts pre-BAPCPA. *Baud v. Carroll,* 634 F.3d 327 (6th Cir. 2011). *Accord In re Vandenbosch,* 459 B.R. 140 (M.D. Fla. 2011) (The district court noted recent authority, including *Baud v. Carroll,* 634 F.3d 327 (6th Cir. 2011), holding that Social Security income was excluded from the definition of "disposable income" under § 101(10A). Although Social Security income had typically been included in the calculation of disposable income prior to BAPCPA, "projected disposable income" must take into account the § 101(10A) exclusion. This is consistent with the Social Security Act's protection of Social Security income in bankruptcy. It is not bad faith for a debtor to decline to voluntarily contribute Social Security income to a plan.); *In re Ragos,* 2011 WL 3101436 (Bankr. E.D. La. July 21, 2011) (slip opinion) (Agreeing with *Baud v. Carroll,* 634 F.3d 327 (6th Cir. 2011), the Code clearly excluded Social Security benefits from the calculation of projected disposable income, and it was not bad faith for debtors to exclude those benefits, even though they are not exempt under applicable Louisiana law.); *In re Burnett,* 2011 WL 204907 (Bankr. N.D. N.Y. Jan. 21, 2011), slip copy, (Projected disposable income excludes Social Security benefits, unless the debtor voluntarily devotes that income to the plan.); *In re Miller,* 445 B.R. 504 (Bankr. D. S.C. 2011) (Social Security Act prevents debtor from being forced to fund plan with benefits.). *Compare In re Herrmann,* 2011 WL 576753 (Bankr. D. S.C. Feb. 9, 2011), slip copy, (Although excluded from CMI, Social Security income must be allocated to living expenses to satisfy § 1325(a)(3) good faith.).

Compare In re re Nicholas, 458 B.R. 516 (Bankr. E.D. Ark. 2011), holding that *In re Thompson,* 539 B.R. 140, 143 n. 3 (BAP 8th Cir. 2010), did not decide whether Social Security income could *ever* be included in projected disposable income, and agreeing with *In re Cramer,* 433 B.R. 391 (Bankr. D. Utah 2010), that by filing for Chapter 13 relief, the debtor voluntarily submitted all income, including Social Security, to the projected disposable income test. "Chapter 13 is always voluntary, and accordingly, a Chapter 13 debtor's SSI is voluntarily committed to fund the Chapter 13 plan."

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

Monthly mortgage payments were not reasonably necessary. $2,800 monthly mortgage payments for a 7,000 square foot residence of a below-median income debtor with no dependents was not a reasonably necessary expense. There was no equity in the property, which the debtor received in a divorce. The debtor argued that she could use Social Security income to pay most of the mortgage payments, but the court held that "the home was an unnecessary and an unreasonable expense that should be surrendered to afford a larger dividend to unsecured creditors." Under the divorce decree, the debtor was solely responsible for the home, and upon a sale any equity would be divided with the former spouse, but the decree did not require the debtor to sell for a profit when there was no equity. *In re re Nicholas,* 458 B.R. 516 (Bankr. E.D. Ark. 2011) (*see* discussion above for the court's conclusion about Social Security income).

IRS Local Standards deductions for housing and transportation are not caps. The bankruptcy court held that secured payments are authorized in full under § 707(b)(2)(A), and the IRS Local Standards for housing and transportation are not caps on those payments, concluding that this was consistent with *Ransom. In re McHenry,* 2011 WL 4625385 (Bankr. D. Mont. Sept. 30, 2011), slip copy.

Plans providing for pro-rata payments to secured creditors did not satisfy "equal monthly payment" requirement. A common practice had developed for plans to propose to pay specific secured claims, such as vehicle loans, "in pro-rata amounts based upon the creditors' ratable shares of each monthly disbursement after deduction of the Trustee's fees, the debtors' attorney fees, and other payments," and the court held that this procedure did not meet § 1325(a)(5)(B)(iii)'s requirement that payments on secured claims be in "equal monthly amounts. The former procedure makes it impossible for a creditor to anticipate what each monthly disbursement to it will be." The court also observed that nothing in the Code required that the debtors' attorney fees be paid in full before payment to secured creditors, with § 1322(a)(2) only requiring that priority claims be paid in full. *In re Willis,* 460 B.R. 784 (Bankr. D. Kan. 2011).

Above-median income debtor's transportation expense is capped. If the above-median income debtor's actual transportation expense is greater than the IRS local standard, the rationale of *Ransom* limits the debtor to the IRS standard expense. The debtors claimed actual expenses in excess of the local standard on Schedule J. *In re Thiel,* 446 B.R. 434 (Bankr. D. Idaho 2011).

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

Sales and Surrender of Property

Late objection to debtors' motion to sell prevented reconsideration. The debtors' confirmed plan, without objection, provided for surrender of a condominium, but the debtors moved thirteen months later to sell the condominium under § 363(f), free of liens. The sale price was $137,300 and there were liens far in excess of that price, including a first and second mortgage, and a condominium association lien. The sale motion was noticed, and no objection was filed, with the bankruptcy court then entering an order approving the sale. The day after the approval order, BAC Home Loans Servicing filed a motion for reconsideration, admitting that its "administrative error" prevented it from appearing earlier; BAC received notice of the sale motion more than a month before the sale, and the notice was routed around in BAC. BAC's now objected because the sale price was so low compared to its $515,000 debt or its $345,000 appraisal value. The bankruptcy court denied reconsideration of the sale, stating that BAC's mistake in handling the notice did not justify overturning a sale to a good-faith purchaser for value. Affirming, the BAP noted that BAC did not argue that the notice of sale was defective or that it did not receive the notice, holding that the sale order was proper under § 363(f)(2). BAC had essentially waived any objection by failure to timely object. *BAC Home Loans Servicing LP v. Grassi (In re Grassi),* 2011 WL 6096509 (BAP 1st Cir. Nov. 21, 2011), slip copy.

Plan provision for surrender did not require foreclosure to fix deficiency. The mortgage creditor objected to plan provisions for surrender and giving 180 days from confirmation for the creditor to filed a deficiency claim, but the court held that the plan did not require the creditor to foreclose in order to fix the deficiency. Other methods existed, including amendment of the original proof of claim, claim estimation, and a motion to value collateral. The plan provision did not violate § 1322(b)(11). *In re Paquette,* 2011 WL 5856265 (Bankr. E.D. Mich. Nov. 21, 2011), slip copy. *See also Arsenault v. JP Morgan Chase Bank, N.A. (In re Arsenault),* 456 B.R. 627 (Bankr. S.D. Ga. 2011), holding that Chase Bank did not violate the stay or the confirmation order by failing to transfer title to property surrendered in the confirmed plan.

Lien Retention

Stripping wholly unsecured liens when discharge not available continues to divide courts. The Eighth Circuit Bankruptcy Appellate Panel adopted the view that a debtor ineligible for Chapter 13 discharge because of § 1328(f) could nevertheless strip off a wholly unsecured junior lien upon completion of a plan, holding that § 1325(a)(5)(B)(i)(I)(bb)'s lien retention clause related to discharge doesn't apply, since the wholly unsecured lien is not an "allowed secured claim" under § 1325(a)(5). After application of § 506(a), the lien is wholly unsecured, and § 1322(b)(2) doesn't protect the lien. *In re Fisette,* 455 B.R. 177 (BAP 8th Cir. 2011). The Eighth Circuit BAP has become the second appellate court to address the issue, joining the district court, *In re Fair,* 2011 WL 1486021 (E.D. Wis. Apr. 19, 2011), in holding that § 1328(f) doesn't prevent strip off. *See also In re Jennings,* 454 B.R. 252 (Bankr. N.D. Ga. July 11, 2011) (holding that a debtor ineligible for discharge may strip off a wholly unsecured lien at completion of a plan, provided the plan was in good faith, and the plan must treat the stripped lien as unsecured).

In contrast, the bankruptcy court in *In re Victorio,* 454 B.R. 759 (Bankr. S.D. Cal. 2011), held that the stripoff of a wholly unsecured lien would not be permanent when the debtor is ineligible for discharge—without a discharge, the debtor must pay the underlying debt completely. The *Victorio* court analyzed old Supreme Court authority to support its conclusion. *See also In re Orkwis,* 457 B.R. 243 (Bankr. E.D. N.Y. 2011), holding that plan completion was not enough, and the wholly unsecured lien could not be stripped until debtor received discharge. The lien was not stripped by default in adversary proceeding. *See also In re Gerardin,* 447 B.R. 342 (Bankr. S.D. Fla. 2011), *en banc*, (Agreeing with *In re Fenn,* 428 B.R. 494 (Bankr. N.D. Ill. 2010), a debtor not eligible for discharge because of § 1328(f) can not strip off the wholly unsecured lien; the debtor must satisfy one of § 1325(a)(5)(B)'s lien retention requirements. The opinion is en banc.).

Contrast In re Pollard, 2011 WL 576599 (Bankr. D. Md. Feb. 9, 2011), slip copy, (Case filed within eight months of Chapter 7 discharge, for purpose of stripping off wholly unsecured lien, was not filed in bad faith; creditor did not object to stripping.).

Debtor could not vacate Chapter 7 discharge to strip lien. When the debtor had received a prior Chapter 7 discharge, there was no Code authority to permit the debtor to vacate the discharge in order to attempt to strip a wholly unsecured lien in a

subsequent Chapter 13. *In re Poorvin,* 2011 WL 5572607 (Bankr. M.D. Fla. Nov. 15, 2011), slip opinion.

Although Code did not prohibit lien stripping in no-discharge case, *in rem* claim was included in eligibility calculation. Reviewing conflicting judicial opinions on lien stripping in no-discharge cases, the court concluded that § 1325(a)(5)(B)'s lien retention applies only to secured claims and that the Code did not prohibit a debtor ineligible for discharge from stripping a wholly unsecured junior lien; however, the case must be filed and plan proposed in good faith, and the *in rem* claim remaining after a prior Chapter 7 discharge must be included as an unsecured claim for purposes of § 109(e) eligibility. This debtor was ineligible for Chapter 13 relief when the *in rem* claim was included. *In re Scotto-Diclememte,* 459 B.R. 558 (Bankr. D. N.J. 2011).

Section 1325(a)(5)(B) only protects lien retention for secured claims. Section 1325(a)(5)(B)(i)(I) only protects lien retention for secured claims, and a mortgage with no value is not a secured claim entitled to the protection of § 1322(b)(2). The court also observed that treatment of a wholly unsecured lien as an allowed unsecured claim is not a voiding of the lien under § 506(d), but is a result of § 506(a) valuation. The court concluded that §§ 506(a), 1322(b)(2) and 1325(a)(5) do not have different meanings for debtors ineligible for a discharge because of § 1328(f), with nothing in the Code conditioning lien strip off on discharge, with the wholly unsecured lien stripped off upon plan completion, provided that §§ 1325(a)(4) and 1325(b)(1) are satisfied. The proper method for stripping the lien is by a motion to value the mortgage lien under § 506(a), with an adversary proceeding not required. *In re Miller,* ____ B.R. ____, 2011 WL 6257450 (Bankr. E.D. N.Y. Dec. 15, 2011). *Accord, In re Gloster,* 459 B.R. 200 (Bankr. D. N.J. 2011), holding that a debtor ineligible for discharge because of § 1328(f) could strip off the wholly unsecured junior lien, with the strip off effective on plan completion, and noting that BAPCA made no change to the Code to specifically disallow stripping of wholly unsecured liens in Chapter 13.

Section 1325(a)(5)(B)(i) prevents debtor ineligible for discharge from stripping wholly unsecured lien. *See In re Sadowski,* ___ B.R. ____, 2011 WL 4572005 (Bankr. D. Conn. Sept. 30, 2011), holding that § 1325(a)(5)(B)(i) lien retention prevented debtor ineligible for discharge from stripping wholly unsecured junior lien. The good faith requirements of § 1325(a)(3) and (7) also prevent using Chapter 13 to avoid the effect of *Dewsnup. See also In re Quiros-Amy,* 456 B.R. 147 (Bankr. S.D. Fla. 2011), holding that the *in rem* claim remaining after Chapter 7 discharge was a secured claim against property, satisfying § 1325(a)(5)(B)'s "allowed secured claim" requirement for lien retention when the Chapter 13 debtor was not eligible for discharge.

Split of decisions continues on whether only "allowed secured claims" are restricted by lien retention. Some courts have held that the BAPCPA amendments do not prevent lien stripping of a wholly unsecured junior mortgage, since there is no value to support the lien; therefore, the lien does not support an "allowed secured claim" under the prefatory language of § 1325(a)(5). See, for example, *In re Fair,* 2011 WL 1486021 (E.D. Wis. Apr. 19, 2011), holding that a "wholly unsecured junior lien on the

principal residence of the debtor can be stripped-off in a chapter 13 despite the operation of § 1328(f)." See *In re Okosisi,* 451 B.R. 90 (Bankr. D. Nev. 2011), agreeing with *Fair,* after analysis of *Nobelman* and *Dewsnup,* and concluding that § 1325(a)(5)(B) only requires plan completion to strip a wholly unsecured lien, which is not an "allowed secured claim." See also *In re Waterman,* 447 B.R. 324 (Bankr. D. Colo. Apr. 7, 2011); *In re Davis,* 447 B.R. 738 (Bankr. D. Md. 2011); *In re Garcia,* 2011 WL 867344 (Bankr. N.D. Cal. Mar. 10, 2011), slip copy; *In re Frazier,* 448 B.R. 803 (Bankr. E.D. Cal. 2011). Other courts say lien stripping is subject to discharge. *See, e.g., In re Gerardin,* 447 B.R. 342 (Bankr. S.D. Fla. Mar. 28, 2011), an *en banc* decision, holding that § 506(d) does not provide a means to void a lien securing a property interest, and lien stripping in Chapter 13 requires a combination of § 506(a) valuation and § 1325(a)(5)(B) lien retention. See also *In re Lindskog,* 451 B.R. 863 (Bankr. E.D. Wash. Apr. 13, 2011); *In re Erdmann,* 446 B.R. 861 (Bankr. N.D. Ill. 2011).

Debtors without personal liability to mortgagee could not strip down undersecured mortgage. The debtors were never parties to a note secured by a mortgage on their residence, and the plan proposal to pay the value of the residence in monthly payments for 36 months, and then a balloon at the end of the plan, violated § 1322(b)(2). The Bank's rights under the mortgage were protected from modification without regard to the debtors' *in personam* liability. *In re Anderson,* ___ B.R. ___, 2011 WL 4494209 (Bankr. E.D. Wis. Sept. 29, 2011).

Car lender only entitled to balance of secured claim after wreck. Section 1325(a)(5)(B) lien retention requires that the insurance proceeds from wrecked vehicle, above the remaining balance of the allowed secured claim in a confirmed plan, be held by the trustee pending plan completion and discharge, and BAPCPA did not change the general rule that the creditor is limited to the amount of its allowed secured claim. If the case was converted or dismissed prior to plan completion, the lien would be fully reinstated by § 349(b)(1)(C). *In re Perry,* 2011 WL 5909065 (Bankr. E.D. N.C. Oct. 24, 2011), slip copy. *Accord In re Norred,* 2011 WL 4433598 (Bankr. D. Or. Sept. 21, 2011), slip copy.

Mortgage lender could not be compelled to foreclose. Concluding that it was without authority to force the lender to foreclose after the debtor surrendered property and the stay was terminated, "surrender" means only that the debtor has consented to let the lender take the property. *In re Ogunfiditimi,* 2011 WL 2652371 (Bankr. D. Md. July 6, 2011), slip opinion. *Accord In re Arsenault,* 456 B.R. 627 (Bankr. S.D. Ga. 2011). *See also In re Spencer,* 457 B.R. 601 (E.D. Mich. 2011), holding that "surrender merely establishes that Debtor will not oppose the transfer of collateral," but does not transfer title to secured creditors.

Good Faith

Paying a mortgage on the home, within the means test limits, does not necessarily mean plan in good faith. The district court held that a plan paying only 1% to unsecured creditors was not in good faith, even though monthly mortgage

payments had no reasonableness limitations under § 707(b)(2)(A)(iii)(II). The debtor was retaining a high value home while paying minimal amounts to unsecured creditors. *Viegelahn v. Essex*, 452 B.R. 195 (W.D. Tex. 2011).

Attorney-fee only case not in good faith. Affirming the bankruptcy court, the district court held that there was no abuse of discretion in denying confirmation, for lack of good faith, of a plan that would pay only the debtor's attorney fees. *In re Puffer,* 453 B.R. 14 (D. Mass. 2011). *Accord Sikes v. Grager,* 2011 WL 4591889 (W.D. La. Sept. 30, 2011) (A district court reversed confirmation of a plan that would devote the first 35 monthly payments to administrative costs, primarily debtor's attorney's fees, with only the 36th payment of $76 going to unsecured creditors (approximately 1%). The court concluded that "the true intent of Chapter 13 was not to simply administer the payment of attorney fees."); *In re Arlen,* 461 B.R. 550 (Bankr. W.D. Mo. 2011) (Under § 1325(a)(3), a plan proposing to pay unsecured creditors nothing and pay only attorney fees was not in good faith, even though the exclusion of the debtors' Social Security income left no projected disposable income.).

Negative Equity

Supreme Court denies cert in *Penrod*. The Supreme Court denied certiorari in *In re Penrod,* 611 F.3d 1158 (9th Cir. 2010), leaving a circuit split on whether negative equity financed in the purchase of a vehicle is part of the purchase money security interest for § 1325(a)(5) purposes. *AmeriCredit Fin. Serv. v. Penrod,* No. 10-1443 (Oct. 3, 2011).

Effect of Confirmation

Interplay of §§ 1306(a) and 1327(b). Without adopting any of the four approaches to harmonizing §§ 1327(b) and 1306(a), the Ninth Circuit, in considering whether a prior Chapter 13 case tolled the three-year lookback for purposes of § 507(a)(8), reviewed the approaches, and when the confirmation order provided for revesting in the debtor, except for funds specifically dedicated for plan fulfillment, the debtor acquired some property of the estate, terminating the stay as to that property and opening the way for the Tax Board to attempt collection (note that the tax at issue was a postpetition tax in the Chapter 13). Therefore, the prior Chapter 13 filing did not toll the three-year lookback, in the debtor's filing of a subsequent Chapter 7 more than three years after the tax return was filed. *In re Jones,* 657 F.3d 921 (9th Cir. 2011).

Interplay between §§ 362(b)(2)(F) and 1327 explored. The New Hampshire Department of Human Services continued to intercept tax refunds and apply them to its prepetition child support claim, and the debtor modified the confirmed plan, with the issue before the BAP being whether the effect of modification prohibited the Department from further tax refund seizures. Section 362(b)(2)(F) specifically excepts from the automatic stay interception of tax refunds for payment of support obligations, even though the refund would be property of the estate. The bankruptcy court had held that, notwithstanding this exception, the interception violated the confirmed modified plan. The binding effect of confirmation only extends to issues actually litigated or necessarily

determined by the confirmation order, and the BAP held that the confirmation of the modified plan did not address the Department's right to intercept future tax refunds. The original plan stated that the Department was seizing refunds, but the modified plan was silent about its right to do so; to preclude the future interception, the modified plan must have specifically so provided. The bankruptcy court erred in ruling that the lack of a permissive provision in the second modified plan was a preclusion against the Department's future interception. Law of the case also applied, when the bankruptcy court had ruled that the first modified plan did not prohibit the Department's collection, with this law of the case applying to the second modified plan, which did not specifically prohibit tax refund interception. *State of New Hampshire v. McGrahan (In re McGrahan),* 459 B.R. 869 (BAP 1st Cir. 2011).

Exception to *Espinosa* required remand. When the confirmed plan contained a nine month arrearage, but the actual prepetition mortgage arrearage was for twenty months, the district court found an exception to *Espinosa* in the Fifth Circuit's *In re Simmons,* 765 F.2d 547 (5th Cir. 1985), and *In re Howard,* 972 F.2d 639 (5th Cir. 1992), indicating that a plan, even when noticed, may not overcome a secured creditor's proof of claim, when there was no objection to the claim. The district court also questioned whether the debtor had acted properly, when scheduling of the correct arrearage would have triggered the trustee's objection to confirmation on feasibility grounds. *Countrywide Home Loans, Inc. v. Stewart,* 2011 WL 1899820 (E.D. La. May 16, 2011), slip copy.

Notwithstanding termination of stay preconfirmation, mortgage creditor was bound by confirmation. Although under § 362(c)(3)(A), the automatic stay had terminated prior to plan confirmation, the mortgage creditor must still protect its rights by objection to a plan. When the plan provided for curing prepetition arrearages and making direct payments on the ongoing obligation, the confirmation order bound the creditor, which was obligated by the Supreme Court's *Espinosa* decision to monitor the plan activity, even though the stay had terminated. The creditor could have protected itself by objection to the plan or timely appeal of the confirmation order. *In re Hileman*, 451 B.R. 522 (Bankr. C.D. Cal. 2011).

Confirmation bound trustee. When the trustee was aware that the plan provided for secured status of the car lender, but was also aware that perfection was avoidable, the confirmation bound the trustee, preventing pursuit of an avoidance action. Even though the avoidance was still timely under § 546(a), the res judicata effect bound the trustee who was fully aware of the avoidable status of the secured claim prior to confirmation. *Hope v. Acorn Financial, Inc. (In re Fluellen),* 446 B.R. 612 (Bankr. M.D. Ga. 2011).

Postconfirmation Modification

Modification must correlate to change in circumstances. Finding that most courts had limited § 1329(a) modifications to those "situations where there has been a substantial change in circumstances," the Eighth Circuit BAP held that "when a confirmed plan is modified to reduce payments. . .due to a substantial change in financial circumstances, the modification must correlate to the change in circumstances.

When the debtors had voluntarily contributed disposable income, including Social Security income, in their confirmed plan (prior to *In re Thompson,* 439 B.R. 140 (BAP 8th Cir. 2010) holding that the Social Security income was excluded from required plan payments), the debtors were bound by § 1327(a) as to that income. While they could modify the confirmed plan to reflect the reduction in income as a result of loss of the debtor/husband's second job, the modification could not deduct the previously committed Social Security income. *In re Johnson,* 458 B.R. 745 (BAP 8th Cir. 2011).

Section 1329 does not permit curing postconfirmation default. Distinguishing Sixth Circuit authority, the court held that postconfirmation modification is not available to cure postconfirmation default under a plan that proposed to cure prepetition defaults and maintain regular mortgage payments. Section 1329(a) is limited to its specific provisions, and § 1329(b)(1) can not be relied on as a substitute for § 1329(a) authority, under Sixth Circuit authority. *In re Long,* 453 B.R. 283 (Bankr. W.D. Mich. 2011).

Postconfirmation modification requires showing of substantial change in circumstances subsequent to confirmation. Discussing the split in authority on whether a change in circumstances is required for modification of a confirmed plan, the court found dicta in *Ransom v. FIA Card Services,* 131 S.Ct. 716 (2011), and *In re Anderson,* 21 F.3d 355 (9th Cir. 1994), to be persuasive, holding that in addition to a requirement that the modification be in good faith, "modification pursuant to § 1329 also requires that the moving party show that there has been a substantial change in the debtor's circumstances since the time of the confirmation which was unanticipated or otherwise could not be taken into account at the time of the confirmation hearing, *and that the change in the plan correlate to the change in circumstances."* While a modification might shorten a plan period, the debtors' increase in income and expenses did not correlate to a request to shorten the confirmed plan period. *In re Mattson,* 456 B.R. 75 (Bankr. W.D. Wash. 2011).

Projected disposable income does not apply to postconfirmation modification. Pointing out the split of judicial authority, the court held that § 1329(b) does not incorporate § 1325(a)(3)'s projected disposable income test for purposes of postconfirmation modification. *In re Robenhorst,* 2011 WL 1434696 (Bankr. E.D. Wis. Apr. 14, 2011), slip copy.

Conversion and Dismissal

Debtor's failure to timely file list of creditors required dismissal. When the debtor did not file the required list of creditors within 45 days of the petition filing, the case was properly dismissed. The trustee had requested dismissal due to the debtor's failure, and the clerk notified the parties of automatic dismissal under § 521(i). The debtor's attorney argued that § 521(i)(1) was not triggered because the Code only required the "information" and not the actual list, with the argument being that the creditor "information" was filed in the schedules. "We do not read § 521(i)(1) as eviscerating the form requirements of the documents required by § 521(a)(1), nor are we aware of any other court that has done so." Section 521(a)(1)(A) requires a separate creditor list, and

unlike § 521(a)(1)(B) requirements that may be waived by the court, the list must be filed in every case. The bankruptcy court's denial of the debtor's motion to vacate dismissal was affirmed. The opinion also contains an appendix of the Chapter 13 filing checklist in the District of Utah. *In re Wilcox,* 2011 WL 3347772 (BAP 10th Cir. Aug. 4, 2011) (unpublished).

Unjustified delay and failure to file plan timely were cause for dismissal with prejudice. The bankruptcy court did not abuse its discretion in dismissing the case with prejudice to refiling for 180 days, when it found unreasonable delay in filing amended Form B22C and plan that was prejudicial to creditors. After several months of status conferences on a motion to dismiss, filing these on the eve of an evidentiary hearing on the creditor's motion prevented the creditor from preparing for the hearing. "A debtor's unjustified failure to expeditiously accomplish any task required either to propose or to confirm a chapter 13 plan may constitute cause for dismissal under § 1307(c)(1)." And, failure to timely file a plan is cause under § 1307(c)(3). The debtors also were found to have filed the case in bad faith, with the Bankruptcy Appellate Panel finding it unnecessary to decide the burden of proof for bad faith under § 1325(a)(7), which was added by BAPCPA, since the debtors did not raise the issue before the bankruptcy court or on appeal. Case dismissal with prejudice is a two-step process, with the court first finding cause for dismissal and then considering whether some remedial action less than dismissal with prejudice might be sufficient. *In re Ellsworth,* 455 B.R. 904 (BAP 9th Cir. 2011).

Debtor has right to convert to Chapter 7. Distinguishing *Marrama v. Citizens Bank of Mass.,* 549 U.S. 365 (2007), and *In re Rosson,* 545 F.3d 764 (9th Cir. 2008), plain language of § 1307(a) permits the debtor to convert to Chapter 7, even though a creditor's motion to dismiss for bad faith was pending, with the Bankruptcy Appellate Panel pointing out that on conversion the case continues, and the Chapter 7 debtor remains subject to the court's "power to address any improprieties. . . .[I]f bad faith is involved, chapter 7 debtors may be denied a discharge for engaging in improper conduct under § 727. . . .[A]ny concern that a debtor can escape the consequences of bad faith conduct or for abuse of process is simply unwarranted." *In re Defrantz*, 454 B.R. 108 (BAP 9th Cir. 2011).

Chapter 13 trustee lacks authority following conversion to Chapter 7 to pay creditors undistributed funds. Section 1326(a)(2) did not vest creditors in a Chapter 13 with the right to post-confirmation funds at the time they were received by the trustee, and upon conversion to Chapter 7, the Chapter 13 trustee has no authority to pay undistributed funds in the trustee's hands to creditors. The plain language of § 1326(a)(2) concerns only the obligation of the trustee, not the rights of creditors, and § 348(e) terminates the services and authority of the Chapter 13 trustee. The result is not a windfall to the debtor, since § 541(a)(6) would exclude postpetition earnings from a Chapter 7 estate, and those funds would not be available to creditors if the debtor had originally filed under Chapter 7. *DeHart v. Michael,* 446 B.R. 665 (M.D. Mass. 2011). *Compare In re Quiles,* 449 B.R. 219 (Bankr. M.D. Pa. 2011), holding that at conversion the debtors were entitled to the funds held by the Chapter 13 trustee, but that a claim by

the debtors seeking to compel the trustee to pay them was not within the court's core or related to jurisdiction.

Classification of debt as unsecured was not binding after conversion to Chapter 7. Applying § 348(f)(1), an unopposed order allowing the claim of a credit union as unsecured in the Chapter 13 case was not binding on the creditor after the case converted to Chapter 7. As amended by BAPCPA, under § 348(f)(1)(B), valuation in Chapter 13 does not carry over into Chapter 7, and under § 348(f)(1)(C), the security interest survives unless the claim was paid in full in the Chapter 13. Although the claim was classified as unsecured in the Chapter 13, the debtors did not complete the plan and converted, with the classification having no binding effect—the *in rem* lien was retained. *In re McGregor*, 449 B.R. 468 (Bankr. D. S.C. 2011).

Mortgage Issues

Creditor's attorney violated Rule 9011(b) by relying on computer-generated information. Reinstating the bankruptcy court's findings and non-monetary sanctions, at 407 B.R. 618 (Bankr. E.D. Pa. 2009), and reversing the district court, at 2010 WL 624909 (E.D. Pa. 2010), the Third Circuit explored an attorney's reliance on information provided by the client and a third-party provider in Rule 9011(b) context. The attorney for HSBC Mortgage had admitted to the bankruptcy court that the law firm had no direct access to its client, having been assigned to file a stay relief motion and response to the debtors' claim objection by NewTrak, a computer information system generated by Lender Processing Services, Inc. (LPS). The attorney only proof-read the motion and response, failing to make reasonable inquiry into accuracy of information, resulting in false statements being made in the pleadings and representations in open court. "This case is an unfortunate example of the ways in which overreliance on computerized processes in a high-volume practice, as well as a failure on the part of clients and lawyers alike to take responsibility for accurate knowledge of a case, can lead to attorney misconduct before a court. . . . [A]n attorney must, in her independent professional judgment, make a reasonable effort to determine what facts are likely to be relevant to a particular court filing and to seek those facts from the client. She cannot simply settle for the information her client determines in advance–by means of an automatic system, no less–that she should be provided with. . . . Rule 11 requires more than a rubber-stamping of the results of an automated process by a person who happens to be a lawyer. Where a lawyer systematically fails to take any responsibility for seeking adequate information from her client, makes representations without any factual basis because they are included in a 'form pleading' she has been trained to fill out, and ignores obvious indications that her information may be incorrect, she cannot be said to have made reasonable inquiry." *In re Taylor,* 655 F.3d 274 (3d Cir. 2011).

Debtors lacked standing to dispute noncompliance with pooling and service agreement. The mortgage named MERS as nominee for the lender, its successors and assigns, and the lender endorsed and transferred the note and mortgage, which were then pooled under a servicing agreement. The debtors attempted to attack the validity of the pooling and servicing agreement, but the bankruptcy court properly held

that the debtors lacked standing. The debtors were not parties to that contract, nor were they third-party beneficiaries. *In re Correia,* 452 B.R. 319 (BAP 1st Cir. 2011).

Lender's unilateral mistake in credit bid did not invalidate foreclosure sale. Affirming the bankruptcy court, at 442 B.R. 621, the BAP applied Michigan law, holding that a lender's unilateral mistake in credit bidding the entire amount of the borrower's liability, rather than an amount attributable to the foreclosed property, did not entitle the lender to set aside the foreclosure sale. The lender's claim in the Chapter 13 bankruptcy was subject to setoff by its total credit bid. *State Bank of Florence v. Miller (In re Miller),* 459 B.R. 657 (BAP 6th Cir. 2011).

Adversary proceeding against mortgage lender and servicer had "related to" jurisdiction. The bankruptcy court held that *Stern v. Marshall,* 131 S.Ct. 2594 (2011) did not deprive the court of "related to" jurisdiction over a proceeding alleging both federal and state causes of action against the mortgage lender and servicer. The court could submit proposed findings and conclusions to the district court. *Lacey v. BAC Home Loans Servicing LP (In re Lacey),* 2011 WL 5117767 (Bankr. D. Mass. Oct. 27, 2011), slip copy.

Debtor had no private right of action under HAMP. Agreeing with other courts cited, there was no private right of action by a borrower for alleged violations of the Home Affordable Mortgage Protection Program. *In re O'Biso,* ___ B.R. ___, 2011 WL 5574938 (Bankr. D. N.J. Nov. 7, 2011).

U.S. Trustee's motion for Rule 2004 examination granted. In an analysis of Rule 2004 examination of a mortgage lender, the U.S. Trustee's request for examination was not mooted by a settlement of the debtor's claims that the lender violated the stay in reference postpetition charges. The U.S. Trustee had standing for examination, which was not overly burdensome, since restricted to information about this debtor's account. The court rejected the argument that the U.S. Trustee was usurping the Chapter 13 trustee's duty. *In re Davis,* 452 B.R. 610 (Bankr. E.D. Mich. 2011). *See also In re Sheetz,* 452 B.R. 746 (Bankr. N.D. Ind. 2011), granting Chapter 13 trustee's motion for Rule 2004 examination of mortgage servicer, finding cause in trustee's receipt of conflicting information about the mortgage claim, arrearages and charges; *In re Underwood,* 457 B.R. 635 (Bankr. S.D. Ohio 011), recognizing U.S. Trustee's standing for Rule 2004 examination of mortgage creditor, even though U.S. Trustee had no pecuniary interest at stake, but examination was limited to debtor's loan history and related matters, and the examination could not reach into policies and procedures of the creditor related to other loan servicers; *In re DeShetler,* 453 B.R. 295 (Bankr. S.D. Ohio 2011), finding good cause for U.S. Trustee to conduct Rule 2004 examination concerning mortgage assignee's standing to file proof of claim, with the scope of the examination limited to the original note, the assignment, and the assignee's position as holder of the note.

Mortgagor did not violate § 506(b) or Rule 2016(a) when it only internally recorded postpetition fees. Without deciding if § 506(b) or Rule 2016(a) applies to creditors as

to postpetition charges or fees, but "assuming *arguendo* that § 506(b) and Rule 2016(a) require disclosure of postpetition fees in some circumstances, we hold those provisions are not violated when a creditor merely records costs it has incurred in association with a mortgager's bankruptcy for internal bookkeeping purposes and makes no attempt to collect the fees or otherwise add them to the debtor's balance." The debtors' argument that the postpetition fees could not be collected at any point in the future was not ripe for adjudication, since the circuit court could not know if the debtors would complete their plan and receive discharge, or whether the case would be dismissed or converted. Claims based on events in the future were dismissed for lack of appellate jurisdiction. *In re Jacks,* 642 F3d. 1323 (11th Cir. 2011).

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

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

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

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

Defective affidavit of default results in sanctions. In another analysis of affidavits signed by a mortgage lender's representative, stay relief had been granted based on the affidavit and motion falsely stating default, and the court held a hearing on the U.S. Trustee's motion for sanctions against the lender, Lender Processing Services (LDS) and the attorney for the lender. The court recounts its prior experiences with automated software systems of LDS in other reported decisions. *In re Wilson, (*Bankr. E.D. La. 2011). *See also In re Brannan,* 2011 WL 5331601 (Bankr. S.D. Ala. Nov. 7, 2011) (Denying class certification for fraud of court, which is an injury to the court system, rather than to an individual debtor, but discussing remedy for false affidavits by lender.). No private right of action to enforce HAMP. Citing other opinions so holding, the debtors as borrowers had no private right of action to attempt to enforce a HAMP agreement, when the parties had only agreed to continue to negotiate to try to reach a modification of the mortgage. The borrowers are merely incidental beneficiaries to any contract between the lender and government under HAMP. *In re Salvador,* 456 B.R. 610 (Bankr. M.D. Ga. 2011).

Dismissal

Failure to make payments for three months was cause for dismissal with prejudice. The Chapter 13 debtor admitted failure to make three months of payments to the trustee, resulting in $19,000 delinquency, and even though the debtor stopped making payments to prevent the trustee's disbursements to a mortgage creditor that the debtor disputed holding valid chain of title, the decision was willful. Cause for dismissal with prejudice was found, but the 180-day bar to refiling was moot when the debtor's appeal had been pending for more than that time. The debtor had argued that dismissal with prejudice was a "bankruptcy death penalty sanction." *In re Mallory,* 444 B.R. 553 (S.D. Tex. 2011).

Discharge

State did not violate discharge injunction by collection effort of nondischargeable interest on child support debt. Since interest accruing on a child support obligation is not dischargeable, a state agency could not violate the discharge injunction by attempting collection after discharge. Even though a portion of the child support debt was disallowed when the state failed to respond to the debtor's claim objection, the disallowance of a claim and its discharge are separate issues. Moreover, the issue involved in claim allowance was the amount that would be paid through the plan by the bankruptcy estate and not the total amount owed on the child support; therefore, the state agency was not precluded by the effect of confirmation from litigating the amount

of the debtor's personal obligation that was not subject to discharge. *In re Diaz,* 647 F.3d 1073 (11th Cir. 2011).

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

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

Claims

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

Failure to include postpetition fees in proof of claim was not basis for objection. Holding that the mortgage creditor did not violate the stay by internally recording postpetition fees, when it did not make any effort to collect those fees, and that the creditor had not violated § 506(b) or Rule 2016, the circuit court also held that Wells Fargo's failure to include those fees in its proof of claim did not provide a basis for the debtor's objection to the claim. "Under § 502(b)(1), a claim asserted in a proof of claim is allowed in the amount asserted 'except to the extent that [] *such claim* is unenforceable.' 'Such claim' refers to the claim actually asserted on the proof of claim.'" *In re Jacks,* 642 F3d. 1323 (11th Cir. 2011).

Lack of standing and jurisdiction prevent bankruptcy court from issuing injunctive relief. The Fifth Circuit held that a debtor lacked standing and the bankruptcy court was without jurisdiction to issue broad injunctive relief, including requiring Wells Fargo to audit each proof of claim filed in Chapter 13 cases in the district. In the only case before the bankruptcy court, there "was no demonstrated

likelihood that Ms. Stewart will ever again be subject to an incorrect proof of claim filed by Wells Fargo." There was no class action involved. "The injunctive relief ordering the content of filing in other bankruptcy cases cannot find its jurisdictional basis in Ms. Stewart's objection to the bank's claim in her case." The debtor's injuries were fully remedied without injunctive relief outside of the one case, and any other need for remedies can be addressed in other cases. *In re Stewart,* 647 F.3d 553 (5th Cir. 2011).

Lender entitled to attorney fee for filing proof of claim. Under the parties' deed of trust and Texas law, the mortgage lender was entitled to its fees for preparation and filing of a proof of claim in a Chapter 13 case. The deed of trust language permitting the lender to "do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument" was not restricted to activities that "simultaneously protect both [the lender's] interest in the property and its rights under the Deed of Trust." The word "and" was construed to mean "either or both" lender actions, rather than to require simultaneous actions, as the bankruptcy and district courts had held. The debtors were in default of the note and deed of trust, and the Chapter 13 case could significantly impact the lender's rights under the Deed of Trust, entitling the lender to recovery of its attorney's fees for preparation and fling of the proof of claim. The Circuit Court did not decide whether the lender was required to comply with Rule 2016. *Velazquez v. Countrywide Home Loans Servicing, L.P. (In re Velazquez),* 660 F.3d 893, (5th Cir. Oct. 17, 2011), *per curiam*.

Denial of sanctions related to domestic support claim was not abuse of discretion. As a part of litigation between former spouses related to whether a claim was a domestic support obligation, the former wife sought Rule 9011 sanctions against the debtor's attorney for moving to amend a complaint to add a count alleging that the former wife had breached the parties' agreement never to seek alimony or support when she filed a DSO claim. The bankruptcy court denied the sanctions, and the BAP did not find an abuse of discretion. Although the record before the BAP was sparse, the bankruptcy "judge had been aboard for the entire travel of the case, including the parties' earlier crossing of the swords. The judge had all he needed before him to supportably conclude that [the debtor's attorney's] attempt to amend his complaint, although ill-fated, was 'within the bounds of reason, decency, and competence.'" The attorney's motion for fees for the former wife's alleged frivolous appeal was denied, with the BAP noting that Rule 8020, like Rule 9011, is "far from a strict liability model." *Berliner v. Kusek (In re Kusek),* ___ B.R. ____, 2011 WL 5967184 (BAP 1st Cir. Nov. 22, 2011).

Reasonableness standard used for proof of claim filed by debtor's attorney, applying § 502(b)(4). The law firm representing the Chapter 13 debtors in their pre-bankruptcy litigation against the builder of their home filed a proof of claim for $80,869.33 for services. The debtors had already paid $49,123.96 and objected to the claim as grossly unreasonable under § 502(b)(4). The homebuilder had filed Chapter 7 and there was no recovery for the debtors, but the requested fee, including the amount already paid, exceeded the potential recovery. Section 502(b)(4) applies to unpaid claims for attorney services, whether those services are related to bankruptcy or not,

and the Code section requires application of a reasonableness standard to the value of services. The bankruptcy court properly shifted the burden of showing reasonableness to the law firm, and reasonableness is a question of federal law, with the bankruptcy court properly departing from the lodestar method in finding that the time spent by the attorneys was grossly disproportionate to the amount of recovery at stake. The bankruptcy court did not abuse its discretion in finding that $49,000 paid by the debtors to the law firm pre-bankruptcy was reasonable value for the services when the amount of recovery at stake was $82,000. Additional fees would be unreasonable. The fact that the debtors did not object to the fees prior to bankruptcy was of no significance, since § 502(b)(4) was triggered when the proof of claim was filed. *In re Placide,* 459 B.R. 64 (BAP 9th Cir. 2011).

Estoppel effect of prior proof of claim upheld. The district court affirmed the bankruptcy court's holding, at 454 B.R. 725, that the mortgage creditor was bound by equitable and judicial estoppel to the amount of its arrearage claim filed in a prior case. Although the prior case had been dismissed, the dismissal did not preclude the bankruptcy court from applying judicial estoppel to the claims filed in that case. The creditor took inconsistent positions as to the amount of its claims in the two cases. Of course, to the extent the claim had increased between the two cases, estoppel did not apply, but to the extent the creditor was claiming inconsistent amounts for the same time period, estoppel was properly applied. *Wells Fargo Bank, N.A. v. Oparaji (In re Oparaji),* 458 B.R. 881 (S.D. Tex. 2011).

Judicial estoppel did not prevent debtors' objection to claim. Although the debtors did not object to mortgage servicer's proof of claim in prior case, they were not estopped from objecting in current case. There was no intent to gain unfair advantage in the first case; in fact, the debtors were harmed by continuing to make payments in first case on a mortgage that they now contended was invalid. Debtors' objection raised questions of whether the servicer was a real party in interest to file a proof of claim. *Simmerman v. Ocwen Fin. & Mortgage Servs., Inc. (In re Simmerman),* ___ B.R. ____, 2011 WL 6091731 (Bankr. S. D. Ohio Dec. 7, 2011).

A review of authority on documentation. The bankruptcy court provided a thorough review of authority on documentation of proofs of claim for prima facie validity purposes, and the shifting burden of proof. *In re Pursley*, 451 B.R. 213 (Bankr. M.D. Ga. 2011) .

Section 506(b) does not govern allowance of prepetition tax penalty claim. Although § 506 governs allowance of secured claims, and § 506(b) governs entitlement of over-secured creditors to postpetition fees, interest and other charges, when IRS held a valid prepetition claim that included penalties, the penalties were allowable under § 502 and were not restricted by § 506(b). The opinion cites the majority rule and authorities that the allowability of prepetition interest, fees, charges and penalties is governed by § 502. *In re Wesley,* 455 B.R. 383 (Bankr. D. N.J. 2011).

Interplay of § 502(j) and Rule 60(b). Discussing the conflicting authority on whether Rule 60(b) applies to motions for reconsideration of claim's disallowance when the

creditor had not appeared or responded to the claim's objection, i.e. where the objection was not actually litigated, the court found that § 502(j)'s "cause" standard was parallel to Rule 60(b) requirements. Service of the trustee's claim objection on the attorney listed in the proof of claim for service was found to be sufficient for constitutional due process purposes, and the creditor failed to show cause for reconsideration. Further, the requirements for service of a motion under Rule 9014 don't apply to claims objections, which are governed by Rule 3007, under which mailing of the objection is sufficient service. *In re Wilkerson,* 2011 WL 3025602 (Bankr. W.D. Tex. July 22, 2011) (slip opinion).

Postpetition condominium association assessments. Discussing the lines of authority on whether a claim arises pre- or postpetition, the district court identified: (1) the right to payment test, under which a claim does not arise until each element of the claim is established, which is the minority view; (2) the debtor's conduct test, considering a claim to arise when the conduct of the debtor occurs; and (3) the claim is determined by looking at whether there was a prepetition relationship between the debtor and creditor to indicate that a possible claim is within the fair contemplation of the creditor when the petition is filed—sometimes called the "fair contemplation," "foreseeability," "pre-petition relationship," or "narrow conduct" test. Applying these tests to recurring condominium association assessments has not yielded consistent results, and the court then looked at three additional approaches that courts have used specifically for postpetition assessments: (1) treating postpetition assessments as incidents of ownership deriving from a covenant running with the land; (2) treating postpetition assessments as contractual obligations arising from prepetition acquisition of the condominium; and (3) using a "results-oriented," equity-driven approach. Considering applicable Michigan law also, the court commented that "surrender" is only the debtor's statement of no opposition to the secured creditor taking possession, but it does not effect a transfer of title, and postpetition assessments are postpetition debts since they are connected to the debtor's postpetition ownership of the condominium. The debtor became liable for the assessments on an on-going basis. "Each month's new assessment arose not out of some pre-existing obligation to continue paying for some period of time, but as a result of continued ownership of the property. As a result, there was no prepetition 'right to payment,' which is the sine qua non of a 'claim' under the Bankruptcy Code." *In re Spencer,* 457 B.R. 601 (E.D. Mich. 2011). *See also In re Colon,* ___ B.R. ___, 2011 WL 4706289 (Bankr. D. Utah, Oct. 5, 2011) (Holding that prepetition homeowner association fees were prepetition claims.).

No private right of action for proof of claim with full Social Security number. Agreeing with other courts so holding, the bankruptcy court found no private right of action for damages under § 107(c) or Rule 9037 when a creditor filed a proof of claim containing the full Social Security number of the debtor. Any remedy is by contempt, which under Rules 9020 and 9014 is by motion, rather than adversary proceeding. Also, no private right of action exists under the Gramm-Leach-Bliley Act, and the debtor's alleged state-law claim for breach of privacy was preempted by the Bankruptcy Code and Rules. *In re Lenz,* 448 B.R. 832 (Bankr. D. Or. 2011).

Bankruptcy court has no authority to extend time to file claims, even for unscheduled creditor without notice. Under § 502(b)(9) and Rule 3002(c), deadlines for filing proofs of claim are strictly construed, and when none of Rule 3002(c)'s exceptions applied, the court lacked authority to extend the bar date. Lack of notice of the case filing is not one of the exceptions, and the bankruptcy court could not equitably toll the bar date. No due process violation occurs, since the unscheduled debt would be excepted from the Chapter 13 discharge, as one not provided for in the plan. Also, an unscheduled creditor could move for stay relief to protect any property interest. *In re Sykes,* 451 B.R. 852 (Bankr. S.D. Ill. 2011). *Compare In re Harris,* 447 B.R. 254 (Bankr. W.D. Ark. 2011), where the court adopted equitable, due process approach, allowing late filing of claim by a judgment creditor without timely notice of the bankruptcy filing.

Objections to all claims resulted in *sua sponte* vacating of confirmation order. When the Chapter 13 plan had been confirmed on representation that unsecured claims would be paid in full, and the debtor and counsel then objected to virtually all credit card claims that had been scheduled and for which documentation was sufficient, the court *sua sponte* vacated the confirmation order, finding that confirmation had been obtained by fraud. Debtor's counsel was show caused as to whether Rule 9011 was violated. *In re Davis,* 2011 WL 1302222 (Bankr. E.D. Tex. Mar. 31, 2011), slip copy.

State taxes became payable at end of tax year and were prepetition tax claim. Michigan income taxes for tax year 2008 were prepetition taxes in a Chapter 13 case filed in March 2009; § 1305 did not apply and the debtors could file a claim on behalf of the state when it failed to file a proof of claim. *In re Senczyszyn,* 444 B.R. 750 (E.D. Mich. 2011).

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

CONSUMER LAW UPDATE

Cases reported from January 1, 2012 through March 31, 2012

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Jurisdiction

***Stern* applied to withdraw reference.** The district court withdrew the reference of the Chapter 13 debtor's adversary proceeding challenging a foreclosure sale, holding that under *Stern v. Marshall,* 131 S.Ct. 2594 (2011), the bankruptcy court did not have authority to enter a final order. "Debtor's adversary complaint is a state law wrongful foreclosure action which clearly could have been filed in state court and would not be 'resolved in the process of ruling on a creditor's proof of claim.'" *Salazar v. U.S. Bank Nat'l Assoc. (In re Salazar),* 2012 WL 280759 (S.D. Cal. Jan. 31, 2012).

***Stern* didn't prevent liquidation of claim and determination of discharge exception.** The bankruptcy court concluded that it had subject matter jurisdiction and constitutional authority to determine § 523(a)(2) exception from discharge, which required liquidation of the debt and consideration of Texas Deceptive Trade Practices Act damages, which could be trebled. *Stern v. Marshall,* 131 S.Ct. 2594 (2011) "did not implicate this Court's authority to hear and finally determine whether a creditor's claim is excepted from a debtor's discharge . . ., even if the Court is required to first liquidate the creditor's claim in that process." Citing *In re Morrison,* 555 F.3d 473 (5th Cir. 2009), for authority of the bankruptcy court to enter judgment on unliquidated claim as part of discharge determination. Debtor fraudulently made misrepresentations to franchisee to induce purchase of restaurant franchise. Damages were down payment and loan application costs, trebled under Texas Act. *Farooqi v. Carroll (In re Carroll),* ___ B.R. ___, 2011 WL 6292880 (Bankr. N.D. Tex. Dec. 31, 2011).

***Stern* required proposed findings and conclusions on debtor's claim that heathcare provider violated state-law privacy rights by filing confidential medical records with proof of claim.** Following remand in *Ortiz v. Aurora Health Services, Inc.,* 2011 U.S. App. LEXIS 26009 (7th Cir. Dec. 30, 2011), for consideration of *Stern v. Marshall,* 131 S.Ct. 2594 (2011), the bankruptcy court entered proposed findings and conclusions in the Chapter 13 debtors' complaint that Aurora violated state-law privacy rights by attaching medical records and account numbers to its proof of claim. Other debtors had sued Aurora for the same action in state court that was removed by Aurora to the bankruptcy court, and the adversary proceedings were consolidated. The complaints involved allegations of state-law violation, and the court's proposed findings and conclusions included that the debtors had not proven any actual damages, as required by Wisconsin law, recommending that the district court enter judgment for Aurora as a matter of law on damages. In the alternative, the court recommended withdrawal of the reference. *Lindsey, et al., v. Aurora Health Care, Inc. (In re Ortiz),* ___ B.R. ___, 2012 WL 344769 (Bankr. E.D. Wis. Feb. 3, 2012).

Automatic Stay

Stay relief appropriate when bankruptcy court deferred to state court. Under factors of *In re Robbins,* 964 F.2d 342 (4th Cir. 1992), the bankruptcy court properly abstained, deferring to state court with expertise in a real property dispute, and after stay relief was granted, the state court appeals process was completed. The bankruptcy court

also properly dismissed the debtor's adversary proceeding, without deciding whether the Chapter 13 debtor had standing to pursue § 522(a)(3) avoidance, since collateral estoppel applied to the state court judgment. *Lee v. Anasti (In re Lee),* 2012 WL 29185 (4th Cir. 2012), slip copy.

Rooker-Feldman and issue preclusion did not prevent bankruptcy court from deciding creditor's standing for stay relief. Reversing and remanding the BAP's decision, 2011 WL 1807015, the Circuit panel held that while the debtors had lost on their standing argument in state court, it was now Deutsche Bank seeking affirmative stay relief, and its standing issue was not precluded by the state-court's decision. Neither did Rooker-Feldman prevent the bankruptcy court from deciding whether the Bank had standing to seek stay relief. Although the Bank had presented proof that its predecessor had endorsed a note in blank, under Colorado's UCC, the Bank must also prove that it had physical possession of that note. Col. Rev. Stat. § 38-38-100.3(b) defines a "holder of an evidence of debt" as a person "in actual possession of" or "entitled to enforce an evidence of debt." Remand was required to see if the Bank could prove physical possession of the note. *Miller v. Deutsche Bank (In re Miller),* 666 F.3d 1255 (10th Cir. 2012).

Stay was not in effect in gap period between case dismissal and district court's vacating of dismissal. Notwithstanding the district court's vacating of dismissal of the Chapter 13 case, during the gap period between dismissal and vacating, the automatic stay had terminated and was not retroactively reinstated. The mortgage creditor did not violate the stay by proceeding with foreclosure during the extended gap period. *In re Scarborough,* 2012 WL 70638 (3d Cir. 2012), slip copy.

"Colorable claim" defined for stay relief standing. Citing the Cornell University Law School's Legal Information Institute, a "colorable claim" is "a plausible legal claim. In other words, a claim strong enough to have a reasonable chance of being valid if the legal basis is generally correct and the facts can be proven in court. *The claim need not actually result in a win."* The Federal National Mortgage Association established a colorable claim, for constitutional and prudential standing, when it had purchased at foreclosure and timely recorded the trustee's deed. Under California law, once a foreclosure occurs and the trustee's deed is recorded, title is transferred and the original owner has no interest in the property. *Elstner-Bailey v. Federal National Mortgage Assoc. (In re Elstner-Bailey),* 2011 WL 6934490 (BAP 9th Cir. Oct. 4, 2011), slip copy.

Good faith not in play under § 362(c)(3)(A). When first case had been dismissed, for failure to provide required tax returns, second case filed within one year was properly dismissed under § 362(c)(3)(A). Since debtor had not moved to extend stay, the good faith element of § 362(c)(3)(B) did not become a factor, and any motion to extend the stay would have been untimely by the time the bankruptcy court granted relief under (c)(3)(A). The court did not err in retroactively applying *In re Resnick,* 446 B.R. 362 (BAP 9th Cir. 2011), holding that the stay had terminated thirty days from the second filing as to the debtor and property of the estate. *Ortola v. Ortola (In re Ortola),* 2011 WL 7145793 (BAP 9th Cir. Dec. 16, 2011), slip opinion.

Avoidance actions

Forged document deprived assignee of equitable mortgage. Applying Michigan law, the assignee inherited the mortgage subject to all equitable defenses, and the debtors established that their signatures to the mortgage had been forged. Although an assignee may be entitled to an equitable mortgage under some circumstances, here the forged mortgage was void ab initio. The assignee was not entitled to an equitable mortgage. *Sutter v. U.S. Nat'l Bank (In re Sutter),* ___ F.3d ___, 2012 WL 5734 (6th Cir. Jan. 3, 2012).

Partial avoidance of judgment lien affirmed. A judgment creditor paid off a prior lien on a vehicle and the BAP affirmed the holding that the satisfaction of the debtors' consensual lien with the bank was not avoidable, although the separate judgment lien was avoidable. Although the judgment lien creditor paid off the bank after its lien was fixed, it held two liens—the judgment lien and the consensual lien, with the creditor stepping into the shoes of the bank. *Carter v. Estate of Heimer (In re Carter),* ___ B.R. ___, 2012 WL 789320 (BAP 8th Cir. Mar. 13, 2012).

Property of Estate

Judicial estoppel didn't prevent debtor's pursuit of action for benefit of creditors. Although the Chapter 13 debtor did not disclose a cause of action in the original case, it had now been reopened and schedules amended to disclose the action. The trustee either could litigate the cause of action, or the debtor could pursue it for benefit of creditors. To prevent pursuit of the action would "undermine the interests of creditors." *Rainey v. United Parcel Service, Inc.*, 2012 WL 753680 (7th Cir. Mar. 9, 2012), slip copy.

Tax refund not property of Chapter 7 estate. During Chapter 13 phase of case, debtors received and spent tax refunds that were property of the estate, but the case was converted before confirmation to Chapter 7, and under § 348(f)(1)(A), the tax refunds were not subject to turnover to the Chapter 7 trustee because the debtors no longer had possession of those funds. If the debtors had remained in Chapter 13, they would have been required to account for the refunds, which would have been available to creditors under the hypothetical Chapter 7 liquidation test, but under the plain language of § 348(f)(1)(A), the refunds which were spent for the debtors' normal living expenses, were not property of the Chapter 7 estate. The opinion discusses the range of opinions interpreting § 348(f)(1)(A). *Warfield v. Salazar (In re Salazar),* ___ B.R. ___, 2012 WL 898784 (BAP 9th Cir. Mar. 14, 2012).

Exemptions

Inherited IRA exempt under § 522 (d)(12). Affirming the district court and agreeing with *In re Nessa*, 426 B.R. 312 (BAP 8th Cir. 2010), an IRA that the debtor had inherited from her mother was exempt under § 522(d)(12), concluding that the IRA was still a "retirement fund" notwithstanding that it was not directly the debtor's retirement to which it was tied. The majority of other courts have held that it is not necessary that the

IRA be retirement funds belonging to the debtor. The statute is referring to funds that have been set aside for retirement, and an inherited IRA is still exempt from taxation under 26 U.S.C.A. § 408(e), which exempts any individual retirement account. Section 408 is one of the sections referred to in § 522(d)(12). *Chilton v. Moser (In re Chilton)*, ___ F.3d ___, 2012 WL 762924 (5th Cir. Mar. 12, 2012). *See also Mullen v. Hamlin (In re Hamlin)*, ___ B.R. ___, 2012 WL 898790 (BAP 9th Cir. Feb. 21, 2012), allowing exemption in an IRA inherited from the debtor's grandmother under § 522(b)(3)(C), which contained the same language as § 522(d)(12). Hamlin had claimed exemption under Arizona statutes, and Arizona had opted out of the § 522(d) exemptions. Section 522(b)(3)(C) has only two requirements: the amount must be retirement funds, and the funds must be in an account that is exempt from taxation under one of the Internal Revenue Code sections specified in § 522(b)(3)(C). The court found support for its conclusion in § 522(b)(4)(C)'s provision that direct transfer of retirement funds from one account to another does not end qualification for exemption.

Exemption claim of full fair market value invalid. The First Circuit BAP joined other courts in holding that the debtors' claims of exemptions under § 522(d) for full market value (FMV), without specifying a dollar amount under statutes with monetary caps, were invalid on their face. The trustee's objections were sustained. The debtors misread *Schwab v. Reilly*, 130 S.Ct. 2652 (2010), which held that if the exemption claim is valid on its face, the trustee would not have to object, so long as the exemption claim was within the statutory cap amount, but the asset itself remained in the estate, subject to sale and paying the debtor's exemption. No court had construed *Schwab* as allowing the debtor "unfettered authorization. . . to exempt assets in-kind." *Massey v. Pappalardo (In re Massey)*, ___ B.R. ___, 2012 WL 616587 (BAP 1st Cir. Feb. 27, 2012). The *Massey* court commented that the proposed amendment to Schedule C is consistent with its opinion.

Claim of 100% equity doesn't survive trustee objection. Joining other courts, the bankruptcy court held that the debtors' claim of exemption in "100% of equity" or "100% of FMV" in their residence under § 522(d)(1) did not survive the trustee's objection; "by claiming a *percentage* of value as exempt, as opposed to an actual dollar figure, [the debtors] were essentially saying 'Trustee, you figure out what [the dollar amount of the exemption] is supposed to be.'" To satisfy the best interests of creditors test, the trustee must be able to calculate the value of assets, less any exemption. Limited asset exemptions, such as § 522(d)(1) permit an exemption only in the debtor's "interest" in the asset, up to a dollar limitation. "As the *Schwab* court explained, and repeatedly emphasized, where the exemption statute provides a limited-interest exemption, only a defined monetary interest in the property is removed from the bankruptcy estate—not necessarily the value of the entire property." For the § 522(d)(1) exemption, a claim of "100% of equity" or "100% of FMV" does not adequately describe the allowed exemption. "At is core, *Schwab* was not about the validity of any particular exemption claim, . . .but about *notice* to interested parties as to what exemption in particular property the debtor had actually claimed, and, consequently, whether it 'constitute[d] a claim of exemption to which an interested party must object under § 522(l).'" The *Schwab* Court's example of "100% of FMV. . .has nothing to do with the 'proper' way to

claim a particular exemption under a particular exemption statute. The Court was merely demonstrating the type of language that may be used to show the world that the debtor is attempting to exempt an asset in its entirely, regardless of its actual value. . . .The *Schwab* Court was *not,* as the Debtors have argued, outlining a procedure by which an exemption claimed under a limited-interest exemption statute could be legitimately converted into an exemption in-kind. Thus, to require the Debtors here to amend Schedule C to state a specific dollar value for their claimed (d)(1) exemption does not 'eviscerate' any 'rights' established under *Schwab* and does not prevent the Debtors from 'employing' any legitimate 'strategy' suggested by the Supreme Court." In footnote 14, the court discusses the preliminary draft of the proposed amended Schedule C, and finds it consistent with its opinion. *In re Luckham,* ___ B.R. ___, 2012 WL 115386 (Bankr. D. Mass. Jan. 13, 2012).

Cap under state statute prevents exemption for more. The debtor's reliance on *Schwab* was misplaced when she claimed 100% fair market value of her vehicle, $12,000, as exempt, but the applicable Arizona statute had a cap of $5,000. *Schwab's* suggestion of claiming 100% FMV did not mean that such an exemption would be valid if the applicable statute had a cap and fair market value exceeded that cap. Also, the debtor's claim that an annuity was excluded from the estate under § 541(c)(2) was invalid, when there was no support in the annuity documents that it was a trust under applicable Arizona law. *Messer v. Maney (In re Messer),* 2012 WL 762828 (BAP 9th Cir. Mar. 9, 2012), slip copy.

Res judicata effect of first order barred exemption. The debtor claimed exemption in an annuity under various Missouri statutes and the bankruptcy court sustained the Chapter 7 trustee's objection; rather than appeal, the debtor amended Schedule C again, claiming exemption in the same annuity under other state statutes. The BAP held that the debtor should have litigated issues about her exemptions under all of the state statutes before allowing a final order to go down. Despite the amended Schedule C, "these claims share a common nucleus of operative fact in that they involve an interpretation of the Annuity and the Debtor's rights thereunder." The annuity had not changed, and the same parties were involved in both hearings. Even if res judicata had not applied, the BAP held the insurance statutes the debtor tried to use for exemption did not apply to the annuity. *Bryan v. Staton (In re Bryan),* ___ B.R. ___, 2012 WL 953186 (BAP 8th Cir. Mar. 21, 2012).

Eligibility

Completion of credit counseling day after filing was cause for dismissal. Affirming the bankruptcy court, the BAP held that when the debtor did not complete the required credit counseling until the day after filing Chapter 13, the debtor was ineligible. The case was properly dismissed. The debtor had completed an online portion of the counseling but did not complete the telephonic portion before commencement of the case. *In re Ingram,* ___ B.R. ____, 2011 WL 6288392 (BAP 6th Cir. Dec. 16, 2011). See also *Gibson v. Dockery (In re Gibson),* _____ B.R. ____, 2011 WL 7145612 (BAP 9th Cir. Dec. 1, 2011) (Section 109(h) requirement is clear; unless one of stated exceptions apply,

individual may not be debtor unless she has received credit counseling prior to filing. Completion of counseling four days after filing meant debtor was not eligible and case was properly dismissed. Even though court dismissed sua sponte, the debtor had sufficient notice of consequences, including through the warning in Exhibit D to Official Form 1. The debtor was also told by court clerk staff that prepetition counseling was essential.).

Permanent disbarment was within bankruptcy court's power. An attorney representing Chapter 7 and 13 debtors was permanently disbarred by the bankruptcy court for multiple causes, including false statements in petitions concerning debtors' county of residence, failure to timely pay filing fees, the attorney's own pro se Chapter 7 containing false statements and incomplete disclosures (including transposing first and middle names to mislead creditors), misappropriating client funds, and "widespread" ethical violations. The bankruptcy court had authority to permanently disbar the attorney from practice in that district, including under Rule 9011(c), § 526(a)(5), and inherent authority. There was no abuse of discretion. *Parker v. Jacobs (In re Parker),* ___ B.R. ___, 2012 WL 252185 (M.D. Ala. Jan. 26, 2012).

Debtor's attorney sanctioned for filing for improper purpose. The Chapter 13 debtor's attorney was sanctioned $10,000 fees, payable to the mortgage creditor's attorney, when the case was filed solely to frustrate and stall the creditor. The attorney had represented the debtor in a prior Chapter 7 and had represented her husband in another filing, with the current filing made when eviction proceedings were about to begin in state court. A reasonable inquiry was not made under Rule 9011, the debtor had insufficient income to treat the mortgage claim, the debtor was not the owner of the property at issue, the petition improperly listed a d/b/a name as co-debtor, the case involved a two-party dispute, and the petition and Form B22C misrepresented the debtor's employment and income. Sanctions were appropriate under Rule 9011(c), as well as under § 105(a) and 28 U.S.C. § 1927 (under the latter, the court found that the debtor's attorney had multiplied proceedings unreasonably and vexatiously, causing larger fees to the objecting creditor). *In re Antonelli,* 2012 WL 280722 (Bankr. D. N.J. Jan. 30, 2012), slip copy.

Chapter 7 Issues

Priority Claims

Obligation to former spouse for twenty years was domestic support priority claim. Looking to the law in the circuit where the debtor filed Chapter 7, rather than the law of the circuit where the marital obligation was created, the Eleventh Circuit required the focus to be on the parties' intent at the time the obligation was created, rather than on labels in the agreement, and the intent was that the debtor's obligation functioned as support. Under the "property" section of the marital dissolution agreement was a requirement that the debtor pay $7,490,000 without interest, with $31,000 monthly payments over twenty years or so long as the former spouse lived. The spouse had not worked outside the home for the thirty-seven years of marriage. There was no separate

alimony award, there was a significant disparity in the parties' financial position and earning capacity, and the obligation was intended to provide continuing support. *In re Throgmartin,* 462 B.R. 836 (Bankr. M.D. Fla. 2012).

Discharge, Exceptions and Objections

Late returns were not tax returns for purposes of § 523(a)(1) exception. A late-filed state tax return did not qualify as a "return" for exception from discharge purposes. In a paragraph added by BACPA to the end of § 523(a), "return" is defined for discharge purposes as "a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)." The Mississippi tax code required tax returns to be filed by April 15 for calendar-year taxpayers, and the Chapter 7 debtor had filed two years of pre-bankruptcy tax returns late. Those taxes were excepted from discharge. *McCoy v. Mississippi State Tax Com'n (In re McCoy),* 666 F.3d 924 (5th Cir. 2012).

Attorney fees awarded in arbitration were not excepted under § 523(a)(4). The exception from discharge for defalcation while acting in a fiduciary capacity did not apply to attorney fees awarded, as part of arbitration, against the Chapter 7 debtor who was a former corporate officer who falsely claimed to own an interest in the company. The arbitration resolved the disputed ownership interest and the company was awarded $50,000 attorney fees, which were not related to defalcation. However, whether the fees resulted from a willful and malicious injury required remand for trial. *Shcolnik v. Rapid Settlements Ltd. (In re Shcolnik),* 670 F.3d 624 (5th Cir. 2012).

Defalcation requires recklessness. Chapter 7 debtor breached his fiduciary duty as trustee of his father's trust, by self-dealing, and the Eleventh Circuit affirmed the exception from discharge under § 523(a)(4), concluding that defalcation under this section requires a known breach of fiduciary duty by conduct that is objectively reckless. The defalcation requires more than mere negligence. *Bullock v. BankChampaign (In re Bullock),* 670 F.3d 1160 (11th Cir. 2012).

Willful and malicious injury to property. The debtor, after being sued along with her former spouse and a partnership in a personal injury action, participated in a conveyance of property owned by the partnership, and the conveyance was a willful and malicious injury to the property interest of the plaintiff. The debtor had been found to be a conspirator with the other defendants in the fraudulent transfer of the property to avoid its being subject to the personal injury plaintiff's $3.9 million judgment. In the § 523(a)(6) action, finding that the debtor intended to prevent the plaintiff from satisfying his judgment, the transfer was willful and with malice, with the debtor having no just cause to make the transfer. *Maxfield v. Jennings (In re Jennings),* ___ F.3d ___, 2012 WL 555875 (11th Cir. Feb. 22, 2012).

Collateral estoppel not given to state court judgment. A pre-bankruptcy California judgment based on negligence, negligent infliction of emotional distress, intentional infliction of emotional distress and fraud was not given collateral estoppel effect in a § 523(a)(6) complaint for summary judgment purposes. The elements of the California tort

of intentional infliction of emotional distress were not identical to § 523(a)(6), since the tort included the alternative of "reckless disregard of the probability of causing" the distress. The judgment had not been based unambiguously on the debtor's subjective intent to injure the plaintiff. Summary judgment was vacated. *B.B. v. Bradley (In re Bradley),* ___ B.R. ___, 2012 WL 762925 (BAP 1st Cir. Mar. 7, 2012).

Attorney fees for frivolous claims were excepted under § 523(a)(7). A prisoner serving a life sentence sued the state prosecutors for negligence and emotional distress, and state courts dismissed the suit and appeal as frivolous, awarding attorney fees and costs. Under Idaho law, the fee award was a penalty, excepted from discharge under § 523(a)(7). The court did not need to reach the issue of whether it was also excepted under § 523(a)(17). *Searcy v. Ada County Prosecuting Attorney's Office (In re Searcy),* 463 B.R. 888 (BAP 9th Cir. 2012).

Gambling debt action did not violate discharge injunction. The state prosecutor and Hard Rock Casino did not violate the discharge injunction related to the Chapter 7 debtor's gambling debt that was discharged. Gambling had been the debtor's primary occupation. The debtor did not produce proof that the casino had engaged in post-discharge collection activity, and the bankruptcy court properly applied *In re Gruntz,* 202 F.3d 1074 (9th Cir. 2000), in denying sanctions against the prosecutor. The debtor's discharge did not prevent the state from pursuing prosecution when the casino's marker was returned by the debtor's bank for insufficient funds. *Nash v. Clark County District Attorney's Office (In re Nash),* 464 B.R. 874 (BAP 9th Cir. 2012).

Reaffirmation

Discharge not set aside to enter into reaffirmation. Finding that setting aside the prior Chapter 7 discharge, on motion of the debtors, would undermine § 524's requirement that reaffirmation agreements be entered into before discharge, the debtors cited no authority for their motion. The debtors' "discomfort" at not having a reaffirmation in place on their home was not enough reason to ignore § 524. *In re Smith,* ___ B.R. ___, 2012 WL 956183 (Bankr. W.D. Mich. Mar. 8, 2012).

Chapter 13 Issues

United States lacked standing to seek injunctive and mandamus relief. The Sixth Circuit held that the United States lacked standing in its effort to block the procedure in the Eastern District of Michigan, under which the confirmation orders required IRS to pay future tax refunds the trustees. The defendants were the standing Chapter 13 trustees and the district court had entered the injunctive and mandamus relief, with the latter directing the bankruptcy judges not to include the tax refund requirement in confirmation orders. The government claimed that the tax refund orders violated sovereign immunity, but the government simply should have appealed any of the confirmation orders; it lacked standing to seek the relief sought. *United States v. Carroll,* 667 F.3d 742 (6th Cir. 2012).

Confirmation Issues

Priority Claims

Straddling tax is prepetition, priority claim. The Michigan Department of Treasury objected to the debtor filing a proof of claim on its behalf for a 2008 income tax when the debtor filed Chapter 13 in January 2009, arguing that it was a postpetition tax for which the debtor had no authority to file a claim. The Sixth Circuit found that the 2008 tax was entitled to priority under § 507(a)(8)(i), concluding that the statute's phrase "after three years before the date of filing the petition" includes all dates that occur after the three years, including dates occurring after the petition was filed, agreeing with *In re Dixon*, 218 B.R. 150, 153 (BAP 10th Cir. 1998). If § 507(a)(8)(i) only applied to prepetition time periods, it would make § 502(i) unnecessary. Section 502(i) treats a claim arising after the petition filing that is entitled to § 507(a)(8) priority as if it had arisen before the petition filing; "a postpetition claim for a tax qualifying under § 502(i) is treated as if it was a prepetition claim." Also, the 2008 tax was entitled to priority under § 507(a)(8)(iii), because the tax became assessable after commencement of the case. Since the tax is subject to § 502(i), the debtor was permitted to file a claim on behalf of the Department under § 502(c), even if not authorized to do so under § 1305. This conclusion was consistent with the requirement of § 1322(a)(2) that the priority tax must be paid in full in a plan, even though it could be paid in deferred cash payments. Section 1305(a) was not a nullity, since there would be some taxes for a tax year ending after the petition filing that would not be entitled to § 507(a)(8) priority, for which the debtor could not file a proof of claim under § 502(i) and § 502(c). Bottom line, the debtor could file a "protective claim" on behalf of the Department for the 2008 tax. *In re Hight*, ___ F.3d ____, 2012 WL 688526 (6th Cir. Mar. 5, 2012). *Accord In re Wilson*, 2012 WL 441177 (E.D. Mich. Feb. 10, 2012), reaching the same conclusion as *Hight*, but also concluding that an income tax for 2009 was payable on January 1, 2010, and when the petition was filed February 26, 2010, that tax was a prepetition claim for which the debtors could file a proof of claim on behalf of the state. Acknowledging a split of authority on the debtor's ability to file a claim for the creditor on a "straddling tax" under § 1305(a), the *Wilson* Court disagreed with the conclusion of the district court in *In re Senczyszyn*, 444 B.R. 750 (E.D. Mich. 2011), holding that "although § 1305(a) does not authorize a debtor to file a proof of claim on behalf of a creditor for taxes that become payable while the bankruptcy case is pending, neither does it prohibit such action."

Former spouse's attorney fee was domestic support obligation and priority claim. Taking the majority position, although the former spouse's attorney is not a named party to whom a domestic support obligation is owed in § 101(14A), "there is no support in the legislative history of BAPCPA that Congress intended to reduce protection for non-debtor former spouses." The claim filed by the attorney was for a fee related to child custody dispute, and it was a DSO, given priority treatment under § 507(a)(1)(A). *In re Tepera*, 2012 WL 439257 (Bankr. S.D. Tex. Feb. 9, 2012).

Form of Plan

Debtor did not treat secured claim, as required in local form plan. Finding the local form plan for the Eastern District of California to conform to Code and Rule requirements for claims, that plan required that a proof of claim determined the amount and classification of a claim, and the plan should treat the claim accordingly, unless a valuation or lien avoidance motion had been granted, or a claim objection had been sustained, requiring different treatment. The fact that the debtors' claim objection and adversary proceeding contesting a mortgage claim were pending, but not resolved, did not excuse the debtors from complying with the local form plan requirement. Failing to treat the mortgage claim violated § 1322(b)(2) and justified denial of confirmation. Failure to timely propose and confirm a plan also justified conversion to Chapter 7. *de la Salle v. U.S. Bank, N.A. (In re de la Salle),* ___ B.R. ___, 2011 WL 6942896 (BAP 9th Cir. Dec. 12, 2011).

Disposable Income

After payment of 401(k) loan, funds are projected disposable income. Affirming its BAP on slightly difference grounds, the Sixth Circuit held that after the debtor completes required repayment of a 401(k) loan, the funds used for the repayment become projected disposable income that must be dedicated to unsecured creditors under § 1325(b)(1)(B); the debtor may not use that money to fund future 401(k) contributions. Section 541(a), in conjunction with §§ 541(b)(7) and 1306, fixes the amount of exclusion from property of the estate as the amount the debtor was voluntarily contributing on the date of filing Chapter 13. *Seafort v. Burden,* 699 F.3d 662 (6th Cir. 2012).

Projected disposable income must reflect vehicle being surrendered. The debtor's schedules indicated intention to surrender two all-terrain vehicles and that her ex-boyfriend was making payments on a truck that was in his possession, but Form B22C reflected the secured payments on all three items, and the trustee objected to confirmation. The reasoning of *Hamilton v. Lanning,* 130 S.Ct. 2464 (2010), while addressing changes in income, applied to expenses. The Fourth Circuit agreed with the Sixth and Seventh Circuits that the debtor's projected disposable income must take into account the fact that the debtor would not be making secured payments on the surrendered ATVs and the truck. *In re Quigley,* ___ F.3d ___, 2012 WL 718894 (4th Cir. Mar. 7, 2012).

Secured payments could be deducted regardless of need for collateral and exclusion of Social Security income was in good faith. The Ninth Circuit BAP affirmed confirmation of a plan in which the debtors retained six vehicles, continuing to make payments on them. The trustee had objected on the basis that some of the vehicles were not necessary and that the debtors' failure to take into account Social Security income was in bad faith. Two of the vehicles were ATVs and one vehicle was used by the debtors' daughter, a medical resident who was unable to make the payments. One of the ATVs was used to plow the driveway in the winter. As to disposable income for these above-median income debtors, the BAP concluded that § 707(b)(2)(A) allows deduction

from current monthly income of payments on secured debt, averaged over 60 months, regardless of whether the collateral is necessary. This is distinguished from payments on collateral being surrendered. As to Social Security income, the BAP discussed the split of authority on whether debtors' exclusion of that income was indicative of lack of good faith, "the fact that a debtor excludes income from the disposable income calculation that Congress specifically allows the debtor to exclude is not, by itself, probative of a lack of good faith." There may be circumstances where the exclusion of that income, coupled with other factors, might indicate bad faith, but that was not the case here, where the trustee relied solely on the exclusion of income. There was a dissent as to good faith. *Drummond v. Welsh (In re Welsh),* ___ B.R. ___, 2012 WL 603818 (BAP 9th Cir. Feb. 17, 2012).

Liens

Debtor not allowed to strip lien for non-filing spouse. Disagreeing with *Strausbough v. Co-op Services Credit Union (In re Strausbough),* 426 B.R. 243 (Bankr. E.D. Mich. Mar. 25, 2010), and agreeing with *Hunter v. Citifinancial, Inc. (In re Hunter),* 284 B.R. 806 (Bankr. E.D. Va. Sept. 30, 2002), debtor may not avoid second mortgage lien on tenancy by entirety property as to nondebtor spouse. "[A]s to property owned by tenants by the entireties, the debtor and the nondebtor spouse each have a bundle of rights. Each has, for example, a survivorship interest and ownership rights in the event the tenancy is severed. If [debtor were] correct, in a tenants by the entireties context, not only would the debtor Husband end up with an ownership interest in a property no longer subject to the second lienholder's security interest, but the nondebtor spouse would also." *Alvarez v. HSBC Bank, USA,* 2011 WL 6941670 (D. Md. Dec. 28, 2011).

Petition date is time for determination of § 1322(b)(2) protection. Discussing the split of authority, the BAP held that for purposes of determination of the debtor's principal residence and protection of a loan from modification, the appropriate date was the petition date, rather than the time of execution of the mortgage. The bankruptcy court had applied the time of the transaction, applying the contract language to permit modification, but the BAP applied its prior rule in a Chapter 11 case, *BAC Home Loans Servs., L.P. v. Abdelgadir (In re Abdelgadir),* 455 B.R. 896 (BAP 9th Cir. 2011), which held that under § 1123(b)(5), the petition date was appropriate. Language of § 1123(b)(5) and § 1322(b)(2) is identical, and the BAP found the majority of case law under § 1322(b)(2) to support using the petition date. *Benafel v. One West Bank, FSB (In re Benafel),* ___ B.R. ____, 2011 WL 6942897 (BAP 9th Cir. Dec. 9, 2011).

Length of Plan

Five-year maximum length not tolled in gap between dismissal and reinstatement. In addition to holding that the automatic stay is not reinstated retroactively during a gap period between case dismissal and reinstatement, the court held that the five-year cap for a plan length was not tolled during that period. The bankruptcy court had dismissed the case, and with some delay, the district court reinstated, but the debtors were unable to

complete plan obligations within the maximum five-year term. Confirmation was properly denied. *In re Scarborough,* 2012 WL 70638 (3d Cir. 2012), slip copy.

Attorney Fees

Reduction of fees in uncomplicated case was affirmed. The First Circuit, with Justice Souter sitting, affirmed the bankruptcy court's denial of $8,000 additional fees to the Chapter 13 debtors' attorney, holding that the bankruptcy court properly applied § 330. That section and the lodestar method do not bind the bankruptcy court to a single way of calculating the number of hours that are reasonable, and the bankruptcy court properly determined that the case was relatively uncomplicated. The attorney's argument that "convoluted" calculations under the means test for an above-median debtor required much time didn't get far, and the bankruptcy court was not required to explain its fee award by a line-by-line examination of the application. "There is no requirement that a bankruptcy court, in explaining a fee award, be precise to the point of pedantry." *Berliner v. Pappalardo (In re Sullivan),* ___ F.3d ____, 2012 WL 934397 (1st Cir. Mar. 21, 2012).

Dismissal

Dishonesty and bad faith justified dismissal with prejudice and sanction. After discharge had been denied in a prior Chapter 7, the debtors' third case, a Chapter 7 that was converted to Chapter 13, was dismissed with prejudice to refilling for two years, and the debtors were sanctioned attorney fees and expenses of an objecting creditor that prosecuted a motion to dismiss. There was no purpose in filing the present case under Chapter 7, since the debts were the same as those for which discharge had been denied in a prior case; therefore, the filing was for the purpose of hindering and delaying creditors. Although converted to Chapter 13, the debtors lied under oath about their income on Schedule I, and they did not timely amend after the conversion. Cause existed to dismiss under § 1307(c)(1), because of prejudicial delay to creditors, and the court had inherent authority, as well as under § 105(a), to sanction the debtors' misconduct, and to bar them from refilling for two years under § 105(a) and § 349(a). *In re Mehlhose,* ___ B.R. ___, 2012 WL 968018 (Bankr. E.D. Mich. Mar. 22, 2012).

Dismissal of case and adversary proceeding proper. In dismissing the Chapter 13 case of deceased debtor, the bankruptcy judge properly assessed the value of a pending avoidance proceeding brought by the trustee and former Chapter 7 trustee (the case had been converted from 7 to 13), finding no value in the proceeding and that it was time barred. Dismissal of the case left the trustees with no standing to pursue a cause of action on behalf of a former estate; the attorneys for the trustees were attempting to recover fees but there was no source of payment of those fees. *Dockery v. Busuego (In re Christensen),* 2012 WL 603708 (BAP 9th Cir. Feb. 2, 2012), slip copy.

Mortgage Litigation

Waiver of rescission right enforced. In an interpretation of the Truth in Lending Act and Massachusetts Consumer Credit Cost Disclosure Act (MCCCDA), the borrower knowingly and voluntarily waived his right to rescission in a loan modification, and the debtor failed to state claims for relief under those acts. *DiVittorio v. HSBC Bank USA (In re DiVittorio),* ___ F.3d ___, 2012 WL 33063 (1st Cir. Jan. 6, 2012).

$3 million punitive against Wells Fargo. In a case with history, including remand from the Fifth Circuit, *Wells Fargo Bank, N.A. v. Jones (In re Jones),* 439 Fed.Appx. 350 (5th Cir. 2011), to reconsider monetary sanctions, the bankruptcy court found that it had jurisdiction for civil contempt and assessed $3,171,154 punitive damages "to deter Wells Fargo from similar conduct in the future," in addition to $24,441.65 compensatory damages and $292,673.84 attorney fees and costs of litigation. The court had previously imposed remedial measures on Wells Fargo in lieu of monetary sanctions, but the Fifth Circuit remanded for consideration in light of *In re Stewart,* 647 F.3d 553 (5th Cir. 2011). Reviewing why Wells Fargo's treatment of the debtor's payments were inappropriate, and finding nothing in the record to support that Wells Fargo had corrected its past errors or to assure compliance in the future, in this case, Wells Fargo had overcharged the debtor $24,000 and caused the debtor to incur hundreds of thousands in legal fees over five years of litigation. The court found that the punitive damage award was warranted. *Jones v. Wells Fargo (In re Jones),* Case No. 03-16518, A.P. No. 06-1093, Docket No. 470 (Bankr. E.D. La. Apr. 5, 2012). *See also Wells Fargo v. Rodriguez,* 2012 WL 393319 (W.D. La. Feb. 6, 2012), slip copy, in which the bankruptcy court properly sanctioned in the amount of $5,535 fees to the trustee's attorney for Wells Fargo's delay in responding to the trustee for accounting of how plan payments were allocated between pre-petition arrearage and on-going payments.

Fair Debt Collections Practices Act

Creditor's attorney liable under Fair Debt Collection Practices Act. The Eleventh Circuit held that the debtor stated a cause of action under the Fair Debt Collection Practices Act when the collection attorney sent a letter incorrectly identifying BAC Home Loan Servicing, L.P. as the creditor and BAC had not yet received the loan assignment transfer. Any false representation in connection with debt collection is forbidden under the FDCPA. The district court had held that BAC was within the ordinary use of the term "creditor," and that any error was harmless, but the circuit court vacated the dismissal of the complaint and reversed. *Bourff v. Rubin Lublin, LLC,* No. 10-14618 (11th Cir. Mar. 15, 2012), per curiam.

Employment of special counsel

Chapter 13 debtor, rather than trustee, has responsibility to move for employment of special counsel. Analyzing § 327(c) in Chapter 13 cases, where special counsel is needed to prosecute a cause of action belonging to the estate (here a prepetition workers compensation claim), the court held that for purposes of § 327(c) the debtor was a debtor

in possession, included within that statute's term "trustee," and that the debtor had authority and duty to file an application for employment of special counsel. The debtor controlled that litigation, and the duty to file the application was not on the Chapter 13 trustee. *In re Goines,* ___ B.R. ___, 2012 WL 470449 (Bankr. N.D. Ga. Feb. 9, 2012).

Claims

Alleged defects in pooling and servicing agreement not grounds for claim objection. The Chapter 13 debtor objected to the proof of claim on grounds that the claimant had not complied with the pooling and servicing agreement underlying the securitized mortgage, and the court held that the note was a negotiable instrument under Pennsylvania's UCC Article 3, with the claimant having the right to enforce the note. The debtor lacked standing to object to the claim on the basis that the assignment of the note was defective under the pooling and servicing agreement. The debtor, as maker, could satisfy the note at any time by paying it. *In re Walker,* ___ B.R. ___, 2012 WL 443014 (Bankr. E.D. Pa. Feb. 13, 2012).

CONSUMER LAW UPDATE

Cases reported from April 1, 2012 through June 30, 2012

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Automatic Stay

Stay did not preclude entry of contempt related to injunction enforcement. Although the debtor had filed Chapter 13, the district court was not stayed from contempt proceedings in a suit in which an injunction had been entered, preventing the debtor's trademark infringement and other torts, related to a restaurant name. "Because this matter involves [the debtor's] use of the restaurant to commit a tort, specifically the tort of trademark and service mark infringement, application of the automatic stay would permit [the debtor] to continue to commit this tort. [C]ommission of a tort is not protected by the Bankruptcy Code." The opinion relies on this policy statement, without reference to any specific Code exception from the stay. *Dominic's Restaurant of Dayton, Inc. v. Mantia,* ___ F.3d ___, 2012 WL 2580741 (6th Cir. July 5, 2012).

Service of foreclosure complaint was void, but stay violation was not willful. It was undisputed that the mortgage creditor did not have knowledge that the debtor had filed Chapter 13 when it served an amended foreclosure complaint. Although the service was a technical violation of the stay, it was not willful, and the creditor moved for, and obtained, stay relief to foreclose. The debtor was prevented by the *Rooker-Feldman* Doctrine from re-litigating the state court's foreclosure judgment, which was obtained after stay relief had been granted and after the case was dismissed. *In re Kline,* ___ B.R. ___, 2012 WL 1963388 (BAP 10th Cir. June 1, 2012).

Foreclosure sale purchaser was party in interest for stay relief. A junior lienholder purchasing property at prepetition foreclosure sale was a party in interest, with standing to move for stay relief to seek possession. It did not matter that the purchaser was not a creditor; its interest in the property was adversely affected by the stay. *In re Bushnell,* 469 B.R. 306 (BAP 8th Cir. 2012).

"Colorable claim" requirement enforced for § 362(j). The bankruptcy court should not have reached the substantive issue of whether the automatic stay was in effect in a successive Chapter 13, without first determining that the party moving for comfort order that the stay was not in effect had the required standing to seek stay relief. Citing the Tenth Circuit's recent decision, *In re Miller,* 666 F.3d 1255 (10th Cir. 2012), which addressed standing under § 362(d), the BAP held that a movant for an order under § 362(j) must prove that it has a "colorable claim," in this case, a "facially valid security interest," under applicable state law, and the bankruptcy court must determine standing before reaching the substantive issue. *In re Thomas,* 469 B.R. 915 (BAP 10th Cir. 2012).

For discussion of standing for stay relief, see also *In re Lee,* 467 B.R. 906 (BAP 6th Cir. 2012) (In Chapter 11 case, J.P. Morgan Chase Bank and Chase Home Finance merged into one entity, allowing Bank to step into shoes of Chase Home Finance, with right to enforce mortgage, and giving Bank standing to move for stay relief.). See also *In re Balderrama,* ___ B.R. ___, 2012 WL 1893634 (Bankr. M.D. Fla. May 16, 2012) (Discussing person entitled to enforce negotiable instrument under Florida law, when note was payable to specific party, it became a "special instrument," and possession alone would not confer standing to enforce. The party claiming standing must show evidence of valid assignment, proof of debt purchase, or evidence of effective transfer.). See also *In re McFadden,* ___ B.R. ____, 2012 WL 1614806 (Bankr. D. S.C. May 9, 2012) (Discussing satisfaction of business records exception to hearsay rule by servicer's electronic business records, and finding note negotiable under South Carolina's UCC,

with stapling of allonges to note sufficient to "affix" them to note. Holder of negotiable note had standing to enforce note and to move for stay relief.).

Discrimination

Refusal to grant additional student loan was not discrimination. The Chapter 13 debtor filed an adversary proceeding alleging that Sallie Mae had discriminated and interfered with her fresh start by refusing to grant additional student loans, but the lender's policy of not granting additional loans when existing loans were in default did not improperly interfere with the fresh start, nor did the refusal violate the automatic stay or improperly discriminate. Discussing § 525(c), the court found that Sallie Mae declined another student loan because the debtor was in default of existing loans, not because the debtor had filed Chapter 13. The debtor's plan proposed to pay 1% of the existing student loan debt, but the debtor had not filed an adversary proceeding to determine undue hardship. *In re Moss,* 470 B.R. 505 (Bankr. E.D. Wisc. 2012).

Avoidance Actions

Lien avoidance denied when debtor not entitled to homestead exemption. Applying *In re Morgan,* 149 B.R. 147 (BAP 9th Cir. 1993), at the petition date the debtor was not entitled to a homestead exemption in property located in Montana, when the debtor was living and working in California. With no exemption entitlement, the debtor's motion to avoid judicial liens was denied. *In re Anderson,* 2012 WL 1110056 (Bankr. D. Mont. Apr. 2, 2012), slip copy.

Homestead exemption applied to real property as a whole, permitting lien avoidance against the real property and all structures. Applying Tennessee's homestead exemption, which protected the real property, not just the debtors' principal residence, the debtors could avoid a judicial lien as to the real property, their residence, and a separate farmhouse. *In re Young,* ___ B.R. ___, 2012 WL 1717868 (Bankr. E.D. Tenn. May 15, 2012).

Property of Estate

Judicial estoppel barred employment cause of action. With a dissent, the Fifth Circuit's panel found no abuse of discretion by the district court's dismissal of a Chapter 13 debtor's suit alleging wrongful employment termination, on grounds of judicial estoppel. The cause of action was not disclosed in the schedules, and there was no factual support for the debtor's argument that the failure to disclose was inadvertent. The dissent asserted that the district court could have estopped recovery for the debtor personally, while allowing recovery for the benefit of the bankruptcy estate. *Love v. Tyson Foods, Inc.,* 677 F.3d 258 (5th Cir. 2012). See also *Guay v. Burack,* 677 F.3d 10 (1st Cir. 2012) (Chapter 7 debtor was judicially estopped from pursuing claims that were not disclosed by amending schedule prior to receiving discharge.).

Lis pendens did not prevent bankruptcy estate from having interest in property. When the Chapter 13 debtor had acquired property by prepetition quit claim deed from his mother, who was subject of a lis pendens lien under Ohio law, the bankruptcy estate had an interest in the property, subject to the lien; the lien's existence did not prevent the automatic stay's prohibition of a foreclosure. Continuing with the scheduled foreclosure was a willful stay violation, and the

bankruptcy court did not abuse its discretion in awarding reasonable attorney fees and costs as damages under § 362(k). *In re Webb*, 2012 WL 2329051 (BAP 6th Cir. 2012), slip copy.

Exemptions

Section 522(o)'s term "interest" refers to equity. The phrase in § 522(o) "value of an interest. . .in real property" refers to any increase in monetary value of the real property claimed as the homestead, rather than to a title interpretation of "interest." The Chapter 7 trustee argued that even when there was no equity in the homestead property, the trustee was entitled to an equitable lien, but the BAP affirmed the bankruptcy court's interpretation, holding that § 522(o) was added by BAPCPA "to prevent the fraudulent attempt to build up equity in a homestead." If there is no equity in the property, "there is no value subject to reduction." *In re Willcut*, ___ B.R. ___, 2012 WL 1929913 (BAP 10th Cir. May 29, 2012).

IRA inherited from relative was exempt. The Chapter 7 debtor had inherited an IRA, which was established by a relative, and the bankruptcy court agreed with the emerging consensus, including the Fifth Circuit's *In re Chilton*, 674 F.3d 486 (5th Cir. 2012), holding that an inherited IRA that was tax exempt under 26 U.S.C. § 408, was exempt under § 522(d)(12). "The Bankruptcy Code requires no forensic analysis in order to determine from where those funds arose. All that the Bankruptcy Code requires is that the funds sought to be invested have been placed in a particular form of a retirement investment vehicle in order to be exempt from taxation." *In re Seeling*, ___ B.R. ___, 2012 WL 1899177 (Bankr. D. Mass. May 24, 2012). See also *In re Reinhart*, 267 P.3d 895 (Utah 2011) (On certification from the Tenth Circuit, the Utah Supreme Court held that strict compliance with IRC qualification of retirement plans was not required for exemption; rather, a retirement plan (here a Keogh) qualified as exempt under state law so long as it substantially complied with IRC requirements.).

Section 522(p) applied to interest re-conveyed within 1215 days. The Chapter 7 debtor had acquired an interest in his residence, when the trust over which debtor acted as trustee re-conveyed residential property to the debtor within the 1215 days before bankruptcy filing. The debtor had previously conveyed the property to the trust to protect it from creditors and for the benefit of his sons. Although during the trust's recorded ownership of the property the debtor acted as if he owned the property, paying all expenses, mortgage and taxes from a personal account, the debtor had acquired an interest in the property upon its re-conveyance to him within the 1215 days, for purposes of § 522(p)'s cap on the homestead exemption. *In re Stella*, 470 B.R. 1 (Bankr. D. Mass. 2012).

Debtor ineligible for state exemptions may claim under § 522(d) and federal law did not preempt state exemption law. The debtor filing in Kansas was not eligible for Kansas exemptions because she had not lived there the required 730 days, and she was not eligible for Nebraska exemptions, which were restricted to use by its residents. The trustee objected to use of the more generous § 522(d) exemptions, asserting that federal law preempted Nebraska's territorial limitation, but the court could not "conclude that Congress intended to preempt state exemption law when it enacted a statute that expressly provides for state law to apply when the debtor chooses, and, indeed, to apply exclusively when the state opts out of the federal exemption scheme. That is the antithesis of preemption." Since both Kansas and Nebraska

exemptions were unavailable, the debtor could use the § 522(d) exemptions, under § 522(b)'s hanging paragraph. *In re Long,* 470 B.R. 186 (Bankr. D. Kan. 2012).

Chapter 7 Issues

Means Test

Debtors could not deduct contractual secured payments for home to be surrendered. The above median Chapter 7 debtors were not permitted to deduct mortgage payments on real estate that they intended to surrender. The phrase "scheduled as" in § 707(b)(2)(A)(iii)(I) has been interpreted in different ways, but this court adopted the position that the phrase is "a term of art in bankruptcy parlance that refers to a debtor placing information on the bankruptcy schedules. . . . For a debt to be 'scheduled as contractually due to secured creditors in each month of the 60 months following the date of the filing of the petition,' a debtor's schedules must show a secured payment arising out of a contractual relationship that is due and being paid post-petition. In other words, Schedule J and the Statement of Intention must reflect that the debtor intends to pay the secured creditor on the contractual obligation." Also, applying *Lanning,* a debtor's decision to surrender is "known or virtually certain." A presumption of abuse was also not overcome. *In re Fredman,* ___ B.R. ___, 2012 WL 1965372 (Bankr. S.D. Ill. May 31, 2012). See also *In re Sterrenberg,* 471 B.R. 131 (Bankr. E.D. N.C. 2012) (Debtor could not deduct secured payments on residence, boat and vehicle to be surrendered.).

Conversion

In case converted to Chapter 7, § 523(a)(16) applied. In a case converted from Chapter 11 to 7, the debtor moved to extend the automatic stay, arguing that condominium association fees would be discharged, but the association's fees became due and payable after the Chapter 11 petition was filed and before conversion to Chapter 7. Although §§ 348(b) and 727(b) together treat debts that arose after the Chapter 11 filing and before conversion to Chapter 7 as prepetition debts, § 727(b) includes the § 523 exceptions, and homeowner association fees that become due and payable "after the [Chapter 11] order for relief" are excepted from a Chapter 7 discharge under § 523(a)(16). The court found a distinction in § 523(a)(16)'s reference to "order for relief" rather than to § 348's "order for relief under the chapter" to which the case was converted; therefore, since the association's fees arose after the Chapter 11 filing, they were excepted from discharge. *In re Hijjawi,* ___ B.R. ___, 2012 WL 1684533 (Bankr. N.D. Ill. May 14, 2012).

Discharge

Unpaid unemployment insurance taxes were dischargeable. The Chapter 7 debtor was allegedly a responsible person, obligated to pay unemployment insurance taxes that were not in the nature of withholding taxes, and the BAP held that the particular taxes were not a "tax required to be collected" within the meaning of § 507(a)(8)(C), and that consequently, the taxes were not excepted from discharge under § 523(a)(1)(A). The state entity conceded that the taxes were not withheld from employees, but argued that they still fell within the scope of § 507(a)(8)(C). Finding the statute ambiguous, the BAP looked to legislative history, which showed that a "tax required to be collected" must be collected from a third party, and the

unemployment insurance taxes were payable directly by the employer, never collected from another party. To be excepted from discharge, the tax must be a priority tax, as contemplated by §§ 507(a)(3) or 507(a)(8). *In re Hansen*, 470 B.R. 535 (BAP 9th Cir. 2012).

Representation of ownership of particular residence is not statement regarding financial condition. The Fifth Circuit observed a split of circuit authority on interpretation of § 523(a)(2)A), with the Fourth Circuit, in *In re Van Steinburg*, 744 F.2d 1060 (4th Cir. 1984), holding that a debtor's false representation that property was unencumbered, when it was pledged as collateral, was a statement regarding the debtor's financial condition, while the Eighth and Tenth Circuits, in *In re Lauer*, 371 F.3d 406 (8th Cir. 2004) and *In re Joelson*, 427 F.3d 700 (10th Cir. 2005), concluded that the term "financial condition" in § 523(a)(2)(A) referred to overall financial health. The Fifth Circuit agreed with the Eighth and Tenth, holding that the debtors' representation about ownership of specific property fell short of representation of their net worth or overall financial condition. The statements of ownership were not statements respecting their financial condition for purposes of § 523(a)(2)(A)'s restriction of the exception. The bankruptcy court's findings that the debtors made false representations upon which the lender justifiably relied were affirmed. *In re Bandi*, ___ F.3d ___, 2012 WL 2106348 (5th Cir. June 12, 2012).

Real estate broker did not become jointly and severally liable for loan. The Chapter 7 debtor was a real estate broker and owner of a company that facilitated loans for real estate purchasers. He acted as broker for loans made by an individual and the loans were not repaid**.** By acting as a loan broker the debtor had not become jointly and severally liable for any fraud committed by the borrowers. The borrowers had previously filed bankruptcy, and the broker had sued them, alleging fraud and seeking equitable indemnification in the event the broker was found liable to the lender. The broker was not judicially estopped by seeking equitable indemnification, since the broker had been seeking a conditional or contingent claim for common law indemnity, while denying that he was liable for any fraud committed by the borrowers. *In re Parker*, ___ B.R. ___, 2012 WL 1932975 (BAP 9th Cir. May 29, 2012).

Bank failed to prove false representation. The bank failed to prove that the debtor made false representations about lien waivers to induce advance of construction funds for a duplex, and the bank did not prove that the debtor knew the funds were being used by a limited liability company to build a different duplex. The debt was not excepted from discharge under § 523(a)(2)(A). The bank also did not prove an intentional tort for purposes of § 523(a)(6). *In re Steger*, ___ B.R. ___, 2012 WL 2138136 (BAP 8th Cir. June 14, 2012).

Bankruptcy court had authority to liquidate debt for § 523(a)(2)(A) exception, distinguishing *Stern*. The Chapter 7 debtor had acted as a general building contractor, and a finding that he intentionally misrepresented that he was a licensed general contractor was affirmed. The creditors justifiably relied on that representation in hiring the debtor. The bankruptcy court had constitutional authority to liquidate the debt for discharge purposes, with the BAP applying a narrow interpretation to *Stern v. Marshall*'s limitation on the bankruptcy court's authority. The opinion discusses other post-*Stern* authority agreeing that a bankruptcy court continues to have the constitutional authority to hear and determine claims that are excepted from discharge. *In re Deitz*, 469 B.R. 11 (BAP 9th Cir. 2012).

Creditors waived emotional distress damages related to fraud. In pre-bankruptcy litigation, the Tenth Circuit's reversal and remand for damages held that the plaintiffs had waived any claim for emotional distress damages, and in subsequent § 523(a)(2) litigation, the creditors were precluded from pursuing those damages. The opinion discusses the "murky" application of preclusion in bankruptcy, including the distinction between claim and issue preclusion, as well as whether the preclusive effect of a prior federal court judgment is guided by federal or state law. Since the Tenth Circuit had dealt with a diversity judgment, the law of the state in which the federal diversity court sat applied, here Oklahoma law (which the panel found to be essentially the same as federal preclusion law). Although the Tenth Circuit had remanded, it had made a final determination that emotional distress damages had been waived, and preclusion attached to that determination. *In re Zwanziger*, 467 B.R. 475 (BAP 10th Cir. 2012).

Derivative damages included in § 523(a)(6) exception. The Chapter 7 debtor attempted to kill his ex-wife, beating her and leaving her in an unheated storage facility for eighteen hours, resulting in miscarriage and loss of all toes to frostbite. He was convicted and a civil judgment included damages for battery, false imprisonment, and intentional infliction of emotional distress, as well as loss of consortium for the victim's husband and children. The debtor argued that the state jury did not find that he intended to inflict the specific injuries, but the Seventh Circuit held that all of the damages, including loss of consortium, were excepted from discharge. The opinion observes the lack of consistency in the definition of "willful and malicious" across the circuits, noting that the opinions reflected "different legal definitions of the same statutory language that probably don't generate different outcomes. . . .We imagine that all courts would agree that a willful and malicious injury, precluding discharge in bankruptcy of the debt created by the injury, is one that the injurer inflicted knowing he had no legal justification and either desiring to inflict the injury or knowing it was highly likely to result from his act." J*endusa-Nicolai v. Larsen,* 677 F.3d 320 (7th Cir. 2012).

Discharge denied for false oaths. Just because bankruptcy court commented that the debtor had "played fast and loose" did not mean that court applied wrong standard in § 727(a)(4)(A) denial of discharge. The bankruptcy court found that the debtor acted with actual fraudulent intent in omitting from schedules a $50,000 payment for the debtor's interest in commercial lease. *In re Phillips,* 2012 WL 1071270 (11th Cir. 2012), slip copy.

Discharge Injunction

No abuse of discretion in refusing to reopen case for discharge injunction complaint. The Chapter 7 debtor had not listed student loan debts in her schedules until an amended Schedule F was filed, but the debtor did not file a § 523(a)(8) complaint, and no determination of undue hardship was made before the general discharge order was entered. Five years later, the debtor moved to reopen the case, not to seek discharge of student loans, but to pursue sanctions for violation of the discharge injunction, and the bankruptcy court denied reopening. The bankruptcy court had broad discretion on reopening, and the student loan debt was automatically excepted from discharge, since no undue hardship determination had been made. *In re Smyth,* 470 B.R. 459 (BAP 6th Cir. 2012).

Reaffirmation

Lease assumption process separate from reaffirmation. The Chapter 7 debtors filed motions to approve reaffirmation agreements, but the underlying obligations were personal property leases, and the court found that personal property lease assumption in Chapter 7, under § 365(p)(2), was a "handshake" process, not one involving the court. Attempting to assume such leases through the reaffirmation process unnecessarily involved the court. The opinion discusses the split of case authority, disapproving attempted reaffirmations, with the order having no effect of validity on any § 365(p)(2) lease assumption agreements. *In re Perlman*, 468 B.R. 437 (Bankr. S.D. Fla. 2012).

Redemption

On conversion from Chapter 13 to 7, redemption value is not the same as in the plan. Reminding the bar of BAPCPA's amendment of § 348(f)(1)(B), Chapter 13 valuations are only applicable in cases converted to Chapter 11 or 12, but when the case is converted to Chapter 7, the court is not bound by valuation of a vehicle in the Chapter 13 plan. For redemption purposes, the court adopted a commercially reasonable disposition approach, "considering the property itself, and the property's existing physical condition and age." While the creditor relied solely on N.A.D.A. for value, the debtor produced proof of higher mileage than the N.A.D.A. guide and appraisals based on the actual mileage. The court commented that "the consumer bankruptcy bar should not slavishly rely upon the N.A.D.A. Appraisal Guide." *In re Airhart*, 2012 WL 1965609 (Bankr. S.D. Tex. May 31, 2012), slip copy.

Dismissal

Court was not required to dismiss case. The Chapter 7 debtors had filed to stop foreclosure, and the debtors subsequently filed a pleading in a pending state court foreclosure action, alleging lender liability and discrimination. When the debtors then moved to dismiss the Chapter 7 petition, the United States Trustee and secured lender objected, with the bank and Chapter 7 trustee agreeing to settle the debtors' claims against the bank for $5,000. Under *In re Asbury*, 423 B.R. 525 (BAP 8th Cir. 2010), there is no absolute right to dismiss a Chapter 7 case, with the debtor required to show cause for dismissal. The bankruptcy court found that the debtors' claims against the bank were speculative, and the debtors' schedules had valued the claims at zero. The cause of action belonged to the Chapter 7 trustee, who lacked funds to pursue litigation, and the settlement was within the range of reasonable compromise. *In re Cockhren*, 468 B.R. 838 (BAP 8th Cir. 2012).

Reopening Case

Chapter 7 case reopened and discharged trustee had standing to be heard on conversion. The Chapter 7 debtors moved to reopen their case and to convert to Chapter 11, disclosing for the first time that they had a prepetition cause of action for personal injury. The BAP, in a first impression decision, held that the Chapter 7 trustee, although discharged on closing of the case, had standing to be heard on the motion, since the underlying issue was control of the litigation

that had not been disclosed previously. Section 350(b) does not define "party in interest," but to deny the trustee standing would be contrary to common sense. The debtors did not own the undisclosed prepetition cause of action, since it was not abandoned. The BAP's opinion cites other case authority for recognizing the discharged trustee's standing and for the trustee falling within § 350(b)'s "party in interest." The bankruptcy court did not abuse its discretion in granting the reopening, but denying conversion. *In re Levesque,* ___ B.R. ___, 2012 WL 2400886 (BAP 9th Cir. June 25, 2012).

Chapter 13 Issues

Confirmation Issues

Local Plan Forms

Plan language deviating from local plan disapproved. The district court rejected debtors' plan language warning secured creditors that if they did not object to the plan's proposed treatment of liens or arrearage amounts, the plan would bind them as to the lien and claim amount, with the court finding that this language, which deviated from the local plan form, was in conflict with Bankruptcy Code and Rule claims procedures. The bankruptcy courts in the District of Colorado had disagreed whether debtors could include such language in plans, and the district court adopted the position taken in *In re Butcher,* 459 B.R. 115 (Bankr. D. Colo. 2011). The issue involved plan confirmation occurring prior to expiration of the claims deadline, and "under the debtors' approach, a claim filed by a secured creditor after confirmation of a Chapter 13 plan cannot alter the plan, even if the claim demonstrates that the plan is not in compliance with the requirements of the Code and the Rules." The standard local plan in the district provided that after confirmation the debtor shall file a modified plan providing for allowed priority and secured claims that were filed timely but after confirmation. The local bankruptcy rules also required a modified plan filing. The non-standard language proposed by some debtors would permit the plan, without the required modification, to define the claim amount and treatment of secured claims and liens, but the district court held that bankruptcy courts have an obligation to direct that a debtor conform the plan to the Code's requirements. Section 1329 does not prevent the bankruptcy court from requiring post-confirmation modification, and the local standard language requiring modification is part of the res judicata effect of confirmation—the required modification provision had binding effect. *In re Gordon,* 2012 WL 1020643 (D. Colo. Mar. 27, 2012), slip copy.

See also *In re Walters,* 2012 WL 1536964 (Bankr. E.D. Okla. Apr. 30, 2012), slip copy, in which the court, while agreeing that the district's current seventeen page plan form needed revision, denied confirmation of a non-standard, shorter plan. "The Court believes that a standard plan form is essential for this Court to meet its responsibility to review all Chapter 13 plans, . . .to provide proper notice to interested parties, and to promote efficiency in the review of those plans." The opinion notes that it is unlikely that a national plan form will be adopted in the near future, and that the bankruptcy bar and trustees were encouraged to "work toward an acceptable revision of the current standard form that will comply with the Bankruptcy Code and be in a form that most debtors and creditors can comprehend."

See also *In re Vu,* 2012 WL 1521635 (BAP 9th Cir. May 1, 2012), slip copy, where the BAP rejected the mortgage creditor's argument that compliance with a local addendum to a plan

was unduly burdensome and expensive. A similar argument had been rejected in *In re Herrera*, 422 B.R. 698 (BAP 9th Cir. 2010), *aff'd* 650 F.3d 1300 (9th Cir. 2011).

Classification

Confirmation should not be denied solely because plan separately classified and preferred debt guaranteed by debtor's mother. The plan separately classified an unsecured consumer debt, on which the debtor's mother was guarantor, and proposed to pay that debt in full, with interest, while paying very little to other unsecured creditors. The trustee objected. Discussing the divergent views on the "however" clause in § 1322(b)(1), the BAP found that "courts have been unable to derive from the text of the statute a plain and unambiguous meaning for the 'however clause.'" Looking to legislative history, principally the committee reports related to 1981 and 1983 acts leading up to the Bankruptcy Amendments and Federal Judgeship Act of 1984, the BAP held "that Congress sought to permit a chapter 13 debtor to separately classify *and* to prefer a codebtor consumer claim when the facts are similar to those presented in [*In re Utter*, 3 B.R. 369 (Bankr. W.D. N.Y. 1980), and *In re Montano*, 4 B.R. 535 (Bankr. D. D.C. 1980)—both cases cited in the legislative history]. . . .Whatever else the 'however clause' may or may not do, a court may not deny confirmation of a plan under § 1322(b)(1) solely because the plan prefers a codebtor consumer claim over all other unsecured claims." *In re Renteria*, 470 B.R. 838 (BAP 9th Cir. 2012).

Projected Disposable Income

Housing expenses were excessive and not reasonably necessary. The applicable IRS Local Standard for housing for a household size of one was $1,125, and that was the starting point for determination of whether housing expenses were reasonably necessary. The debtor occupied the residence alone, and it had 6,100 square feet, with five bedrooms, and other luxuries, such as a 300-plus bottle wine cellar, second kitchen and heated pool. His utilities were double the Local Standard. The debtor had not attempted to demonstrate special circumstances, and the home value was less than the mortgage debt. The mortgage payment of $5,857.13 was unreasonable. Moreover, the plan was not proposed in good faith. *In re Konowicz*, 470 B.R. 725 (Bankr. D. N.J. 2012).

Lien Stripping

Plan stripping junior mortgage was in good faith. The trustee objected to confirmation, based on lack of good faith, when the plan proposed to pay directly a first mortgage, while stripping off the wholly unsecured second mortgage and paying $150 a month for 36 months, which would provide 17.25% dividend to unsecured creditors, including the stripped mortgage creditor. The unsecured debt, except for the mortgage, was only $549. The debtor amended the plan to increase monthly payments to $275, which increased the dividend slightly. The trustee posited that the debtor's sole purpose was to strip the mortgage, since the debtor's income was sufficient to pay monthly expenses and debt. Under *In re Goeb*, 675 F.2d 1386 (9th Cir. 1982), the good faith determination cannot be based exclusively on one factor; rather, a totality of circumstances must be considered. The BAP held that looking only to the factor that the debtor was stripping the mortgage was not proper. This debtor had not previously filed Chapter 7, so this was not a

Chapter 20 case; the opinion distinguishes the facts in Chapter 20 cases in which courts had discussed the need for a debtor's good faith in lien stripping. The BAP also rejected analogy to the attorney-fee only cases, as urged by the trustee. The court noted that the second mortgage creditor would receive a substantial unsecured distribution. The bankruptcy court did not err in finding the debtor's plan in good faith. *In re Lepe,* 470 B.R. 851 (BAP 9th Cir. 2012).

Debtors bound by plan's treatment of junior lien as secured. More than a year after confirmation provided for treatment of a junior lien as secured, the debtors filed an adversary proceeding to value and strip the lien as wholly unsecured, and the court held that the debtors must start the lien modification process in the plan, and if the confirmed plan provided for modification, the debtors may then pursue an adversary proceeding to determine the validity, extent and priority of the lien. Here, the debtors were bound by their confirmed plan, and barring successful modification of their plan, res judicata prevented the relief sought in the complaint. *In re Pierce,* 2012 WL 1903263 (Bankr. E.D. Va. May 24, 2012), slip copy.

Surrender

Partial surrender doesn't satisfy § 1325(a)(5)(C). Adopting the majority position, the debtors' proposal to surrender part of the collateral under § 1325(a)(5)(C), while paying the balance of the secured claim under subsection (B), was not confirmable. The debtors must choose one of the alternatives. Subsection (C) requires surrender of all of the collateral. *In re Snyder,* 2012 WL 1110119 (Bankr. N.D. N.Y. 2012), slip copy.

Post-confirmation Modification

No threshold requirement for change in circumstances, and debtors not in good faith in proposing modification to shorten plan term. The BAP first held that there was no threshold requirement of changed circumstances for a post-confirmation modification. Section 1329 contains no "express requirement [of] a substantial and unanticipated change in the debtor's financial circumstances. . .to overcome the res judicata effect of a confirmed plan under § 1327(a)." However, some courts had incorporated such a test, including *In re Murphy,* 474 F.3d 143 (4th Cir. 2007). The Ninth Circuit had not directly ruled on the issue, and the BAP was not bound by dicta in *In re Anderson,* 21 F.3d 355 (9th Cir. 1994), which suggested "that the substantial and unanticipated change test applies." Although not adopting the test as a required one, the bankruptcy court may consider change in circumstances in exercising its discretion, and "it may make little practical difference whether the bankruptcy court applies the substantial and unanticipated change test as a threshold requirement or uses it as a discretionary tool." In this case, to the extent the bankruptcy court used the test, it was harmless error. The above-median debtors moved to modify their confirmed plan, increasing payments but reducing the plan term from 60 to 36 months, and the bankruptcy court approved the payment increase but denied the term reduction. The bankruptcy court's holding and facts of the case fit within a good faith analysis, and "allowing them to shorten their plan would be an inequitable result," since their income had increased significantly. The BAP emphasized "that the continued absence from § 1329(b)(1) of any reference to § 1325(b) is conclusive as to whether a debtor may modify his or her plan to reduce the term below the applicable commitment period required for an original plan." *In re Mattson,* 468 B.R. 361 (BAP 9th Cir. 2012).

Discharge

Borrower's failure to comply with mortgage assignment did not create fiduciary relationship. The residential mortgage contained an assignment of proceeds, including those from damage to the property, and the debtor had settled with builders of her home but did not pay the proceeds to the mortgagee. While a state statute may create the necessary fiduciary relationship for purposes of § 523(a)(4), a statute can't transform ordinary individuals or transactions into fiduciaries by simply using the terms "trust" or "fiduciary." The relevant Arkansas statute, Ark.Code § 4-58-105(b)(2), did not create a fiduciary relationship between the mortgagor and mortgagee in a strict sense, as required for § 523(a)(4). Moreover, the debtor did not embezzle, since one can't embezzle her own property. *In re Nail*, 680 F.3d 1036 (8th Cir. 2012).

Mortgage Issues

Fair Debt Collection Practices claim against attorney for foreclosing party. The Sixth Circuit reversed the district court's dismissal of a claim that Washington Mutual's attorneys violated the Fair Debt Collection Practices Act and Ohio's Consumer Sales Practices Act by filing for foreclosure on behalf of Washington Mutual when it had not yet received or recorded an assignment. The foreclosure action had been filed in state court more than a month before Washington Mutual received a transfer of the mortgage from Wells Fargo, and the Circuit panel held that the borrower's complaint sufficiently stated a claim under FDCPA of a material misrepresentation that would confuse or mislead an unsophisticated consumer. The plaintiff's complaint referred to a statement in the foreclosure complaint that Washington Mutual was the holder of the mortgage, and the complaint sufficiently stated a cause of action to overcome a Rule 12(b)(6) motion. Remand was ordered. *Wallace v. Washington Mutual Bank, F.A., et al.*, 2012 WL 2379664, ___ F.3d ___ (6th Cir. June 26, 2012).

MERS had authority under deed of trust. Affirming the bankruptcy court's dismissal of the debtor's complaint alleging wrongful foreclosure, the debtor failed to allege that the foreclosure violated California law, and the deed of trust, which designated MERS as nominal beneficiary for the lender and lender's successor's and assigns, expressly gave MERS authority to exercise all of the lender's rights, including the right to foreclose. *In re Cedano*, 2012 WL 1191860 (BAP 9th Cir. 2012), slip copy.

Massachusetts court construes who is entitled to conduct foreclosure. Addressing the propriety of a foreclosure by power of sale undertaken by a mortgage holder that did not hold the underlying mortgage note, the Massachusetts Supreme Judicial Court concluded that a foreclosure sale conducted under a power of sale in a mortgage must comply with statutory requirements. The court construed "mortgagee" as used in the relevant statute as referring to the person or entity then holding the mortgage, and also either holding the mortgage note or acting on behalf of the note holder. Prior to this decision, the term "mortgagee" was not free of ambiguity, and the court gave prospective effect to its holding, applying it only to foreclosures under a power of sale where statutory notice is provided after the date of the decision. The court did not conclude that a foreclosing mortgagee must have actual physical possession of the mortgage note, but if the mortgagee lacks possession of the note, it must act as the authorized

agent of the note holder. As background, the court reviewed Massachusetts status as a "title theory" state. Under Massachusetts common law, a real estate mortgage is a transfer of legal title to the mortgaged property and serves as security for an underlying note, with the title transfer being defeasible when the debt is paid. When a mortgage and note are separated, the holder of the mortgage holds it in trust for a purchaser of the note, who has an equitable right to obtain assignment of the mortgage. At common law, a mortgagee possessing only the mortgage was without authority to foreclose on his own behalf the mortgagee's equity of redemption or disturb the possessory interest. *Eaton v. Federal Nat'l Mortgage Assoc., et al.*, 2012 WL 2349008, 462 Mass. 569, ___ N.E.2d ___ (Mass. Supreme Judicial Court June 22, 2012). See also *In re Bailey*, 468 B.R. 464 (Bankr. D. Mass. 2012), finding that Massachusetts law requirement for mailing notice of foreclosure sale to the owner was satisfied, but that the debtor/mortgagor had standing to raise that the entity assigning the mortgage to foreclosing party did not hold the mortgage at time of alleged assignment. Issue of fact prevented summary judgment. The court distinguished this debtor's attack on the assignment from those cases in which the debtor had no right of action under HAMP.

Notwithstanding no private right of action under HAMP, debtor could proceed under state law. Without deciding whether there was a private right of action under HAMP, the borrower was not precluded by HAMP from pursuing a cause of action under Massachusetts law for breaches of implied covenants of good faith and fair dealing. The cause of action related to the conducting of a foreclosure sale, with the plaintiff alleging lack of authority by the foreclosing party. *Blackwood v. Wells Fargo Bank, N.A.*, 2011 WL 1561024 (D. Mass. 2011).

Judicial estoppel prevented attack on mortgagor's standing to enforce note and mortgage. The debtors had scheduled SunTrust Mortgage, Inc. as having undisputed secured claims in two bankruptcy cases, proposing to cure and maintain the mortgage, and in the current case, the debtors agreed to settlement of SunTrust's objection to confirmation. Judicial estoppel prevented the debtors from changing position to assert SunTrust's lack of standing to enforce the note and mortgage. Moreover, on the merits, SunTrust was in possession of the note, with standing to enforce it. *In re Knigge,* 2012 WL 1536343 (Bankr. W.D. Mo. Apr. 30, 2012), slip copy.

Conversion and Dismissal

Right to convert was absolute. Adopting *In re DeFrantz*, 454 B.R. 108 (BAP 9th Cir. 2011), the district court held that a Chapter 13 debtor had an absolute right to convert to Chapter 7. Although BAP decisions were not binding, the court found the *DeFrantz* reasoning and its distinction of conversions from Chapter 7 and 13 to be persuasive. "*Marrama*'s reasoning does not directly translate to conversions under § 1307(a) because there is no cause for concern that a debtor may use that provision to 'escape the consequences of bad faith conduct or for abuse of process.'" *In re Taylor,* 2012 WL 1247190 (C.D. Cal. Apr. 13, 2012).

Dismissal with two-year bar as sanction for contempt was appropriate. In a fourth bankruptcy case, the debtor failed to appear at scheduled deposition, related to the U.S. Trustee's discovery requests concerning a mortgage, and the debtor then had notice of a show cause hearing on why she did not appear, along with notice of the U.S. Trustee's request for sanctions

and case dismissal. As a sanction for disobeying the discovery order requiring appearance at her deposition, the bankruptcy court did not abuse its discretion in dismissing the case with a two-year refilling bar. *In re Cline,* 2012 WL 1957935 (BAP 6th Cir. June 1, 2012).

Debtor did not have absolute right to dismiss. Reviewing the split of case authority subsequent to *Marrama v. Citizens Bank of Massachusetts,* 549 U.S. 365 (2007), the district court held that a Chapter 13 debtor's right to voluntarily dismiss the case is dependent on good faith, finding that the reasoning of *Marrama* should apply. There was cause for conversion of the case to Chapter 7 "in light of [the debtor's] exceptional bad faith conduct." The court found that the debtor had no intention to pay creditors, using the Chapter 13 to litigate claims while having substantial inaccuracies in the schedules. His plan proposed $10 a month, but there were $65,000 in priority claims. *In re Mitrano,* ___ B.R. ___, 2012 WL 1320144 (E.D. Va. Apr. 16, 2012).

Debtor had absolute right to dismiss case, but trustee could distribute settlement proceeds. After confirmation, the debtor and GMAC settled, with GMAC withdrawing its proof of claim, releasing the debtor's mortgage and paying $20,000, with a state court suit against GMAC dismissed. The Chapter 13 trustee moved for turnover of the $20,000 and the debtor moved to voluntarily dismiss the case. A dismissal would not give the debtor a right to the $20,000, since those proceeds were property of the estate, subject to disbursement under the confirmed plan. Under § 349(b)(3), the court has authority to "order otherwise" than allowing vesting of the settlement proceeds in the debtor. The confirmed plan promised unsecured creditors a pro rata share of litigation proceeds, and cause existed to authorize the trustee to disburse the settlement proceeds to unsecured creditors. The trustee was holding additional funds in excess of the 20% distribution provided for in the plan; therefore, the trustee would distribute the $20,000, plus any accrued interest on that amount, then on dismissal, remit the balance on hand to the debtor. *In re Darden,* ___ B.R. ___, 2012 WL 1906414 (Bankr. D. Mass. May 25, 2012).

Attorney Fees

Fee-only plan not per se bad faith. The First Circuit held in March that a fee-only Chapter 13 plan was not per se proposed in bad faith. "While fee-only plans should not be used as a matter of course, there may be special circumstances, albeit relatively rare, in which this type of odd arrangement is justified. Given this possibility, prudence dictates that we hew to the overarching principle that the presence or absence of good faith should be ascertained case by case. . . .The dangers of such plans are manifest, and a debtor who submits such a plan carries a heavy burden of demonstrating special circumstances that justify its submission." *In re Puffer,* 674 F.3d 78 (1st Cir. 2012).

Debtors' attorney sanctioned and no fees. In show cause hearing, attorney appeared fifteen minutes late, and then did not know what the hearing concerned, despite having received a show cause order. The debtor expressed dissatisfaction with the attorney's work in the case. Finding, among other things, that the attorney violated Rule 9011(b)(2), by signing and submitting a motion that was not warranted and without conducting an investigation, the pleading was frivolous, since the court had already denied an identical motion. The debtors were not eligible for Chapter 13 relief, and the value of the attorney's services was zero, with all fees disgorged. Further, the attorney was publicly reprimanded, and referral was made to the state bar. *In re Spickelmier,* 469 B.R. 903 (Bankr. D. Nev. 2012).

Illegal fee sharing examined. An agreed order had been entered in the Chapter 13 case, providing that if the debtors became sixty days delinquent, the stay would be lifted, and a $600 fee for the moving creditor had been allowed, with the order approved by debtors' counsel and the Chapter 13 trustee. The bankruptcy court addressed the issue of whether outsourcing of paralegal and administrative support services by a law firm to third party vendors was an illegal fee sharing, in violation of § 504(a) or Rule 2016. The law firm had sold non-legal assets to a third party vendor, and the law firm's former non-lawyer employees were now employees of the vendor. The $600 fee allowed was being paid by the debtors through their confirmed plan, with that payment directed to be paid to Chase Home Finance, not to the law firm or the third party vendor; the disputed fees that were billed by the law firm or third party vendor to Chase were not being paid from the bankruptcy estate, and Rule 2016(a) did not come into play. The court did not find monthly fees paid by the law firm to its third party vendor to be illegal fee sharing. "It is actually no different from a law firm paying other outside vendors or its own employees and paralegals on a periodic basis from earnings that it manages to collect." The outsourced paralegal working for the vendor was supervised by a law firm attorney, and the paralegal used template forms prepared by the law firm; therefore, since there was supervision by a licensed attorney, "to construe that this procedure is the unauthorized practice of law would place form over substance." The court also found the outsourcing procedure to be in compliance with applicable Mississippi Rules of Professional Conduct. *In re Thorne*, ___ B.R. ___, 2012 WL 1481500 (Bankr. N.D. Miss. Apr. 27, 2012).

Claims

Lost note affidavit sufficient for standing. The Chapter 13 debtors objected to the mortgage claim, asserting lack of standing, but the bankruptcy court correctly found standing, including that the claimant was entitled to enforce the note. The applicable Washington statute provided for a person no longer in possession of a note to still enforce it by an appropriate lost note affidavit that gives adequate proof of the existence and terms of the note. The affidavit included an endorsement in blank of the original note. Under Washington law, the deed of trust follows the note. *In re Allen,* 2012 WL 2086563 (BAP 9th Cir. June 8, 2012), slip copy.

For claim reconsideration, Rule 60(b) standards apply to claims that have been litigated. Although Rule 60(b) standards apply when the court is reconsidering a claim the merits of which have previously been litigated, as to a claim that had not been previously litigated, that Rule does not apply; instead, the court may exercise its discretion and equities of the case to determine whether an allowed claim should be reconsidered. Notwithstanding the creditor's failure to attach sufficient documentation, when the debtors waited sixteen months after a local rule's deadline to object, their objection was denied. The court expressed concern that the particular creditor was not in compliance with the documentation requirements of Rule 3001(c). *In re Ruth,* 2012 WL 1455814 (Bankr. S.D. Tex. Apr. 26, 2012), slip copy.

Documentation for assigned credit card claims, another analysis. Examining the issues of what documentation is required for an assigned credit card claim, to which the debtor had objected, and what evidence is required by the objecting debtor to rebut the presumption of prima facie validity, the bankruptcy court held that evidence of an assignment did not require

specific account numbers of the original credit card, but when the debtors' affidavits swore that they had no dealings with eCast and did not owe eCast, with lack of documentary evidence of specific assigned debts, the debtors rebutted the presumption. Under New York law, there was insufficient documentation of specific credit card accounts or assignment, failing to prove eCast's right to payment. "Rule 3001(e) does not relieve an assignee creditor from the obligation to provide competent proof of the assignment and the underlying debt, but simply limits who may file the claim of the assignee who has acquired the claim." *In re Taranto,* 2012 WL 1066300 (Bankr. E.D. N.Y. Mar. 27, 2012), slip copy.

See also *In re Reynolds*, 2012 WL 1190296 (Bankr. D. Colo. Apr. 9, 2012), slip copy, in which the court analyzed Bankruptcy Rule 3001(c)(2)(D), as revised, effective December 1, 2011, and whether that revised Rule controlled whether a claim may be disallowed because of the creditor's failure to attach the documentation required by Rule 3001(c). There is a conflict between the revised Rule 3001 and the Tenth Circuit's opinion issued before the Rule's revision, *In re Kirkland,* 572 F.3d 838 (10th Cir. 2009), with *Kirkland* "establishing a rule that adds a creditor's failure to attach documents to its proof of claim as an independent ground for denial of the claim as a matter of law. But intervening changes to the Bankruptcy Rules require the Court to question whether that aspect of *Kirkland*'s holding continues to control the issue currently before the Court." Rule 3001(c)(2)(D)'s remedies do not include disallowance of a claim, although 3001(c)(2)(D)(ii) refers to "other appropriate relief." The Rules Advisory Committee Note to 3001(c)(2)(D) says that "[f]ailure to provide the required information does not itself constitute a ground for disallowance of a claim." From this Committee Note, "the revised Rule 3001 makes it clear that a creditor who fails to fully comply with the documentation requirements of Rule 3001(c), primarily faces the *evidentiary* sanction of being precluded from introducing its documents at a subsequent hearing on a substantive objection to its proof of claim under § 502(b). Conversely, Rule 3001(c) does not provide authority for this Court to deny a creditor's claim based solely on its failure to attach documentation to its proof of claim under Rule 3001(c). Because claim disallowance falls outside of the remedies enumerated under Rule 3001(c)(2)(D), the rule precludes such a remedy." Since the debtors' objections to claims did not state any grounds under § 502(b), the court could not disallow the claims. Also, the debtors' scheduling of each of the claims triggered judicial estoppel, which prevented the debtors from now denying liability on the scheduled claims.

Bankruptcy Rule 3001 amendment to take effect December 1, 2012. Assuming Congress takes no action otherwise, a further change to Rule 3001(c) may take effect December 1, 2012. As explained by the Committee Note, subdivision (c) would be amended in several respects. The former requirement in paragraph (1) to file an original or duplicate of a supporting document is amended to reflect the current practice of filing only copies. The proof of claim form instructs claimants not to file the original of a document because it may be destroyed by the clerk's office after scanning. Subdivision (c) is further amended to add paragraph (3). Except with respect to claims secured by a security interest in the debtor's real property (such as a home equity line of credit), paragraph (3) specifies information that must be provided in support of a claim based on an open-end or revolving consumer credit agreement (such as an agreement underlying the issuance of a credit card). Because a claim of this type may have been sold one or more times prior to the debtor's bankruptcy, the debtor may not recognize the name of the person filing the proof of claim. Disclosure of the information required by paragraph (3) will assist the debtor in associating the claim with a known account. It will also provide a basis for assessing the

timeliness of the claim. The date, if any, on which the account was charged to profit and loss ("charge-off" date) under subparagraph (A)(v) should be determined in accordance with applicable standards for the classification and account management of consumer credit. A proof of claim executed and filed in accordance with subparagraph (A), as well as the applicable provisions of subdivisions (a), (b), (c)(2), and (e), constitutes prima facie evidence of the validity and amount of the claim under subdivision (f). To the extent that paragraph (3) applies to a claim, paragraph (1) of subdivision (c) is not applicable. A party in interest, however, may obtain the writing on which an open-end or revolving consumer credit claim is based by requesting in writing that documentation from the holder of the claim. The holder of the claim must provide the documentation within 30 days after the request is sent. The court, for cause, may extend or reduce that time period under Rule 9006.