

Chapter 7 Case Update

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CHAPTER 7 UPDATE

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CENTRAL STATES BANKRUPTCY WORKSHOP

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Panelists:

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Janet S. Baer, Judge
United States Bankruptcy Court
Chicago, Illinois
James D. Gregg, Chief Judge
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CHAPTER 7 UPDATE
By: James D. Gregg, Chief Judge
United States Bankruptcy Court, Western District of Michigan
2012

Numerous recent decisions have been published addressing chapter 7 bankruptcy issues. Most of the cases in this summary have been released during the last year. These materials include selected cases and succinctly identify the major issue(s) discussed in each reported case. The materials are intended as a case-finding aid to assist attorneys and trustees in chapter 7 cases.

It will be impossible for the panelists to discuss all the listed cases. Emphasis may be placed on some highly persuasive cases that have been decided by courts of appeals.

Questions are welcomed. Also, because this is a workshop, we encourage discussion by the attendees. However, please avoid any lengthy hypothetical fact situations. If there is a topic that especially interests you, advise the panel. Also, judges on the panel shall be unable to discuss issues currently pending in their districts. Any typographical errors are solely my responsibility and I hope they are forgiven.

JDG

MATERIALS

Definitions -- “claim”. (§ 101(5))

Walton v. Clark & Washington, P.C., 454 B.R. 537 (Bankr. M.D. Fla. 2011) (a law firm accepted postdated checks as payment of its attorneys’ fees from chapter 7 and chapter 13 debtors; after filing of the case, and sometimes after grant of discharge, the law firm would notify the debtor and then deposit the postdated check; the court stated a postdated check is “the functional equivalent of a promissory note”; a postdated check is a promise to pay a sum of money at a specified time and is a “claim” under § 101(5); “a prepetition claim is not converted into a postpetition claim simply because the time for payment is triggered by a postpetition event”; the cashing of the postdated check violates the automatic stay or, if after discharge, the § 524 injunction; further, the law firm’s fee arrangements relating to cashing of postdated checks created a conflict of interest).

See, e.g., In re Grossman’s, Inc., 607 F.3d 114 (3d Cir. 2010) (a tort claim arose prepetition and constitutes a claim under § 101(5) even when the injury first manifests itself postpetition; this decision overrules a prior Third Circuit decision, which was heavily criticized, Frenville).

Public access to papers. (§ 107)

In re Blake, 452 B.R. 1 (Bankr. D. Mass. 2011) (after the filing of the debtors’ chapter 7 case, creditor Verizon continued to send bills to the debtors, made demands for payments over the telephone, threatened to discontinue service and, finally, terminated the debtors’ internet service; after the debtors’ attorney filed a motion for violation of the stay and requested damages, the matter was settled without a motion to approve the settlement; however, a stipulation for dismissal was filed and the court scheduled it for a hearing; at the hearing, the parties initially refused to advise the court of the settlement amount because of a confidentiality agreement; because the court stated it would conduct a trial and not approve the stipulation to dismiss unless the amount was disclosed, the settlement amount was disclosed on the record; after the case was closed, and a request had been made for a copy of the settlement hearing transcript, Verizon filed a request that the transcript be redacted to delete references to the settlement amount; the court stated that normally papers filed in judicial proceedings should be open to the public and § 107(a) so provides; there is a presumption that the public may review papers unless an exception can be shown under § 107(b) or (c); also, the court noted that B.R. 9037(a) *requires* redaction of certain sensitive and private information from documents including social security numbers, taxpayer identification numbers, birth dates, and financial account numbers; in this instance, the court determined that there was not adequate cause to redact the settlement amount from the transcript; the strong policy reasons for public disclosure and access to information outweighed Verizon’s requested reasons for redaction).

NOTE: See B.R. 9018 which allows the bankruptcy court to protect the estate or creditors regarding trade secrets, confidential research, and commercial information or to shield an entity against any scandalous or defamatory matters. How often do bankruptcy courts permit “sealing of records?”

Involuntary cases. (§ 303)

Hushti v. Hushti, 451 B.R. 717 (E.D. Mich. 2011) (two brothers and their wives operated a business together; after a falling out between the brothers, a state court action was commenced and a judgment was entered in favor of the plaintiffs, one brother, his wife and the related LLC, in the amount of \$500,000 with the defendants, the other brother and his wife, being jointly and severally liable; later, the plaintiffs filed an involuntary petition against the defendants; the issue presented was whether, under § 303(b), the plaintiffs constituted “three or more entities” as petitioning creditors or whether the plaintiffs should be treated as only one creditor because of the joint judgment claim; on appeal, the district court determined that the form of the judgment mandated that only a single claim existed and therefore there were not the mandatory three creditors required to file the involuntary case; in dicta, the court opined that if the judgment was divisible among the holders and could be readily allocable among the creditors, the result might be different).

Cf. Matter of Sims, 994 F.2d 210 (5th Cir. 1993) (in determining the number of petitioning creditors, this court concluded that closely related companies with the debtor are to be considered as separate entities).

Qualification of trustee. (§ 322)

In re Schooler, 449 B.R. 502 (Bankr. N.D. Tex. 2010) (Section 322 requires a Trustee to obtain and file a bond with the bankruptcy court “conditioned on the faithful performance of [the trustee’s] official duties”; in this case, a creditor sued a surety under the trustee’s blanket bond as a result of the trustee’s alleged failure to faithfully perform her duties; after a trial, the court determined that the trustee failed to take sufficient action to recover assets relating to an inheritance and a probate estate; after reviewing authorities, the court also determined that, under Texas law, the trustee was grossly negligent and would be personally liable to the bankruptcy estate; therefore, the surety, under the terms of the bond, was liable in the amount of approximately \$112,000, the value of the “lost assets”; the court discusses at length the standard of care that must be met by a chapter 7 trustee).

In re R. Woolsey & Assocs., Inc., 454 B.R. 782 (Bankr. D. Idaho 2011) (after reopening its chapter 7 case, the debtor sued the chapter 7 trustee alleging that he breached his duties when he endorsed and delivered a \$43,000 check to the debtor’s secured creditor; the gist of the debtor’s complaint was that the trustee should have retained the funds as property of the estate and delivered the funds to the debtor as abandoned property when the case was closed or that the trustee should be held personally liable for failing to return the funds to the debtor; after trial, and *assuming* the trustee had

breached his fiduciary duties, the court focused on the fact that the debtor failed to prove its injury and the amount of damages that would be necessary to compensate the debtor; even if the creditor's security agreement was unperfected, it remained effective as between the debtor and the secured creditor; therefore, after abandonment and closing of the case, the funds would be subject to the creditor's lien against the collateral and in any proceeds from the sale of the collateral; although the court discusses the trustee's bond, the court commented that this was not involved in the litigation because B.R. 2010(b) "requires that an adversary proceeding on the trustee's bond be brought in the name of the United States for the use and benefit of the entity injured by the alleged breach of duty" and that required course of proceeding was not taken by the debtor).

Cf. Texas Pig Stands, Inc., 610 F.3d 937 (5th Cir. 2010) (trustee who failed to pay taxes was personally liable to taxing authority for his failure to pay the requisite taxes; in dicta, opinion states that trustee is only liable to a bankruptcy *estate* for acts of gross negligence); see also In re Reich, 54 B.R. 995 (Bankr. E.D. Mich. 1985) (which attempts to address the confusion between a trustee's liability in an "official" capacity and in a "personal" capacity).

Employment of professional persons. (§ 327)

In re McKenzie, 453 B.R. 737 (Bankr. E.D. Tenn. 2011) (the chapter 7 trustee, represented by two attorneys, sued a creditor for alleged avoidable transfers and equitable subordination of a claim; after the creditor prevailed on its motion to dismiss, the creditor then sued certain persons, including the two attorneys and the trustee, alleging malicious prosecution in the prior action; because the trustee's attorneys were named as defendants, the trustee sought to employ special counsel to defend him in the malicious prosecution action; the issue before the court was whether the trustee's defense counsel could be paid from the bankruptcy estate; analyzing prior case authority from within the Sixth Circuit, the bankruptcy court decided that counsel could be employed and paid for from the estate to defend the trustee; in its discussion, the court considered the concept of immunity, even assuming the possibility of a "rogue trustee").

Debtor's transactions with attorneys. (§ 329)

In re Chez, 441 B.R. 724 (Bankr. D. Conn. 2010) (the debtor paid her attorney \$1,800 for a chapter 7 case as the initial fee; the original fee disclosure stated the attorney would handle most of the routine matters but the representation excluded dischargeability actions, judicial lien avoidances, relief from stay matters, or other adversary proceedings; the attorney provided services and then charged the debtor \$226 for amendments to schedules; the debtor became dissatisfied with her attorney's representation and paid two other attorneys \$400 each; because of complaints made by the debtor on the record in another matter, the court issued an order to show cause why the debtor's first attorney should not disgorge fees under § 329; ultimately, the court ordered the debtor's attorney to disgorge \$226 because there was no supplemental

disclosure of the amendment fee as required by B.R. 2016(b); however, given the facts and the other work the attorney had done for the debtor pertaining to a nondischargeability issue, the court declined to order further disgorgement).

In re Kaib, 448 B.R. 373 (Bankr. W.D. Pa. 2011) (during a chapter 11 case, the court entered an order approving debtor's former attorney's fees; after conversion, the chapter 7 trustee filed a motion to "clarify" the fee award; the court determined that the prior order was not ambiguous and the prior \$7,000 reduction in fees was binding; notwithstanding numerous "irregularities" in disclosure, the court determined to not further reduce the awarded fees with the warning "less than the full measure of disclosure leaves counsel at risk that all compensation may be denied").

In re Burnett, 450 B.R. 116 (Bankr. E.D. Ark. 2011) (UST filed a motion seeking to require the debtors' attorney to disgorge fees under § 329, after the debtors sent two letters of complaint; the court found that as a "direct result" of the debtors' attorney's failure to provide legal services, they lost their home, fell behind on car payments, used a \$6,000 tax refund for other purposes than to cure their mortgage arrearages, filed a bankruptcy case and "ultimately, ended up living in a borrowed camper in an RV park"; the debtors' attorney attempted to conceal errors by removing documents from the debtors' file and making misleading statements to the debtors and in his testimony to the court; not surprisingly, the court ordered disgorgement of fees under § 329(b) in the amount of \$526 and the attorney was suspended from practice before the bankruptcy court until the state court committee regarding professional conduct made a determination).

In re Piccinini, 450 B.R. 677 (Bankr. E.D. Mich. 2011) (the chapter 7 debtor filed bankruptcy in July 2008; the court granted the debtor's request to remove his prior attorney in January 2011; the debtor's new attorney filed a motion for a court determination of the debtor's fee arrangement with his prior attorney under § 329 and also requested removal of a state court collection action in which the prior attorney sued the debtor; examining the purpose of § 329 and stating the statute "enables courts to carefully scrutinize compensation paid to debtors' attorneys, [provide] protection to debtors and creditors and [prevent] overreaching by attorneys", the court determined it had exclusive jurisdiction over the debtor's § 329 claim and the court stayed the state action pending its determination of the dispute).

In re Harwell, 439 B.R. 455 (Bankr. W.D. Mich. 2010) (the bankruptcy court determined it had the ability to disallow all fees when there is an improper disclosure; under § 330, a court is not required to dig into files and engage in guesswork whether an attorney is entitled to a fee; in this case, the court ordered the attorney to return \$500 to the debtor within 21 days).

See also In re Park-Helena Corp., 63 F.3d 877 (9th Cir. 1995) (it is permissible for a bankruptcy court to deny *all* compensation when an attorney fails to adequately disclose the retainer; such a denial is not an abuse of the bankruptcy court's discretion).

Compensation of officers. (§ 330)

In re Carwile, 460 B.R. 464 (Bankr. W.D. Ky. 2011) (an attorney was representing the debtors regarding a will dispute before the debtors filed a chapter 7 case without the attorney's knowledge; the chapter 7 trustee appointed a different attorney to represent the estate who subsequently represented the trustee in approving a settlement of the will dispute; the prior attorney, who was not employed by the estate, sought compensation on a *quantum meruit* basis in an amount of \$5,180; recognizing the result might be "harsh," the court properly denied the requested attorneys fees because there was no prior court approval of employment).

In re Weisel, 464 B.R. 231 (Bankr. W.D. Pa. 2012) (the debtors' attorney failed to enter into a written fee agreement as required by the rules of the bankruptcy court; later, the attorney filed a final fee application requesting about \$11,500 in fees and expenses; the trustee objected and the court limited the fees to those stated in the B.R. 2016 statement; based on a *sua sponte* review, the court noted that fees charged for taking an appeal, after promises to the debtor that the appeal would be at "no cost," would be denied; based upon the attorney having made "numerous misrepresentations and *not* being a "first-time offender," the court required the attorney to serve a copy of the opinion upon the Supreme Court of Pennsylvania Disciplinary Board so it would determine what sanction, if any, would occur).

COMMENT: After reading this opinion, this attorney was very lucky to have kept any fees whatsoever when disgorgement of all fees seems justified.

Effect of conversion. (§ 348)

In re Schick, 452 B.R. 884 (Bankr. W.D.N.Y. 2011) (the debtor filed a chapter 13 case and her plan was confirmed; an asset of the estate was an unfiled income tax refund, not claimed as exempt, which was subsequently received and spent by the debtor before the chapter 13 case was converted to chapter 7; the chapter 7 trustee demanded the income tax refund be turned over, less the amount of plan payments made during the pendency of the chapter 13 case; the court determined the debtor had no obligation to turn over any income tax refund because it was spent and no longer in the debtor's possession or control; § 348(f)(1)(A) mandates that property of the estate, in the converted case, is that which "remains in the possession of or is under the control of the debtor on the date of conversion").

Davis v. Weddington (In re Weddington), 457 B.R. 102 (Bankr. D. Kan. 2011) (some debtors are honest and unfortunate but others are especially bad – this debtor was in the latter category; the debtor filed a chapter 13 case and lied about his employment repeatedly, made no plan payments, delayed the proceedings, and spent money and spent his paychecks, bank accounts and tax refunds prior to the case ultimately converting to chapter 7; his expenditures included vacations, dining out, and internet dating; the chapter 7 trustee learned of these facts and objected to the debtor's discharge on grounds of false oath and fraudulent actions; because the debtor

converted to chapter 7 “in bad faith,” the court determined property of the estate included property of the estate as of the date of conversion rather than the chapter 13 filing date; the court also determined that, under Kansas law, the debtor was unable to exempt his hunting equipment, allegedly used in his guide business, as tools of the trade).

Closing and reopening cases. (§ 350)

Smith v. Silverman (In re Smith), 645 F.3d 186 (2d Cir. 2011) (after the filing of the debtor’s chapter 7 bankruptcy case, the debtor filed a motion to compel the trustee to prosecute a state court action involving a business dispute; because the estate was administratively insolvent and the trustee did not want to litigate, the bankruptcy court denied the debtor’s motion and the debtor failed to appeal the order; the trustee subsequently abandoned the causes of action pertaining to the debtor’s business dispute; after the case was closed for more than 18 months, the debtor and two other persons filed a motion to reopen the case so they could sue the trustee and the insurers who issued the bond because the trustee assertedly breached his fiduciary obligation by failing to pursue the business dispute; the court of appeals stated the bankruptcy court correctly decided not to reopen the case and the appellate court issued an order to show cause why the debtor, the other persons, and their attorney should not be sanctioned for \$5,000 in damages, with joint and several liability).

Automatic stay. (§ 362)

In re Bucchino, 439 B.R. 761 (Bankr. D.N.M. 2010) (at the time the chapter 7 case was filed, the debtors had money in their bank account at Wells Fargo Bank; when the bank placed an administrative freeze on the debtors’ account, it did not violate the automatic stay under § 362 and no willful violation of the stay under § 362(k) took place; in a footnote, the court notes it is curious why a bank would attempt to discover that a debtor had filed for bankruptcy and then freeze the account, perhaps voluntarily subjecting itself to a turnover obligation; the court also addresses the issue of *when* a bank account becomes exempt and addresses a split of authority in which one view is the exemption is effective when claimed and the other view is the exemption is effective after the expiration of the 30-day objection period).

Aja v. Emigrant Funding Corp. (In re Aja), 442 B.R. 857 (1st Cir. BAP 2011) (the debtor, who managed a LLC, filed three chapter 11 petitions that were dismissed; the debtor then transferred the LLC’s real property, which was subject to a mortgage, to herself personally and filed another chapter 11 case which was converted to chapter 7; the bankruptcy court granted the creditor’s motion for relief from stay; rejecting the debtor’s argument that the “bankruptcy court exhibited poor judicial temperament and bias” and that the loan was usurious, the BAP reiterated prior rulings that a chapter 7 debtor does not have standing to prosecute an appeal involving property of the estate unless the appeal would affect the debtor’s discharge rights).

In re Vicente, 446 B.R. 26 (Bankr. D. Mass. 2011) (this court states that abandonment of real estate by a chapter 7 trustee removes the real estate from the bankruptcy estate but the real estate continues to be property of the debtor and the stay remains in effect; the court also implies that the stay against the debtor would terminate under § 362(c)(2) upon entry of the discharge; in this case, the court determines that the creditor demonstrated “cause” for relief from stay under § 362(d)(1) because of 35 missed monthly mortgage payments and under § 362(d)(2) because of the undisputed fact that there was no equity in the property).

In re Reswick, 446 B.R. 362 (9th Cir. BAP 2011) (noting there are “two lines of cases addressing the scope of termination of the stay under § 362(c)(3)(A),” the BAP adopts “the minority -- but better-reasoned -- interpretation;” the BAP holds that the automatic stay is terminated in its *entirety* and not only “with respect to the debtor”).

In re Secrest, 453 B.R. 623 (Bankr. E.D. Va. 2011) (the chapter 7 debtor’s wife sought relief from the automatic stay to pursue an equitable distribution of property of the bankruptcy estate in a pending divorce case; the most significant asset appeared to be the marital home valued at \$1.3 million with a lien of less than \$500,000; no exemption was claimed regarding the residence; the court stated that whether to permit a determination of property rights in the state court is discretionary; given the facts of the case, the court determined that the trustee should sell the residence under § 363(h) and convert the residence into proceeds; the state court could continue to determine the equitable distribution of the estate provided it did not divide the property of the bankruptcy estate; the state court was permitted to conduct an equitable distribution hearing provided that property of the estate was not transferred to the non-filing spouse and a monetary award was made).

In re Blixseth, 454 B.R. 92 (9th Cir. BAP 2011) (in this case, a chapter 7 debtor failed to list certain personal property on the statement of intention that was the subject of a creditor’s security interest; there were red flags that the debtor was wealthy and had substantial assets; the secured creditor took action to conduct a sale on some of its collateral and the trustee countered by filing a motion to enforce the automatic stay under § 362; with regard to § 362(h), the trustee argued that the stay was terminated only with respect to collateral that was listed on the debtor’s schedules; after reviewing the schedules, § 362(h), and § 521(a)(2), the BAP concluded that the plain language of the statute mandates that “all personal property secured by a scheduled debt is released from the automatic stay if a debtor fails to timely file and comply with her statement of intention”).

In re Miller, 447 B.R. 425 (Bankr. E.D. Pa. 2011) (before the filing of their chapter 7 bankruptcy case, the debtors were represented by an attorney in state court landlord-tenant litigation; after the bankruptcy, the state court action was stayed but the debtors’ attorney continued to send invoices for unpaid fees during the following four months; the debtors’ bankruptcy attorney then filed a motion for stay violation under § 362(k); the court states that the statute is “remarkably simple” and requires imposition of sanctions only if three conditions are met: the offending party must have violated the stay, the

violation must have been willful, and the willful violation must have caused injury; because there was no injury or actual damages, the court denied the motion; with regard to the attorneys' fees incurred to file the motion, the court found the fees were not reasonable and necessary under the circumstances).

In re Estrada, 439 B.R. 227 (Bankr. S.D. Fla. 2010) (after her chapter 7 case was filed, the debtor received a letter from the mortgage company stating it was willing to enter into a reaffirmation agreement; however, the letter also stated that the creditor "will suspend all credit bureau reporting if the debt is not reaffirmed prior to a discharge"; the debtor filed a motion to hold the creditor in contempt for violation of the automatic stay; noting that many courts permit a creditor to send a postpetition letter proposing a reaffirmation agreement without violating the stay, the court states that the communication must not be threatening or coercive; because of the threat to suspend the reporting of mortgage payments when the debtor was not in default and was current under the loan, the creditor violated the automatic stay; the creditor represented it would change the language in its letters and the court therefore denied the requested damages).

In re Govero, 439 B.R. 917 (Bankr. S.D. Fla. 2010) (after the joint chapter 7 debtors filed their case, a collection agent was served with the notice of bankruptcy filing and imposition of the automatic stay under § 362 regarding an *existing* creditor; several weeks later, the collection agent was retained by *other* creditors to collect a prepetition debt owed by the debtor-wife; the collection agent contacted the wife twice in writing and at least seven times by telephone in an attempt to collect the *other* creditors' debt; although the collection agent opened a new account for the debtor-wife and there was no reference to the previously received notice in the *other* creditors' files, the court determined the creditors had knowledge of the bankruptcy case and violated the stay; the collection agent should have undertaken some activity to adjust its programming and procedures to not attempt to collect the debt in contravention of the stay; the court scheduled a separate evidentiary hearing to determine damages).

Use, sale or lease of property. (§ 363)

In re Miell, 439 B.R. 704 (8th Cir. BAP 2010) (the chapter 7 trustee filed a motion to sell several parcels of real estate free and clear of liens to a bank, which presumably was the first mortgagee; creditors who held junior liens against two of the parcels of real property were given notice of the sale motion and failed to object; the bankruptcy court order authorized the trustee's proposed sale and the sale was consummated without an appeal; the junior lienholders subsequently sued the bank purchaser contending there was a denial of due process because the trustee's motion did not specifically identify the junior lienholders or specifically describe their liens; although the trustee's failure to serve a copy of the motion violated a procedural rule, there was no denial of due process because the junior lienholders could have objected based upon violation of the rule; the content of the motion was sufficient under Mullane v. Central Hanover Bank, and the junior lien holders received a copy of the notice of the proposed sale; in accordance with the recent Supreme Court Espinosa decision, lienholders were given a

full and complete opportunity to litigate and no Rule 60(b)(4) relief was appropriate; the BAP concluded that the bankruptcy court properly dismissed the junior lienholders' complaint against the purchasing bank).

In re JL Building, LLC, 452 B.R. 854 (Bankr. D. Utah 2011) (the chapter 7 trustee moved to sell real property and to assume and assign leases to the proposed buyer of the property; the court noted that there were four lienholders regarding the property to be sold and the first and second position lienholders consented to the sale even though the sale price may have been less than the aggregate value of all liens; the court authorized the sale, permitted immediate payment of the commission and closing costs, and ordered the balance of the proceeds to be escrowed until such time that the various lienholders' interests could be litigated or otherwise determined).

See Winget v. JP Morgan Chase Bank, N.A., 537 F.3d 565 (6th Cir. 2008) ("We join other circuits in holding that a bankruptcy court's sale order is a final order for res judicata purposes A sale order signals an end to litigation in a bankruptcy proceeding; with the execution of the sale order, the debtors' assets are judicially sold and no further litigation can be brought regarding those assets without forcing the court to undo the sale, an action of the very kind res judicata seeks to prohibit. If sale orders were not final, parties could continue to litigate issues regarding the assets long after their sale, which is certainly an outcome worth prohibiting."; the Sixth Circuit therefore upheld the dismissal of a complaint which was seeking to litigate about assets which were subject to the bankruptcy court sale).

In re Wolk, 451 B.R. 468 (8th Cir. BAP 2011) (a chapter 7 trustee sought to sell the estate's interest and a non-debtor wife's interest free and clear of the wife's interest in residential property under § 363(h); at trial, the bankruptcy court determined that *all* the equity in the residence resulted from the non-debtor wife's financial contributions; under state law, there is a rebuttable presumption that each co-owner holds an equal share; because the presumption was rebutted, it was determined that the bankruptcy estate would not benefit from the sale of the jointly held residential property; further, the bankruptcy court found there would be detriment to the non-debtor wife co-owner because of her history of depression, significant health issues, and because the equity in the residence was not a result of contributions from debtor; the BAP affirmed).

Allowance of administrative expenses. (§ 503)

In re marchFirst, Inc., 448 B.R. 499 (Bankr. N.D. Ill. 2011) (§ 503(a) provides that a creditor may timely file a request for payment of an administrative expense or tardily file a request if permitted by the court; the court states that this implicitly permits bankruptcy courts to set deadlines for the filing of administrative expense requests; in this case, the creditor filed amended requests after the deadline for lessors under rejected leases to request administrative expenses; the court determined that the amended request did not relate back under B.R. 7015 because the original and amended requests arose "out of entirely different conduct at entirely different times"; the court also rejected the creditor's argument based upon an alleged filing of an informal proof of claim; finally,

because there was a final judgment rendered against the creditor in an adversary proceeding which covered the same operative facts, the court determined that *res judicata*, i.e., claim preclusion, applied).

In re Keystone Surplus Metals, Inc., 445 B.R. 483 (Bankr. E.D. Pa. 2010) (a principal of the debtor filed an administrative expense claim in the amount of approximately \$216,000 based upon alleged ordinary course loans made to the debtor during the pendency of a chapter 11 case, and prior to conversion to chapter 7; the principal relied upon § 364(a) which permits an administrative expense when unsecured debt is incurred in the ordinary course of business; this court utilized a two-prong test to determine whether the debt had been incurred in the ordinary course; under the “vertical” dimension inquiry, the focus is upon the “creditor’s reasonable expectations”; under the “horizontal” dimension inquiry, the focus is on whether “the transaction is the sort commonly undertaken by companies in that industry”; reviewing the facts, the court determined the principal failed to meet either the vertical dimension or the horizontal dimension inquiries and the administrative expense request was denied).

In re Hall, 443 B.R. 59 (Bankr. D. Md. 2010) (a townhouse association requested administrative expenses under § 503(b)(1) on account of unpaid homeowners’ association dues for approximately \$3,900; because the fees were attributable to the prepetition time period, it was argued that there was not adequate benefit to the estate; in its analysis, the court considered § 523(a)(16) regarding nondischargeable condominium and association fees; the court recognized three lines of decision: (1) such fees are administrative expenses, (2) expenses are entitled to administrative priority because they confer benefit on the properties within the association, and (3) administrative expense priority is warranted if it can be shown there is a benefit to the estate and not just upon the condominium; this court required specific evidence of benefit conferred upon the estate which the creditor failed to provide; the court stated that the association was protected by the nondischargeability of the obligations and because of possible relief through imposition of a lien).

In re Resource Technology Corp., 662 F.3d 472 (7th Cir. 2011) (a chapter 11 debtor converted to chapter 7 and the trustee continued business operations for a short period of time; during operations, “foul odors as a result of negligent maintenance of the gas collection and control system” occurred which constituted a legal nuisance, and therefore a tort; the adjoining land owner argued that Reading v. Brown permitted an administrative expense under § 503; the Seventh Circuit rejected this argument because the chapter 7 debtor was “not operating in any meaningful sense during the brief period in which the trustee was in charge” and that the trustee had no resources to correct the condition except to liquidate the assets as quickly as possible).

Determination of secured status. (§ 506)

In re Jack Kline Co., Inc., 440 B.R. 712 (Bankr. S.D. Tex. 2010) (an alleged over-secured creditor must request postpetition attorneys’ fees by filing a § 506(b) application; a proof of claim form does not pass muster; the court must first determine

that a creditor is over-secured *after* any § 506(c) surcharge is determined; to establish over-secured status, a B.R. 3012 motion is necessary and the creditor bears the burden of proof; in this case, the secured creditor failed to file the requisite § 506(b) application and to request fees under B.R. 2016; even assuming this was “accidental”, such failure constitutes misconduct; although a prior sale order may have authorized the creditor to collect postpetition interest at a default rate, this provision of the order may be set aside under Rule 60(b)(3) because the trustee was prevented from litigating the issue of whether the creditor was entitled to receive postpetition interest and recover its postpetition attorneys’ fees; the court further determined that the trustee was able to surcharge the creditor under § 506(c) for a *pro rata* share of the trustee’s reasonable and allowable attorneys’ fees, calculated to be approximately \$8,000; other expenses, including the real estate commission, title insurance and property taxes, were not surchargeable because they were already paid from the sale proceeds and permitting a surcharge for those expenses would constitute impermissible “double dipping”).

In re Cook, 449 B.R. 664 (D.N.J. 2011) (the bankruptcy court denied a chapter 7 debtor’s motion to void a second mortgage lien on his real property; on appeal, the district court considered whether a lien is void under § 506(d) if it is junior to a senior lien which exceeds the appraised value of the real property; relying on Dewsnup v. Timm, this court followed other mainstream holdings that lien strip offs are not permitted in chapter 7 because of “the pre-Code rule that liens pass through bankruptcy unaffected”).

See In re Talbert, 344 F.3d 555 (6th Cir. 2003) (in chapter 7 cases, a strip off under § 506(d) is not permitted because of the rule that liens ride through bankruptcy unaffected and a debtor’s fresh start does not apply to *in rem* claims).

NOTE: Dewsnup v. Timm, 502 U.S. 410, 112 S.Ct. 773 (1992) (stands for the proposition that a chapter 7 debtor cannot *strip down* a creditor’s under-secured lien in real property to the amount of the value of its collateral; most courts have used this analysis to reject *strip offs* of liens in chapter 7 cases).

Exemptions. (§ 522)

In re Wengerd, 453 B.R. 243 (6th Cir. BAP 2011) (the debtors claimed a homestead exemption under Ohio law and the chapter 7 trustee objected to the exemption; the trustee argued that the debtors intended to abandon their homestead postpetition because they had entered into contract for the sale of their home prior to the petition date and moved into an apartment four days after the chapter 7 was filed; the BAP reversed the trial court and stated any intention to abandon the exempted homestead postpetition was irrelevant principally because exemptions are determined as of the filing date).

In re Hall, 453 B.R. 22 (Bankr. D. Mass. 2011) (in this chapter 7 case, the debtor filed a prepetition wrongful termination claim against her former employer; on her schedules, the claim was disclosed with a value of “unknown” and on her list of exemptions the

value of the claim was also listed as “unknown” but the debtor explicitly listed the claim as exempt under § 522(d)(5), the so-called “catch all” exemption; the chapter 7 trustee did not object to the exemption; the debtor argued that Taylor v. Freeland & Kronz, and the failure to object to the debtor’s listing “unknown” resulted in the exemption of the entire asset and its removal from the bankruptcy estate; the trustee asserted that Schwab v. Reilly only permitted the debtor to exempt her interest in the wrongful termination claim up to a specified dollar amount; the bankruptcy court focused on the issue of “*what did the debtor claim as exempt?*”; relying on many pre-Schwab decisions, the court determined that a chapter 7 trustee is not required to seek clarification or object to an ambiguous exemption; the court interpreted the debtor’s exemption claim to incorporate the maximum monetary limitation provided in § 522(d)(5); the court therefore limited the debtor’s exemption to \$11,190 with any excess amount to remain property of the bankruptcy estate for the benefit of creditors).

In re Salazar, 449 B.R. 890 (Bankr. N.D. Tex. 2011) (trustees objected to exemptions in nine different bankruptcy cases and the court consolidated the objections for decision; in each case, the debtor claimed the exemption, whether under federal or state law exemptions, as “100% of FMV”; the court noted the holding in Schwab v. Reilly, that “an interested party need not object to an exemption claimed in this manner [a specific dollar amount] in order to preserve the estate’s ability to recover value in the asset beyond the dollar value the debtor expressly declared exempt”; this court considered the issue of what happens when a trustee objects to an exemption claim of “100% of FMV”; one approach is to hold an evidentiary hearing regarding the value; another approach is to declare the objection to be “facially valid” and require a debtor to amend the exemption and state a specific dollar amount; this court adopts the second approach and states no valuation hearing is necessary).

In re Massey, 465 B.R. 720 (1st Cir. BAP 2012) (the debtors claimed exemptions regarding their single family home and a vehicle as “100% of FMV” under § 522(d); trustee challenged the residence exemption because it exceeded statutory limits and argued that the form of the exemption attempted to capture post-petition appreciation; the debtors argued that “100% of FMV” was authorized by the Supreme Court in Schwab v. Reilly as a “phrase of art;” the bankruptcy court overruled the claimed exemptions and on appeal the BAP affirmed; the BAP stated that Taylor “stands for the narrow proposition that a trustee must object timely to a facially invalid exemption” and Schwab “stands for the equally limited proposition that the time limits for objecting to an exemption do not apply if the claimed exemption is valid on its face;” the BAP astutely states that no court has interpreted Schwab “as either unfettered authorization for debtors to exempt assets in-kind, or as a mandate for courts to allow such exemptions;” an exemption claim of “100% of FMV” is facially invalid and no hearing is necessary because debtors are required “to state their exemptions accurately and in conformance with statutory limits, by identifying the value of the claimed exemption up to or in a specific dollar amount”).

In re Messer, 2012 WL 762828 (9th Cir. BAP 2012) (the chapter 7 debtor “claimed as exempt 100% of the fair market value of her vehicle listed at \$12,000” which was over

the \$5,000 statutory limit for a vehicle under applicable Arizona law; the BAP affirmed the bankruptcy court's determination that the debtor ignored the statutory cap and claimed an exemption in excess of what was authorized; the Supreme Court language in Schwab addressing "100% of FMV" does not stand for the proposition that a debtor may claim a valid exemption which exceeds a statutory limit; the bankruptcy and the BAP observed language which states "if the trustee objects and the objection is sustained, the debtor will be required either to forfeit the portion of the exemption that exceeds the statutory allowance, or to revise other exemptions or arrangements with her creditors to permit the exemption").

In re Luckham, 464 B.R. 67 (Bankr. D. Mass. 2012) (this court also determines that § 522(d)(1) allows a debtor to exempt only the "aggregate *interest*, not to exceed \$21,625 in value, in real property;" because § 522(d)(1) limits the claimed exemption in property to a specific dollar amount an exemption claim of "100% of FMV" or "100% of Equity" is impermissible when the trustee objects; the court then considered whether an evidentiary hearing would be required to determine value as of the petition date or not; this court agrees that the trustee asserted a "facially valid objection" because the debtors had failed to set forth a dollar amount in accordance with the statute; the debtors' policy argument that trustees would leave bankruptcy estates open to eventually realize potential post-petition equity increases is irrelevant and does not defeat the monetary limits set forth in the Bankruptcy Code).

In re Rice, 452 B.R. 623 (Bankr. E.D. Mich. 2011) (before the bankruptcy case was filed, the debtor received \$107,000 in retirement benefits from the State of Michigan by direct bank account deposit; the next day, the debtor withdrew \$100,000 and purchased a cashier's check made payable to himself; later, the debtor negotiated the cashier's check, kept \$5,000 and purchased another check for \$95,000; the debtor failed to disclose the existence of the cashier's check on his schedules; at the first meeting of creditors, the debtor orally disclosed the existence of the check and then he filed amended exemptions claiming the check as exempt under § 522(d)(12); the trustee objected to the exemption arguing that the funds were not held in a tax exempt account and also arguing that the amended exemption was in bad faith; the court determined that the debtor would not be permitted to amend his exemptions because the omission was intentional or made with reckless indifference; also, the court stated that the § 522(d)(12) exemption was improper because the funds were not in an exempt retirement account on the petition filing date).

In re OBrien, 443 B.R. 117 (Bankr. W.D. Mich. 2011) (this court rejects opinions of two other judges which state that it is "too late" to exempt income tax refunds after they have been spent; the court states that exemptions are determined as of the filing date and when exemptions are amended, they normally relate back to the filing date as well; however, amendments to exemptions must be made in good faith and not be prejudicial to the estate; in this case, based upon the facts, the debtors' amendment to the exemptions was permitted but the debtors' attorney was warned to list estimated tax refunds as exempt in future cases).

In re Howe, 439 B.R. 257 (N.D.N.Y. 2010) (in their original schedules, the debtors claimed a \$100,000 homestead exemption under state law; later, although the debtors apparently had \$55,000 in equity in the residence, and without opposition by the debtors, the secured creditor was granted relief from stay regarding the homestead; the trustee took action to recover and administer the non-exempt tax refunds; the debtors then amended their exemptions to delete the homestead exemption and exempt the tax refunds; on appeal, the district court agreed with the bankruptcy court that the amendment to exemptions would be denied as prejudicial; the trustee lost the opportunity to sell the house and obtain the equity because of the debtors' untimely amendment).

In re Lesak, 2012 WL 1029313 (Bankr. N.D. Ill. 2012) (in their bankruptcy schedules the chapter 7 debtors listed an annuity valued at \$247,836; although the annuity arose from a structured settlement for a personal injury to the debtor-wife, the annuity was payable to the debtor-husband in settlement of a claim for loss of consortium; the debtors claimed the annuity as exempt under Illinois law based upon proceeds paid under a life insurance contract upon death of an insured, the right to receive payment under a life insurance contract necessary to support a debtor or a debtor's dependent, and a right to receive payments, up to \$15,000, as a result of personal bodily injury; the court interpreted the Illinois exemption provisions, including a two year time limitation for the life insurance annuity, and determined that the exemptions claimed were not valid; because the time limit for claiming one of the exemptions expired, the court did not need to determine the interesting issue of "whether loss of consortium is a personal bodily injury" under the Illinois exemption).

In re Kemp, ___ B.R. ___, 2011 WL 4434996 (Bankr. D.D.C. 2011) (the District of Columbia exemption regarding a debtor's right to receive a pension plan payment is identical to § 522(d)(10); the debtor attempted to exempt a bank checking account arguing that the money in the account came from pension plan payments; the chapter 7 trustee objected to the exemption and requested a turnover; the court cites prior decision interpreting the exemptions statute and concludes that benefits already received pre-petition cannot be claimed as exempt noting there is no language involving "property that is traceable to;" the court also determines the trustee's "is entitled to turnover of the funds that remain on hand in the account, or that came from the account, and is entitled to a judgment to the extent that such sum falls short of [the amount in the account as of the petition date]").

In re Flattery, 444 B.R. 501 (Bankr. D. Mass. 2011) (at the time the debtors' chapter 7 case was filed, the debtor-wife had a pending claim for employment discrimination and wrongful termination; the debtor-wife claimed the potential recovery as exempt under § 522(d)(11)(D) and (E); the trustee objected to the exemption, asserting that the claim was not for a "personal bodily injury" or for a "loss of future earnings"; recognizing that courts have "struggled to understand the scope of this exemption", this court states that § 522(d)(11)(D) "is limited to payments on account of personal bodily injury" and nothing in the debtor's claim involves such injury because the claim was for emotional distress; with regard to the exemption for loss of future earnings under § 522(d)(11)(E), the court

concludes that the state law action must be decided before it can be determined whether a valid exemption exists or not).

In re Lewis, 387 F. App'x 530, 2010 WL 2813328 (6th Cir. 2010) (before her chapter 7 bankruptcy case, the debtor elected to take an early buyout from Ford Motor Company in accordance with agreed upon options with the UAW; by electing the buyout, the debtor waived "all her rights to future earnings, pension benefits, unemployment compensation, and UAW member benefits"; the debtor received one payment prior to filing bankruptcy and a second payment in the amount of approximately \$27,600 after the bankruptcy filing; the debtor claimed her rights to receive payment as exempt under § 522(d)(11)(E); the trustee objected because he argued that "loss of future earnings" involves a tort claim with the loss due to a bodily injury; agreeing with the bankruptcy court and the district court, the Sixth Circuit states the statute is unambiguous and subsection (E) does not require any bodily injury; the word "or" separates subsection (E) from subsection (D)).

In re Johnson, 452 B.R. 804 (Bankr. W.D. Wash. 2011) (the debtor was the beneficiary of his mother's IRA and, after her death, the funds were transferred by a *trustee-to-trustee* transfer to an account the debtor established; about four years later, the debtor's father died; the debtor was also the beneficiary of his father's IRA funds and he transferred them to an account he established by another trustee-to-trustee transfer; prior to the bankruptcy filing, the debtor received distributions from each of the inherited IRA accounts; after the case was filed, the trustee objected to the debtor's claim of exemptions arguing that the inherited IRAs were not exempt under § 522(d)(12); this court states that two requirements must be met to exempt funds under § 522(d)(12): the amount exempted "must be retirement funds" and those funds must be "in an account that is exempt from taxation under one of the designated provisions" of the IRC; this court identifies many prior decisions which address inherited IRAs and concludes that, in this instance, the inherited IRA funds are exempt).

In re Thiem, 443 B.R. 832 (Bankr. D. Ariz. 2011) (the debtor-wife inherited an IRA from her mother prior to bankruptcy; the funds from the mother's traditional (non-Roth) IRA were transferred into the inherited IRA account within 60 days of the mother's death; the debtor-wife claimed the inherited IRA funds as exempt under § 522(b)(3) and the Arizona state exemption for a retirement plan; the chapter 7 trustee timely objected to the exemption; the court noted that under BAPCPA Congress created new exemptions for certain retirement funds regardless of whether state exemptions or federal exemptions are claimed; § 522(b)(3)(C) applies in opt-out states and § 522(d)(12) applies when a debtor elects federal exemptions; the court states that § 522(b)(4)(C) permits exemptions in IRAs when there are direct, i.e., trustee-to-trustee transfers; after carefully examining prior decisions, the Code language regarding exemptions under state and federal law, and also considering a number of technical arguments, the court determined that the debtor may exempt an inherited IRA under applicable Arizona law).

In re Mathusa, 446 B.R. 601 (Bankr. M.D. Fla. 2011) (the chapter 7 trustee objected to an IRA exemption claimed under Florida law; the debtor-wife had inherited an IRA from

her mother prior to the case; after her mother's death, the debtors made a trustee-to-trustee transfer to the IRA and followed all legal requirements under the IRC; the court notes that § 522(b)(3)(C) is identical to § 522(d)(12) and this results in equal treatment regarding retirement funds regardless of whether a state opts out of the federal exemption scheme or not; although the court states that the debtors are unlikely to be able to claim an exemption under applicable Florida law, § 522(b)(3)(C) permits the exemption).

In re Daley, 459 B.R. 270, 2011 WL 4806905 (Bankr. E.D. Tenn. 2011) (much before filing a chapter 7 case, a debtor created a Merrill Lynch IRA during May 2008, depositing approximately \$61,000; when the account was created, the debtor failed to check the form "Decline Margin Lending" box and he authorized the securities to "be loaned to Merrill Lynch or loaned out to others;" although the IRA received a favorable determination under the Internal Revenue Code, the trustee objected to an otherwise property § 522(b)(3)(C) exemption because the debtor engaged in a "prohibited transaction" thereby causing the IRA to lose tax exempt status and forfeit the right to claim an exemption under state law; in an extensive analysis, the bankruptcy court ruled that the debtor's failure to mark the "Decline Margin Lending" box did *not* constitute a prohibited transaction; however, by granting the broker a lien on the IRA at the inception of the account, this was an extension of credit or a guarantee which *was a prohibited* transaction; the court says the "guarantee is, in effect, also a contract to make a loan to the trust" and therefore the opening of the account constituted a prohibited transaction; because this debtor failed to read the boilerplate print or understand the IRA document, the debtor was not entitled to a Tennessee exemption under § 522(b)(3)(C) exemption).

In re Pfiester, 449 B.R. 422 (Bankr. D.N.M. 2011) (after the debtor filed his chapter 7 bankruptcy case, the trustee avoided and recovered a preferential transfer, in the amount of about \$9,000, from a credit card company; the debtor claimed the proceeds from the preference recovery as exempt and the trustee objected; the key determination under § 522(g)(1)(A) was whether the payment made to the credit card company was "voluntary" or "involuntary"; the debtor argued that it was an involuntary transfer because it was made in connection with a state court divorce settlement and the money was paid from funds received from the sale of real property in accordance with the state court order; the bankruptcy opinion contains a very persuasive discussion of what constitutes a "voluntary payment" and identifies prior court decisions; under the facts of this case, this court ruled that the transfer was voluntary and the debtor could not exempt the trustee's preference recovery proceeds).

In re Dickson, 655 F.3d 585 (6th Cir. 2011) (although this is a chapter 13 case, it may be applicable in a chapter 7 case; under Kentucky law, a *lis pendens* does not perfect an interest in a manufactured home which is personal property and it does not create a lien against property or establish priority; § 522(h) authorizes a debtor to avoid certain transfers provided the debtor could have exempted the property under § 522(g)(1), i.e., if the transfer was not voluntary and was not concealed by the debtor; in this case, although there was a voluntary transfer regarding the real estate mortgage, the manufactured home, as personal property, was not covered by the mortgage; rather,

the transfer that perfected the creditor's lien on the manufactured home was the state court judgment, which is an involuntary transfer; therefore, the debtor had direct standing under § 522(h) and the Sixth Circuit did not reach the issue of whether the debtor had "derivative standing" as was determined by the BAP).

In re Osejo, 447 B.R. 352 (Bankr. S.D. Fla. 2011) (approximately three months prior to filing her chapter 7 case, the debtor sold non-exempt securities and used more than \$42,000 of the proceeds to improve her homestead property; the trustee discovered that non-exempt property was used to improve the exempt homestead property and objected to the increase of the debtor's exemption; the debtor failed to disclose the use of the property and "forgot" about her securities sale as well as belatedly disclosing other assets; under these facts, the court found the debtor converted non-exempt property into homestead property with the intent to hinder creditors and the increased amount of the homestead exemption was disallowed; the court stated: "Honesty after one is caught is honestly not honesty.").

Exceptions to discharge. (§ 523)

Sharfarz v. Goguen (In re Goguen), 453 B.R. 452 (1st Cir. BAP 2011) (Sharfarz, the creditor, entered into a construction contract with Goguen, the debtor, in September, 2006 with necessary permits to be obtained and renovation to be completed by March, 2007, in a total amount of approximately \$171,000; after delays in getting the permits, construction progressed slowly until November, 2007, when the debtor informed the creditor that project was underfunded and the money had run out; by then the entire contract price had been paid and the creditor hired a new contractor to complete the project at an additional cost of over \$100,000; after the debtor filed for bankruptcy, the creditor sued for a nondischargeable debt under § 523(a)(2)(A); based upon the debtor misrepresenting the problems in the building permit process, the bankruptcy court excepted the debt from discharge; on appeal, the BAP properly focused upon whether the misrepresentation caused the injury; there were no proofs to establish a "direct link" between the misrepresentations about the permits and the creditor's damages; also, the misrepresentations regarding the permit process occurred *after* signing of the construction contract and therefore, the misrepresentations could not have induced the creditor to enter into the contract).

In re Dillon, 446 B.R. 260 (Bankr. N.D. Tex. 2010) (the debtor and another party entered into a real estate purchase agreement for nearly \$7 million; the original contract was cancelled and subsequently reinstated; because the new agreement was entered into after banking hours, the debtor gave the creditor a \$225,000 personal check that was to be replaced by a cashier's or certified check two days later; the debtor determined that his principal, a group of investors, would not go forward with the new agreement because of a dispute about application of certain pipeline easement proceeds and the debtor declined to replace the personal check with a cashier's or certified check; when the personal check was deposited, it was dishonored either for insufficient funds or because the debtor stopped payment; the creditor obtained a state court default judgment, *not* based upon fraud, and the judgment was assigned to the plaintiff in the

nondischargeable debt action; addressing the plaintiff's fraud claim under § 523(a)(2)(A), the court first determined that the debtor did not receive anything of value for the NSF check except perhaps for two extra days pursuant to an amendment of the agreement; also, the court determined that tendering the check was not fraudulent under the facts because there was no intention to deceive; the court also discusses the issue of whether tendering a check amounts to a representation or not; finally, regardless of whether a representation occurred, the court decided that there was not justifiable reliance by the creditor).

In re Harwood, 637 F.3d 615 (5th Cir. 2011) (the debtor served as president of B & W, a consumer lending business, which was then reorganized into a limited partnership, FNFS (the facts are convoluted); the debtor withdrew funds from FNFS for personal use including a down payment on a family home and a new car; although the B & W corporate board routinely approved employee loans, the board was only generally aware of the debtor's growing indebtedness and the fact that the debtor did not make any significant efforts to repay his debts; after the debtor owed B & W and/or FNFS almost \$850,000, a lawsuit was brought and the debtor filed a chapter 7 case; in analyzing whether a fiduciary obligation existed, the Fifth Circuit concluded "that an officer of a corporate general partner who is entrusted with the management of the limited partnership and who exercises control over the limited partnership . . . owes a fiduciary duty to the partnership" under § 523(a)(4); because this debtor exercised near-complete control over the business entities, the circuit determined that the debtor stood "in the same fiduciary capacity to the limited partners as a trustee stands to the beneficiaries of the trust"; under the facts of this case, the debtor owed the entities a nondischargeable debt).

In re West, 446 B.R. 813 (Bankr. N.D. Ohio 2010) (the chapter 7 debtor breached a lease with his landlord; in addition to not paying rent, the debtor and his three minor children left the leased premises in a "sub-par" condition, including a broken toilet, holes in the property's walls and doors, crayon marks on the carpeting, etc.; the court dismissed the landlord's complaint under § 523(a)(6) based on an alleged willful and malicious injury; given the facts in this case, this was not an instance where the debtor crossed the line to committing what is tantamount to vandalism of the leased premises).

In re Boring, 445 B.R. 576 (Bankr. M.D. La. 2011) (the chapter 7 debtor was a licensed manufactured home mover who agreed to move the creditor's home in a job that eventually went wrong; at the new site where the home was to be moved, there was wet soil and standing water; the job was not completed and the creditor sued the debtor in state court obtaining a money judgment of approximately \$32,500; the bankruptcy court ruled that, under the facts, the creditor failed to establish a willful and malicious injury under § 523(a)(6); an intentional breach of contract will not cause a debt to be nondischargeable because there must be intent or substantial certainty to cause harm; in this action, as in many others, the credible testimony given by the debtor to explain the factual circumstances was important).

In re Lymberopoulos, 453 B.R. 340 (Bank. N.D. Ill. 2011) (in a state court action, a law firm represented a mother and two minor children against the debtor to obtain a protection order; a state court ordered the debtor to reimburse the mother for damage caused to her car and also awarded reasonable attorneys' fees for an aggregate judgment in excess of \$26,000; in the chapter 7 case, the attorneys sought a determination that the state court attorneys' fees were nondischargeable under § 523(a)(6); it was uncontested that the debtor engaged in willful and malicious injury against *his wife* based upon the state court's determination of abuse, harassment, and property damage; however, the debtor argued that the wife's attorneys were not directly injured and the attorneys' fees awarded were dischargeable; the bankruptcy court, relying upon analogous § 523(a)(4) decisions, determined that attorneys' fees are nondischargeable when a judgment debt is nondischargeable; the court rejected the debtor's "double recovery" argument because although the wife paid the attorneys, any money recovered by the attorneys would be refunded to the wife).

In re Love, 442 B.R. 868 (Bankr. M.D. Tenn. 2011) (the chapter 7 debtor, who was an attorney, was disciplined by the Tennessee Board of Professional Responsibility and assessed costs in the amount of approximately \$24,600; it was stipulated that the costs were actual and included costs for transcripts and court reporters, the rental of a hearing room, and attorneys' time based upon specific rates; the debtor moved to reopen the chapter 7 case to file an adversary proceeding for a determination that the disciplinary costs were dischargeable and that the Board's refusal to reinstate the debtor's law license violated the § 524 discharge injunction; the primary issue was whether the disciplinary costs are nondischargeable under § 523(a)(7); the court identified the three elements under § 523(a)(7): "(1) a debt payable to and for the benefit of a governmental unit; (2) the debt must be in the nature of a fine, penalty or forfeiture; and (3) the debt must not be compensation for actual pecuniary loss"; after citing numerous cases which have held attorney disciplinary cost assessments to be nondischargeable penalties, the court closely examined the disciplinary rules established by the Tennessee Supreme Court and stated that "[c]ost assessments in attorney disciplinary proceedings in Tennessee are singularly intended to compensate . . . for actual pecuniary loss" and the fact that the assessment "was entered in proceedings that punished [the debtor] for unprofessional conduct does not change its compensatory character"; therefore, the court determined that the disciplinary costs were discharged and the debtor's law license should not be held hostage to the payment of the discharged debt).

In re Browning, 449 B.R. 902 (Bankr. W.D. Ky. 2011) (prior to the chapter 7 bankruptcy case, the debtor pled guilty to a charge of theft by deception and was sentenced to imprisonment for a maximum term of five years; the debtor was ordered to "pay restitution" in the amount of approximately \$85,000 and was placed on probation for five years conditioned upon making the restitution payments; after the bankruptcy filing, the debtor filed an adversary proceeding seeking a determination that the restitution was dischargeable and an injunction to prevent collection of further restitution payments; the gist of the debtor's complaint was that the restitution debt was not payable to a governmental unit but rather was for the benefit of a bank; the court notes the general

rule that “restitution obligations imposed as probation conditions are not dischargeable in bankruptcy proceedings”; the court states it does not matter whether the payments are made to a victim or a third party who was injured by the debtor’s actions, citing Kelly v. Robinson; the court also distinguishes a Sixth Circuit decision, Hughes v. Sanders, 469 F.3d 475 (6th Cir. 2006), because Hughes involved a civil malpractice action resulting in a civil judgment rather than a restitution order and because that judgment was found to be compensation for an actual pecuniary loss).

In re McCutcheon, 448 B.R. 863 (Bankr. N.D. Ga. 2011) (in this chapter 7 case, the UST sought a determination that the debtor’s debts were nondischargeable under § 523(a)(10) because they were the same debts listed by the debtor in a prior case in which the discharge was waived; the waiver of the discharge in the prior case occurred because a § 727(a) action was pending and the bankruptcy judge, as many judges do, refused to approve a money settlement; shortly before trial of the objection to discharge action in the first case, the debtor waived his discharge but now asserts that he failed to understand the consequences of the action; after noting the requirements for a discharge waiver, the court comments that there are few authorities which address vacating a waiver of discharge; because the debtor was given adequate information about the legal affect of the waiver of discharge in the first case, the court determined that the debts in the second case were nondischargeable under § 523(a)(10)).

In re Ames, 447 B.R. 680 (Bankr. D. Mass. 2011) (prior to filing his chapter 7 bankruptcy case, the debtor, the record owner of a condominium unit, vacated the unit and stopped making monthly payments for his share of condominium fees and assessments; in his SOI, the debtor stated that he would surrender the unit; the condominium management filed a motion to modify the automatic stay to exercise its right to obtain a statutory lien for the unpaid condo fees and assessments and to hold the debtor personally liable for all postpetition condo fees and assessments under § 523(a)(16); that nondischargeable debt subsection excepts from discharge condo fees and assessments that become due and payable after the bankruptcy petition provided that the debtor “has a legal, equitable or possessory ownership interest”; the debtor argued that his interest in the condo terminated when he declared his intention to surrender in the SOI and that, for purposes of § 523(a)(16), he no longer held a legal, equitable or possessory interest; this court rejected the debtor’s argument because surrendering the unit did not affect the debtor’s status as the titleholder of the condo unit; however, the court conditioned the relief from stay to prohibit the condo association from *personally* collecting from the debtor until such time that the condo unit was sold and proceeds were applied to the unpaid fees and assessments).

In re Pigg, 453 B.R. 728 (Bankr. M.D. Tenn. 2011) (the chapter 7 debtor filed an adversary proceeding against the bank which held a mortgage on her condominium and upon the homeowner’s association which collected fees and assessments regarding the debtor’s condominium; in her complaint, the debtor sought equitable relief to cease postpetition homeowner fees and assessments from accruing after her permanent evacuation from her condominium subsequent to the so-called “Nashville Floods”; specifically, the debtor sought to compel the bank to accept a deed in lieu of foreclosure

or to foreclose on the condominium to stop future accumulation of association fees and assessments; in a highly creative equitable ruling, the bankruptcy court orders: (1) the debtor's discharge to be temporarily set aside, (2) the chapter 7 trustee to be reappointed, (3) the report of no distribution to be set aside, (4) the order granting relief from stay to be set aside, (5) the trustee to sell the condominium and distribute proceeds in an order of priority for administrative expenses, the homeowner association's fees and assessments, the senior bank to the extent of its lien, the junior lienholder bank to the extent of its lien, and (6) any remaining funds to be paid to the chapter 7 estate; the court found there was implicit consent by the parties, especially the homeowner's association and the bank with the first priority lien, as a result of their "inaction").

Effect of discharge. (§ 524)

Parker v. Handy (In re Handy), 624 F.3d 19 (1st Cir. 2010) (Parker, the creditor, sought relief from stay to reopen a state court proceeding against the debtor under the applicable fraudulent transfer act, which had been stayed after the debtor filed her chapter 7 case; the debtor obtained her discharge after filing of the bankruptcy case and before the creditor obtained a state court judgment or a lien against the debtor's property; the creditor argued that because the state court complaint sought to sell the debtor's residence, it constituted an *in rem* claim; the lower courts and the First Circuit held that no *in rem* claim existed and that the debtor's discharge under § 524 resulted in no *in personam* liability; the Circuit declined to rule upon an argument that an unsecured creditor may pursue a fraudulent conveyance claim against a debtor's *property* after discharge because that argument was not raised in the bankruptcy court).

In re Wofford, 449 B.R. 362 (Bankr. W.D. Wis. 2011) (although this is a chapter 13 case, its reasoning is applicable to chapter 7; succinctly stated, this court states that reaffirmation agreements relating to real property do *not* require court approval in accordance with § 524(k)(3)(J)(i)(7)).

Salyersville Nat'l Bank v. Bailey (In re Bailey), 664 F.3d 1026 (6th Cir. 2011) (in this opinion involving very convoluted facts, the Sixth Circuit addressed the enforceability of a reaffirmation agreement; examining the facts from the lower courts' and the circuit opinions, the debtors reaffirmed two debts with the bank, one pertaining to an older vehicle and one pertaining to a mortgage, in a single reaffirmation agreement; the bankruptcy court did not approve the agreement by an order; after the chapter 7 trustee sued, or threatened to sue, the bank for avoidance of the mortgage, an "Agreed Order" was entered whereby the trustee could sell the real property, without the bank having the ability to credit bid; after the real property was sold, the bank was paid as an *unsecured creditor* on both the car loan debt and the mortgage debt; because of a shortfall, the bank instituted an action against the debtors for a deficiency; the bankruptcy court held that the reaffirmation was unenforceable, under Kentucky law, because of a mutual mistake of fact; on appeal, the Sixth Circuit agreed with the bankruptcy court and also apparently ruled that the bank had elected to be treated as an unsecured creditor and waived its right to the security; somewhat curiously, the Sixth

Circuit does not discuss § 524 reaffirmation requirements; the fact that in chapter 7 liens pass through bankruptcy unaffected, or the *res judicata* effect of the Agreed Order).

In re Ong, 461 B.R. 559 (9th Cir. BAP 2011) (the debtor and a credit union entered into a reaffirmation agreement which was certified by the debtor's attorney in accordance with § 524; the bankruptcy court scheduled a hearing on the reaffirmation agreement, although it recognized that there was no "presumption of undue hardship" because the creditor was a credit union; after a short hearing, the bankruptcy court disapproved the reaffirmation; on appeal, the BAP stated that bankruptcy courts may not make "independent assessments of reaffirmation agreements between represented debtors and creditors unless there is a presumption of undue hardship," i.e. "a debtor's monthly income, less the debtor's monthly expenses, is less than the scheduled payment on the reaffirmed debt;" when the agreement is with a credit union, no presumption of undue hardship exists and the bankruptcy court cannot deny approval of the agreement even if it believed that the agreement was not in the debtor's best interest).

Thompson v. Credit Union Financial Group, 453 B.R. 823 (W.D. Mich. 2011) (in this chapter 7 case, the debtor sought to hold the creditor in contempt for violation of the discharge injunction imposed by § 524; a vehicle lease was automatically deemed rejected because the trustee failed to assume it within 60 days as required by § 365(d)(1); BAPCPA § 365(p) permits an individual chapter 7 debtor to assume the lease after the automatic rejection; overruling the bankruptcy court, the district court held that a debtor's *unapproved* assumption of a personal property lease under § 365(p) does not overcome the § 524 discharge; for a debtor to relinquish *in personam* discharge protection, a valid reaffirmation agreement pertaining to the lease is required; the district court recognizes that authority addressing this issue is limited and cases are cited which yield differing results).

Protection against discriminatory treatment. (§ 525)

In re Burnett, 635 F.3d 169 (5th Cir. 2011) (the debtor interviewed for employment with a title company which made her an offer of employment contingent upon results of a drug screening and a background check; during the check, the prospective employer discovered the debtor had filed for bankruptcy and rescinded its job offer; the debtor sued under § 525(b) alleging unlawful discrimination based upon bankruptcy status; the circuit court distinguishes § 525(a) relating to government units which may not "deny employment" from private employers under § 525(b) which may not terminate employment; the adversary proceeding was dismissed).

Myers v. TooJay's Mgmt. Corp., 640 F.3d 1278 (11th Cir. 2011) (this circuit court acknowledges that § 525 prohibits employers from taking certain actions against bankruptcy debtors; after interviewing, the prospective employer conducted an "on-the-job evaluation" of the debtor; although the debtor may have been offered a job, it was apparently conditioned upon the employer reviewing a credit report; the employer decided not to hire the debtor because he had filed for bankruptcy; the circuit court compared § 525(a) and (b) and noted the different language about *denying*

unemployment and *terminating* employment; in dicta, the circuit court states that the language “discriminate with respect to employment” does not cover “discrimination in hiring” but must mean something else such as discrimination in promotions, demotions, hours, categories of pay, etc.).

Rea v. Federated Investors, 627 F.3d 937 (3d Cir. 2010) (this circuit court also holds it is permissible to deny employment to a debtor-applicant who had previously sought bankruptcy relief; “§ 525(b) does not create a cause of action against private employers who engage in discriminatory hiring”; this circuit court rejects the contention that the language in § 525(b) “discrimination with respect to employment” is broad enough to cover “discrimination in the denial of employment”).

Restrictions on debt relief agencies. (§ 526)

In re Seidel, ___ WL ___, Case No. 09-58731 (Bankr. S.D. Ohio, Sept. 30, 2010) (boiled down, the facts in this case were that the debtor consulted with an attorney to file for bankruptcy relief; the debtor was led to believe that a chapter 7 would be filed but the attorney filed a chapter 13 case; the attorney advised the debtor to pay his \$3,000 fee by using a credit card; further, although a no-look fee was contemplated with specific services to be provided, the attorney attempted to charge the debtor additional funds apparently in contravention of the fee agreement and applicable local rules; the attorney also failed to adequately represent the debtor by failing to object to a claim filed by a mortgage company which would have permitted a strip off of the second mortgage; the attorney failed to attend hearings, threatened the debtor with withdrawal, and (based upon my reading of the opinion) lied to the debtor; the bankruptcy court determined that the attorney violated § 526 by advising the debtor to incur a credit card debt to pay an attorney, failing to perform specific services, misrepresenting the services to be provided, and violating the Ohio Rules of Professional Conduct which are applicable in bankruptcy cases; the court ordered that (1) the attorney repay the credit card company \$3,274, (2) the attorney was unable to retain the no-look fee and be required to submit a fee application in each future chapter 13 case, (3) the attorney shall attend six hours of bankruptcy ethics instruction, and (4) the attorney shall file a list of all bankruptcy clients from whom he obtained attorneys fees by credit card charges from October 2005 to September 2010).

Property of estate. (§ 541)

In re Jokiel, 447 B.R. 868 (Bankr N.D. Ill. 2011) (the debtor, when he filed his chapter 7 case, was a vice president of a corporation and was subject to an employment agreement which provided for severance pay based upon certain conditions, including if he was terminated because of a change of control of the company; to receive any severance payment, the debtor was required to sign a general release of claims against the company and also agree to a noncompete provision; slightly more than one month prior to the bankruptcy filing, the company entered into a merger agreement; the merger was consummated about three months *after* the filing and resulted in the debtor receiving a lump sum payment of approximately \$1.2 million; the trustee argued that the

severance payment constituted non-exempt property of the estate and should be turned over; the debtor argued that the severance payment was tantamount to “earnings from services” that would be excluded from the bankruptcy estate in accordance with § 541(a)(6); relying on cases determining whether payments “are sufficiently rooted in the pre-bankruptcy past”, this court decided that the severance agreement was a result of a prepetition agreement for prepetition services rather than in the nature of a mere expectancy; however, under the facts of this case, some of the debtor’s service occurred postpetition to keep the employment agreement in effect and therefore this court allocated the severance payment *pro rata* between the prepetition and postpetition services; because the debtor had not formally claimed any portion of the severance payment as exempt, the court declined to rule on that issue).

In re Palmer, 449 B.R. 621 (Bankr. D. Mont. 2011) (the chapter 7 debtor and his non-filing spouse overpaid their withholding taxes for 2009 by \$13,449; the trustee and the debtor both agreed that the bankruptcy estate was entitled to some portion of the income tax refund but were unable to agree how the calculation would be made; this court discussed the three approaches previously used by courts to allocate tax refunds between debtors and non-debtor spouses; this court adopts a fourth approach by utilizing the IRS formula for dividing joint tax returns between spouses in a “blended approach” that considers income and withholdings determined in accordance with the “married filing separate” formula; this fourth approach was previously adopted by the Tenth Circuit BAP, In re Crowson, 431 B.R. 484 (10th Cir. BAP 2010)).

In re Evans, 449 B.R. 827 (Bankr. N.D. Ga. 2010) (the debtors filed a joint chapter 7 case with a disclosed anticipated tax refund of approximately \$7,000 for 2009, asserted to be a joint asset; each debtor claimed the tax refund as exempt with allocation of one-half to each debtor; the trustee objected to the exemption arguing that the tax refund was actually the sole property of the debtor-husband and that his available exemption was insufficient to fully exempt the estimated tax refund; this court also states that it must determine the property interest of the debtor in the refund using state law; this court recognizes the three prior methods by which refunds were allocated between spouses: (1) proportion the amount of income earned by each spouse, (2) divide the refund based upon the amount of income withheld from each spouse’s income, or (3) divide the refund evenly between spouses; this court rejects the approaches and relies upon the Crowson “new” fourth approach which relies upon guidance from the IRS manual).

In re Bosack, 454 B.R. 625 (Bankr. W.D. Pa. 2011) (the chapter 7 debtor earned monthly commissions under an agreement pertaining to soliciting customers to purchase electric usage; the agreement provided that the debtor’s commission would be based upon the electric usage of customers who entered into service contracts for as long as the customers continued to purchase and pay for the electric service; in addition to the independent contractor arrangement which gave rise to commissions, the debtor was also a salaried employee for the energy company; the debtor failed to disclose the commission arrangement on his schedules and first disclosed the commissions at the § 341 meeting; to determine whether property is exempt or whether a trustee can obtain

a turnover, the court states it first must determine what constitutes property of the estate under § 541; with regard to postpetition contracts, the commissions are not property of the estate; with regard to contracts that were executed prepetition, it must be determined whether the commissions also would have a postpetition component; this court adopts an approach which allocates the commission between its prepetition and postpetition components based upon the debtor's testimony about the time expended to service the accounts; with regard to the trustee's objection to the debtor's claimed exemption of property of the estate, the court denied the exemption because the debtor intentionally concealed the commissions at issue).

Zavala v. Wells Fargo Bankr (In re Zavala), 444 B.R. 181 (Bankr. E.D. Cal. 2011) (the joint chapter 7 debtors sued the bank alleging that the bank violated the automatic stay when it refused to disburse monies from deposit accounts in which the debtors had listed an exemption; rather than turning over the funds, the bank first requested instructions from the chapter 7 trustee regarding the bank account; the court first states that a bank deposit account is nothing more than a promise to pay money which creates a debtor-creditor relationship and that a bank's temporary refusal to pay does not take possession of property or exercise control over property of the estate, citing Citizens Bank of Maryland v. Strumpf; further, in accordance with Ninth Circuit precedent, merely claiming property as exempt does not remove it from the property of the estate under § 541; it is within the chapter 7 trustee's power to determine how and when to demand payment of the obligation from a bank and debtors do not have standing to allege automatic stay violations because the property is property of the estate and not property of the debtors; therefore, the court granted the bank's motion to dismiss the adversary proceeding).

In re Young, 439 B.R. 211 (Bankr. M.D. Fla. 2010) (the chapter 7 debtor had checking and savings accounts with a bank that were scheduled and claimed as exempt; upon learning of the bankruptcy filing, the bank placed an administrative freeze on the accounts and sought direction from the chapter 7 trustee regarding the disposition of the accounts; the debtor sought damages from the bank for violation of the automatic stay and also sought an order directing the bank to release the funds to the debtor; this court determined that the bank accounts were property of the estate under § 541 and that the bank owed a duty to the trustee; the court also determined that the debtor had an obligation to the trustee, i.e., to surrender his interest in the bank accounts; although a bank may honor checks drawn by the debtor on an account that is property of the bankruptcy estate pursuant to § 542(c), this bank had actual notice of the bankruptcy case because of its internal policy in reviewing bankruptcy filings; although the debtor claimed the property as exempt, the bank accounts are not removed from the estate until the exemption is allowed or the time for objecting to the exemption has expired under B.R. 4003; finally, this court ruled that the debtor lacks standing to obtain sanctions against the bank because there was no "injury in fact").

Turnover of property of estate. (§ 542)

In re Brubaker, 443 B.R. 176 (M.D. Fla. 2011) (as of the petition date, the debtors had issued checks, in the ordinary course of their personal affairs, which had not been negotiated and were outstanding; the funds in the account, subject to the checks being honored, were not claimed by the debtors as exempt property; later, the debtors amended their Schedule C to claim the \$513 in outstanding checks as exempt; the chapter 7 trustee objected to the entire bank account amount of \$5,862 rather than only the \$513; the debtors responded, relying upon In re Pyatt, 486 F.3d 423 (8th Cir. 2007), arguing that checks written prepetition, but negotiated postpetition, should be deducted from the bank account balance; in opposition to the trustee's § 542 turnover motion, the debtors further argued they no longer possessed or controlled the \$513 and the funds were no longer property of the bankruptcy estate; agreeing with the bankruptcy court, the appellate court stated the funds were vested in the estate as of the filing date and the trustee could compel turnover of the value of the funds from the debtors after the checks had been cashed, see In re Bailey, 380 B.R. 486 (6th Cir. BAP 2008)).

In re Rogove, 443 B.R. 182 (Bankr. S.D. Fla. 2010) (the trustee sought a § 542 turnover of distributions the debtor received from a "special needs trust"; these distributions included \$18,000 received prepetition and \$22,500 received postpetition within 180 days of the filing date; the primary beneficiary of the discretionary trust was the debtor's mother and the trust contained a spendthrift provision; after the mother's death, the trustee exercised discretion and made periodic distributions under the terms of the trust for a period of years, including payments to the debtor who held a 50% beneficial interest in the trust; the court determined that the funds in the trust were not property of the estate under § 541(a)(1) or (5)(A) because the transfers pursuant to the trust did not occur under a will or result from intestacy; the trustee's turnover motion was denied because distributions from an *inter vivos* trust do not constitute property of the estate).

In re Ruiz, 440 B.R. 197 (Bankr. D. Utah 2010), rev'd, 455 B.R. 745 (10th Cir. BAP 2011) (*see BAP summary below*) (prior to the filing of their chapter 7 petition, the debtors wrote four checks that were honored and withdrawn postpetition; the bankruptcy court noted that there was a split of authority as to whether the debtors are liable to the bankruptcy estate for the value of the funds based upon checks honored postpetition and without court authority; this court states that the debtors disclosed the bank account information in their schedules and therefore constructively turned over possession, custody and control of the bank's promise to pay and there is nowhere in the Bankruptcy Code that an individual must stop payment of checks prior to, or at, the time of the bankruptcy filing; to require the debtors to "replenish" the estate for the prepetition checks contravenes the fresh start policy).

In re Ruiz, 455 B.R. 745 (10th Cir. BAP 2011) (reversing the bankruptcy court, the BAP held that the funds which were in the debtors' checking account on the filing date were property of the bankruptcy estate; although four prepetition checks written by the debtors had cleared by the time the trustee demanded turnover and the debtors no longer had "possession" of the funds, they had "control" over the funds "during the case"

as required by § 542; accordingly, the debtors were ordered to turn over the full balance of funds in their checking account as of the filing date to the trustee).

Lovald v. Falzerano (In re Falzerano), 454 B.R. 81 (8th Cir. BAP 2011) (the debtor's mother died in 2001, leaving the debtor a life estate on a 320 acre ranch and leaving her children her personal property and the remainder interest in the ranch; one of the daughters, who was omitted from the will, threatened a will contest and the debtor and other heirs entered into a family settlement agreement whereby the debtor would continue to use the personal property, run and raise the cattle for the heirs, and use the profits for the debtor's living expenses; in connection with the ranch, the debtor bought hay from a creditor who subsequently sued and received a judgment for \$10,000; before the judgment was satisfied, the debtor filed for chapter 7 relief and the trustee subsequently sought § 542 turnover against the debtor and the heirs to recover rent for the ranch and the value of hay provided to the probate estate's cattle on an unjust enrichment theory; the bankruptcy court entered judgment on the grounds that the trustee failed to prove the elements of unjust enrichment; the BAP affirmed on different grounds, i.e., that the relief sought by the trustee was beyond the scope of § 542 because the property was not in the possession or control of the estate at the time of the turnover demand and the trustee's claim was construed as constituting "nothing other than a demand on an alleged debt").

Trustee as lien creditor. (§ 544)

In re Day, 443 B.R. 338 (Bankr. D.N.J. 2011) (the debtor filed a chapter 11 case in May, 2008 and the case was subsequently converted to chapter 7 in February 2010; the chapter 7 trustee sued the bank which held an unrecorded mortgage under § 544(a)(3); the bank defended on the basis that it held an equitable lien on the mortgage property to the extent that the bank's mortgage advance paid off the prior existing mortgage held by another bank; the court characterized the issue as "a clash between the bank as an equitable lien holder (and one who asserted equitable subrogation to the position of the earlier discharged mortgage) and the trustee in his status as a BFP"; in a lengthy and well-reasoned opinion, the court examines the interplay between § 544(a)(3) and the New Jersey law, including recording statutes; the court determines that the trustee's avoidance power as a BFP under § 544(a)(3) is superior to the bank's asserted equitable lien position and related subrogation rights from the prior bank that held a valid mortgage; finally, the court concludes that the bank's advancement of an "oral constructive trust argument is a nonstarter" based upon the statute of frauds).

In re Harvey Goldman & Company, 455 B.R. 621 (Bankr. E.D. Mich. 2011) (in this case, the chapter 7 trustee sought to avoid a security interest because the debtor's name on the financing statement was improper; the debtor's name was "Harvey Goldman & Company" which operated as an assumed name under "Worldwide Equipment Company;" the financing statement identified the debtor as "World Wide Equipment Co.;" after considering various arguments made by the secured creditor and applicable Michigan law, the court determined that the financing statement was not filed under the

corporate name and incorrectly described the name of the debtor; therefore the lien was unperfected, avoided, but preserved for the chapter 7 estate).

Preferences. (§ 547)

In re Halling, 449 B.R. 911 (Bankr. W.D. Wis. 2011) (the debtor's son guaranteed the debtor's obligation to the bank and granted a mortgage on his real property; during the one-year period prior to the debtor's bankruptcy, the bank was paid about \$4,100 by the debtor while she was insolvent; the court notes that the debtor's payments were for the benefit of the insider because every payment reduced the guarantor-son's potential liability to the bank; even though the trustee could not recover from the bank, see §§ 547(i) and 550(c), the trustee could recover from the guarantor-son; in dicta, the court comments that the debtor would be unable to claim an exemption in the transferred payments because they were voluntarily made, § 522(g)).

In re U.S. Insurance Group, LLC, 451 B.R. 437 (Bankr. E.D. Tenn. 2011) (in this adversary proceeding to avoid a preference, the bankruptcy court primarily addresses the element set forth in § 547(b)(5); after conversion to chapter 7, the trustee sued a defendant, who held a subordinate security interest, in the amount of approximately \$128,000; the court noted that whether a particular payment permits a creditor to receive more than it would under chapter 7 is determined as of the filing date and also that payments to an unsecured or undersecured creditor are preferential; the court rejects the creditor's contention that it would hold a security interest in the proceeds of the avoidance action, even in an instance when a creditor may be able to trace its security interest to the proceeds of an avoidance action; the court also found the debtor to be insolvent and rejected the creditor's ordinary course of business defense relying upon, in part, the lateness of the debtor's payment).

In re Frankum, 453 B.R. 352 (Bankr. E.D. Ark. 2011) (within 90 days of the filing of their chapter 7 petition, the debtors were involved in a closing of an asset purchase agreement and an assignment of their covenant-not-to-compete payments to a judgment creditor; pursuant to "wiring instructions" the creditor received \$500,000 allocable to the covenant-not-to-compete payments; the court first concludes that the payments were contractual rights in which the debtors had an interest establishing the § 547(b) "property of the debtor" requirement; the court rejected the creditor's argument that the rights to receive the covenant-not-to-compete payments were held in trust for it because the documents of the transaction supported a finding that the payments were within the debtors' control; examining the element that a creditor received more than it would have in a chapter 7 distribution, § 547(b)(5), the court considers two calculations: the "hypothetical liquidation" and the "real liquidation"; because the creditor's claims are at least partially unsecured, and unsecured creditors will receive less than 100% payment from distribution, this element was established).

In re J. Silver Clothing, Inc., 453 B.R. 518 (Bankr. D. Del. 2011) (among other asserted causes of action, the chapter 7 trustee asserted that a grant of a security agreement to a bank was a preferential transfer under § 547(b); one of the bank's defenses was the

exception to avoidance under § 547(c)(1), a substantially contemporaneous exchange; to establish that affirmative defense, it must be shown that the transfer was intended to be contemporaneous and is in fact contemporaneous; this court notes a split among the circuits: the First and Sixth Circuits use a bright line rule that if the transfer extends beyond the 10-days (now 30-days under BAPCPA), provided for by § 547(e), the exchange is not substantially contemporaneous but other circuits, including the Eighth and Eleventh, look at all relevant circumstances surrounding the alleged transfer to determine whether the transfer was, in fact, substantially contemporaneous, “e.g., “length of delay, reason for delay, nature of the transaction, intentions of the parties, [and] possible risk of fraud”; based upon the facts in this case, the court determined the transfer of the security interest was substantially contemporaneous with the loan transaction, notwithstanding a delay in perfection).

In re JS & RB, Inc., 446 B.R. 350 (Bankr. W.D. Mo. 2011) (the chapter 7 trustee sued a landlord asserting it had received avoidable and recoverable preferential transfers resulting from untimely payment of rents; although the February rent payment was voidable, the court held that the landlord had a valid defense under § 547(c)(1) because “new value” was given by permitting the debtor the right to continue to possess the leased premises in exchange for the rental payment; although there are decisions that state that refraining from enforcing a right or obligation is not “new value”, the court distinguishes those cases because an unexpired lease on real property is treated as an executory contract and “as each month comes up under the lease the lessee becomes obligated anew for that individual month’s rent”; however, the court determined to conduct a trial regarding the March rent because the debtor may have already been locked out of the premises or there may have been a special arrangement for temporary possession to conduct a liquidation sale).

In re Nowlen, 452 B.R. 619 (Bankr. E.D. Mich. 2011) (on October 15, 2010, the debtor’s husband passed away and the debtor met with a funeral home and entered into a contract for funeral services and burial of her husband in the amount of approximately \$12,300; although the terms of the contract required immediate payment and provided for a late fee, the debtor was unable to timely pay the costs and agreed to pay the funeral home from the proceeds of a life insurance policy with an agreement on November 30, 2010; about two weeks later, the debtor filed a chapter 7 case; subsequently, the chapter 7 trustee sued the funeral home to recover a preferential transfer; the court determined the preference was insulated from avoidance under § 547(c)(2) because the debtor’s payment was not out of the ordinary course based upon the debtor’s position in arranging for funeral and burial services and deferring the original agreement to handle financial difficulties; the amended contract that provided for payment out of life insurance proceeds was consistent with the terms of the parties’ agreement; further, based upon information from the funeral home, the court found the payment was made in accordance with ordinary business terms in the industry).

In re American Camshaft Specialties, Inc., 444 B.R. 347 (Bankr. E.D. Mich. 2011) (the chapter 7 trustee sued a creditor who supplied special bar quality steel asserting an avoidable preferential transfer in the amount of approximately \$3.1 million; the court first

noted that under BAPCPA it is no longer necessary to prove both the subjective component and objective component of the ordinary course of business defense under § 547(c)(2) because now proof of only one component is required; explaining the factual circumstances in detail, the court found that the payments within 90 days were consistent with the normal relations of the parties and the timing and amounts of payments were not materially different than the timing and amounts of payments which occurred before the preference period; further, there was nothing in the record to indicate any collection activities that differed from what had occurred prior to the 90 day preference period; even though a fact-intensive analysis is required to establish the subjective component of the § 547(c)(2)(A) defense, summary judgment in favor of the creditor was appropriate).

In re Bay Area Glass, Inc., 454 B.R. 86 (9th Cir. BAP 2011) (in this chapter 7 case, the court determines that the plain language of § 547(c)(9) “provides a monetary threshold for determining which transfers are avoidable in nonconsumer bankruptcy cases”; transfers of less than \$5,475 are protected from recovery even if they would otherwise be avoidable; however, transfers equal to or greater than \$5,475 are entirely avoidable if the preference elements are shown; the creditor’s contention that the trustee could only avoid an amount in excess of \$5,475 was properly rejected).

Fraudulent transfers and obligations. (§ 548)

Perkins v. Haines, 661 F.3d 623 (11th Cir. 2011) (the trustee sued to recover fraudulent transfers made to defendants under a Ponzi scheme; the Eleventh Circuit determined that a defrauded investor has given “value” in exchange for return of the principal amount of the investment but has not given “value” for any payments that are made in excess of principal, including fictitious profits; this court, consistent with other courts, states that transfers made in a Ponzi scheme are presumed to have been made with the intent to defraud under both § 548(a) and § 544(b); the court recognizes that an affirmative defense under § 548(c) may exist to the extent that principal is returned).

In re Tarin, 454 B.R. 179 (Bankr. D.N.M. 2011) (about six months prior to their bankruptcy filing, the debtors paid approximately \$12,000 for their daughter’s wedding; the chapter 7 trustee sued the daughter alleging that she received a fraudulent conveyance under § 548(a)(1); in this case, the court states the debtors received value equal to what they paid and the fact that they put the value into a wedding party for their daughter does not make it a fraudulent transfer; the court asked the question: “what would be the difference between this set of facts and a situation in which [debtors] hosted Thanksgiving dinner for all the extended family?”).

In re Wells, 448 B.R. 909 (Bankr. W.D. Tex. 2011) (the debtor-wife’s grandfather died in September 2000 and the debtor received an undivided one-half interest in real property that was appraised at a value of approximately \$160,000 as of the date of the chapter 7 bankruptcy petition; about 18 months prior to the chapter 7 bankruptcy, the debtor transferred her one-half interest in the real property to a trust; however, the property interest was subject to a lease, similar to a life estate, to a tenant who was not required

to make any lease payments; the chapter 7 trustee sued the trust asserting that a fraudulent conveyance took place under § 548(a)(1); the court states that the debtor's interest which was transferred for no consideration was similar to a contingent remainder interest in the real property which is capable of valuation; because there was value that was transferred by the debtor to the trust, a fraudulent transfer occurred).

In re Akillian, 448 B.R. 113 (Bankr. D. Mass. 2011) (the debtor and his brother were beneficiaries under a trust which terminated prepetition; in accordance with Massachusetts law, upon termination of the trust, the debtor and his brother took title to the real property as tenants in common; however, when the property was sold, the proceeds were not equally divided and the debtor, instead of receiving about \$165,000, only received \$95,000; there was no proof that the brother made greater contributions toward maintenance or improvement of the property that would justify him receiving a larger share from the sale; the court determined a constructively fraudulent transfer took place when the debtor's brother received more than his share).

Postpetition transactions. (§ 549)

In re Ellis, 441 B.R. 656 (Bankr. D. Idaho 2010) (after they filed their chapter 7 bankruptcy petition, the debtors consolidated their first and second mortgages into a new single mortgage with the same bank that held the prepetition mortgages; there was no permission from the trustee or by the court and the trustee sought to avoid the new mortgage as a postpetition transfer under § 549; in accordance with the BAPCPA amendments, the debtors' creation of a lien is a "transfer" for purposes of § 549 and as defined by § 101(54); the court also reiterates the legal interpretation that a debtor-initiated transfer is covered by § 549; with regard to a possible § 549(c) defense, the bank which granted the new mortgage had actual knowledge of the debtors' bankruptcy case and therefore the bank does not qualify as a good faith transferee; notwithstanding the bank's other equitable arguments, the court declines to craft any equitable remedies and determines that the postpetition grant of the mortgage was avoidable under § 549, preserved for the estate under § 550(a), and therefore the real property is subject to sale by the trustee without regard to the postpetition mortgage lien).

Query: why would any bank do this with knowledge of the bankruptcy?

In re First Protection, Inc., 440 B.R. 821 (9th Cir. BAP 2011) (individual debtors filed an individual chapter 11 case and also filed a chapter 11 case for their closely held corporation, First Protection; after filing the cases and before conversion to chapter 7, the debtors transferred 50% of their membership interest in a non-debtor LLC to their mother in exchange for \$1,000; after conversion to chapter 7, the trustee sued the mother and others for an avoidable postpetition transfer; the bankruptcy court held the transfer was avoidable and the debtors and the mother appealed to the BAP; after first determining that the debtors, under the specific facts, had standing to appeal, the BAP addressed the merits; the LLC interest, under Arizona law, is considered personal property and the debtors therefore transferred property of the estate; because the debtors were the sole members and 100% owners of the LLC, it was determined that

there were no “other parties” to the operating agreement and it was not an executory contract subject to § 365; the BAP determined the transfer was not authorized by statute and was not in the ordinary course by addressing the vertical dimension and horizontal dimension tests that are almost universally utilized by all courts examining § 549 issues; finally, because an interest in personal property was transferred, the mother-transferee could not be protected under § 549(c) which only applies to transferees of real property).

In re Beery, 452 B.R. 825 (Bankr. D.N.M. 2011) (debtor husband filed a chapter 7 case in 1994; he listed his real property residence and failed to claim it as exempt; in 1997, the trustee filed an adversary proceeding to determine the ownership of the residence and also filed a notice of *lis pendens* in the proper real estate records; later, in March 2002, the debtor transferred his undivided one-half interest to his non-debtor spouse and the deed was then recorded; in 2003, the prior bankruptcy judge determined that the debtor held an undivided one-half interest in the residence thereby determining it was property of the estate; in November 2006, the non-debtor wife borrowed money from a bank and granted a mortgage on the residence; the bank then sold the loan package, including the mortgage to another bank; in 2009, the trustee filed another adversary proceeding seeking a determination that the mortgage granted by the non-debtor wife was ineffective and void; deciding a motion for judgment on the pleadings, the court determined that the transfer from the debtor to his wife violated the automatic stay and, under Tenth Circuit law, that transfer was void; in a lengthy analysis, the court discusses the interplay between the automatic stay and avoidance of postpetition transfers under § 549; this bankruptcy court properly states that the automatic stay protects the trustee, as well as creditors of the estate; therefore, the trustee was not required to file a § 549 action, the statute of limitations to bring a postpetition transfer action was inapplicable, and the bank had no possible defense under § 549(c)).

In re Living Hope Southwest Medical Servs., LLC, 450 B.R. 139 (Bankr. W.D. Ark. 2011) (the debtor filed a chapter 11 case in July 2006 and the case was converted to chapter 7 in August 2008; during the chapter 11 case, the debtor received loans totaling \$86,200 that it repaid to a creditor; in addition, the debtor’s account was debited \$25,000; the chapter 7 trustee sued the creditor to avoid and recover unauthorized postpetition transfers under § 549; this court analyzes whether payments were made in the “ordinary course of business” utilizing the horizontal and vertical tests, both of which must be proved; because the tests were not satisfied, the transfers were not in the ordinary course and not authorized by the Bankruptcy Code; although the court recognizes that postpetition lending relationships might be approved *nunc pro tunc*, it declined to do so because of lack of extraordinary circumstances, a failure to show that creditors have not been harmed, and that the credit transaction was in good faith).

Liability of transferee of avoided transfer. (§ 550)

In re Nieves, 648 F.3d 232 (4th Cir. 2011) (the chapter 7 trustee sued to avoid and recover a series of transfers involving real property that was originally owned by the debtor; one of the subsequent transferees argued that it was immune from recovery

under the so-called safe harbor provision of § 550(b)(1); to have a valid defense, the transferee must show that it took for value, in good faith, and without knowledge of the avoidability of the transfer; on appeal, the Fourth Circuit discusses the meaning of “knowledge” and says knowledge is shown “if the transferee knew facts that would lead a reasonable person to believe that the property transferred was recoverable”; with regard to “good faith”, there is both a subjective (“honesty in fact”) and objective (“observance of reasonable commercial standards”) component; because all three prongs of the defense must be proven, and the transferee was unable to show “good faith,” the transferee was liable).

In re Brooke Corp., 443 B.R. 847 (Bankr. D. Kan. 2010) (this bankruptcy court discusses the issue of “whether the trustee must first avoid the transfer between the initial transferor and transferee before he can recover from a subsequent transferee”; although the bankruptcy court seems to indicate that the answer should be “no”, the court was constrained by binding Tenth Circuit precedent which says “yes”; even though the Tenth Circuit’s rule “makes recovery of fraudulently transferred property for the benefit of the estate more difficult” and “can complicate avoidance litigation while providing no benefit”, this court follows Circuit law; although the court denied the defendant-subsequent transferee’s motion to dismiss, the court required that the initial transferee be joined as a party defendant within 14 days or that the court be informed why joinder was not feasible under Rule 19(b)).

Automatic preservation of avoided transfer. (§ 551)

In re Wyatt, 440 B.R. 204 (Bankr. D.C. 2010) (the chapter 7 trustee sued a secured creditor to avoid an unperfected lien under § 547 because perfection occurred during the 90-day preference period and was not entitled to the 30-day safe harbor provision under § 547(c)(3); because the vehicle was sold, the proceeds, rather than the vehicle, were automatically preserved for the estate; postpetition the debtor made payments to the creditor whose lien was avoidable; the court ruled that the trustee was entitled to receive a monetary judgment against the creditor for the postpetition payments made on the vehicle; although “a debtor may voluntarily repay a debt without reaffirming the debt”, in this case payments were made because of the creditor’s *in rem* rights which were based upon a perfected lien; because there was no perfected lien, the payments are not characterized as “voluntary” and the estate was entitled to the full benefit of the preserved lien; “If (as here) it is the lien that prompts payments, the trustee as the new holder of the lien is entitled to recover those payments as proceeds of the lien.”).

Abandonment of property of the estate. (§ 554)

In re Bartels, 449 B.R. 355 (Bankr. W.D. Wis. 2011) (chapter 7 case was filed in November 2007, and the trustee issued a no distribution report, the debtors received their discharge and the case was closed in February 2008; about 18 months later, the trustee discovered a possible defect in the first mortgage because that mortgage only covered a separate pole building but did not cover the debtors’ residence or garage; the trustee moved to reopen the case and set aside the technical abandonment to

administer the asset; the bank opposed the request because it asserted the trustee did not have power to sell property free of its lien even assuming the abandonment could be set aside; as stated by the bankruptcy court, the Seventh Circuit typically rules that “abandonment orders are ordinarily irrevocable”; however, abandonment may be rescinded because of mistake provided a secured creditor will not be “unfairly prejudiced”; in this case, the court permits the abandonment to be set aside and notes that reopening the case is not futile because § 546(a) is probably inapplicable as the trustee will not seek to avoid an interest but desires to sell unencumbered real estate under § 363(f); to the extent avoidance may be sought, the court defers considering the issue of a possible equitable tolling).

In re Schwarz Publishing, Inc., 398 F. App'x 321, 2010 WL 3937615 (9th Cir. 2010) (in this limited precedent opinion which was not selected for publication, the Ninth Circuit rules that the bankruptcy court did not abuse its discretion by permitting the chapter 7 trustee to abandon certain business records; storage of records was burdensome and the records were of inconsequential value considering that the trustee had made copies of relevant documents and gave the *pro se* party an opportunity to examine the records prior to the abandonment).

In re Brokaw, 452 B.R. 770 (Bankr. E.D. Mo. 2011) (the chapter 7 debtor listed a personal injury lawsuit on the statement of financial affairs but failed to list it on Schedule B or exempt the lawsuit; at the § 341 meeting, the debtor orally disclosed the lawsuit but, when Schedule B was amended, the debtor again failed to specifically disclose the lawsuit; later, the trustee filed a Report of No Distribution and closed the case; thereafter, the trustee reopened the case and the debtor finally amended Schedule B and claimed the lawsuit partially exempt under Missouri law; notwithstanding the debtor's oral disclosure of the asset at the § 341 meeting, the court determined that the lawsuit was not properly scheduled; therefore, when the case was closed, the lawsuit was not technically abandoned under § 554(c); the court also commented that the trustee should have been aware of the asset and could have taken additional action but that was “secondary to the fact that the initial burden” was upon the debtor to properly schedule the lawsuit).

In re Burgio, 441 B.R. 218 (Bankr. W.D.N.Y. 2010) (the chapter 7 debtor scheduled an unencumbered vehicle and claimed an exemption; the trustee filed a turnover action and the court granted the motion even though the vehicle was partially exempt; upon a motion for reconsideration, the debtor sought abandonment under § 554(b) arguing that the vehicle was “of inconsequential value and benefit to the estate”; the court commented that the legal standards and evidentiary burden that applied to the debtor's motion for abandonment and the trustee's motion for turnover were “essentially the same”; after re-examining the facts, the court determined the trustee could seek to sell the vehicle and the debtor could make a “credit bid for the amount of the exemption plus the accompanying portion of any auctioneer commission”).

Defenses of the Estate. (§ 558)

In re Miller, 459 B.R. 657 (6th Cir. BAP 2011) (a bank held mortgages on properties located in Michigan and Wisconsin; at a foreclosure by advertisement sale in Michigan, the bank bid in its entire debt; when the bank sought relief from stay to complete a judicial foreclosure on the Wisconsin property, the debtor objected arguing that because there was no debt the mortgage should be discharged; the bankruptcy court ruled that there was no debt and the bank held no claim; therefore, the bank lacked standing, i.e., a pecuniary interest, to seek relief from stay or to object to plan confirmation; on appeal, the BAP ruled that the bank may have had standing because a debt was owed, but the debtor could offset the bank's credit bid in the Michigan foreclosure against the total debt of the debtor, as permitted by § 558). NOTE: Appeal is pending before the Sixth Circuit.

Dismissal of a case or conversion to a case under Chapter 11 or 13. (§ 707)

In re Falch, 450 B.R. 88 (Bankr. E.D. Pa. 2011) (the debtor operated a contracting business and a judgment was entered against him in an amount of approximately \$300,000; shortly thereafter, the debtor filed a chapter 7 case and scheduled very few assets, all of which were exempt; however, the debtor's income was \$150,000 per year and he lived in a rent free farmhouse; the debtor also paid \$2,700 a month on boat payments, slip fees, maintenance, insurance, and fuel for the boat; the judgment creditors moved to dismiss under § 707(a) based upon "bad faith"; relying upon § 707(b)(3) decisions by analogy, and considering the totality of circumstances, the court determined the debtor lacked good faith and dismissed the case).

In re Rahim, 449 B.R. 527 (E.D. Mich. 2011) (the joint chapter 7 debtors were both doctors with an aggregate yearly income of \$500,000; prepetition, two creditors obtained judgments against them totaling \$4.1 million and the aggregate debts owed by the debtors to various secured and unsecured creditors totaled over \$10 million; two creditors moved to dismiss the bankruptcy case for bad faith under § 707(a) and the bankruptcy court granted the motion; on appeal, the district court noted that the debtors listed monthly expenses in excess of \$39,000, with disposable income of only \$20 per month; the expenses included a \$14,000 per month mortgage payment on their residence, \$5,000 per month to maintain their Florida vacation home, and \$4,500 a month in education expenses for two children; further, it was noted that the debtors made a \$29,000 down payment on their new BMW a couple of months before filing; under Sixth Circuit law, In re Zick, a chapter 7 case can be dismissed for bad faith; although a case may not be dismissed solely on "ability to pay" grounds, based upon totality of circumstances, the district court agreed the debtors were in bad faith and the dismissal was justified; in this case the debtors were "merely attempting to preserve their comfortable standard of living at the expense of their creditors"; the court comments that factors regarding § 707(a) and § 707(b) overlap, but a § 707(a) dismissal requires more than a debtor's ability to repay debts).

In re Kuhns, 2011 WL 4713225 (Bankr. N.D. Ohio 2011) (a debtor filed for chapter 7 relief but did not disclose his spouse's income or expenses on Official Form B22A, i.e., the means test; the debtor was employed at a business owned by his spouse's family and the spouse was also employed as a sales representative; the UST moved to dismiss for cause under § 707(a) because of failure to provide information required by § 521(a)(1)(B) and Schedules I and J; the court agreed that the debtor is obligated to provide the information and failure to do so constitutes cause for dismissal of the case).

In re Smith, 447 B.R. 832 (Bankr. N.D. Ohio 2011) (in their schedules, the joint chapter 7 debtors disclosed \$1,300 per month in disposable income and approximately \$60,000 in general unsecured debt; the UST filed a motion to dismiss under § 707(b), asserting the debtors could pay creditors in full in approximately 46 months; in response, the debtors modified their income downward and asserted they qualified for chapter 7 relief; the bankruptcy court stated it "is under a duty to scrutinize a debtor's expenses, and make downward adjustments where necessary, so as to ensure that the debtor's expenses are reasonable"; in this case, the court found the debtors could decrease expenses, including eliminating payments on a 4-wheeler which is "hardly a necessity"; the court gave the debtors an opportunity to convert the case to chapter 13 and, if not done, the case would be dismissed).

In re Piazza, 451 B.R. 608 (Bankr. S.D. Fla. 2011) (the debtor was a physical therapist who earned \$7,700 per month; his non-filing spouse also earned \$7,700 per month; prepetition, a creditor obtained a substantial judgment against the debtor, which totaled approximately \$161,000; regarding the debtor's expenses, the debtor made contributions to his non-filing spouse's 401(k) and paid her credit card payments; the creditor moved to dismiss the case under § 707(a) and § 707(b) alleging that the debtor manipulated his income and expenses "so that he would pass the means test"; the debtor also failed to disclose some of his assets; the debtor argued that § 707(b)(1)-(3) was inapplicable because his debts were primarily non-consumer debts and that § 707(a) dismissal was inappropriate based on totality of the circumstances; the court determined that the debtor's business debt was at least 55% of his total debt and therefore § 707(b) dismissal was not warranted; however, construing the creditor's motion to dismiss as including § 707(a), the court found, based upon totality of the circumstances, that the case should be dismissed).

In re Piazza, 460 B.R. 322 (Bankr. S.D. Fla. 2011) (upon reconsideration) (the court denied reconsideration of its earlier decision dismissing the chapter 7 case under § 707(a); the court rejected the debtor's argument that a possible bad faith dismissal under § 707(a) is prohibited because of more explicit Code sections such as § 707(b); the court compares § 523 with § 727 and § 525(a) with § 525(b) and determines that § 707(b) "is a highly specific subsection dealing with abusive filings by consumer debtors, while § 707(a) applies to both consumer and non-consumer cases and allows for greater bankruptcy court discretion in determining what may constitute 'cause' for a dismissal").

In re Adolph, 441 B.R. 909 (Bankr. N.D. Ill. 2011) (this bankruptcy court characterizes the issue of “[w]hether a chapter 7 case can be dismissed on bad faith grounds under section 707(a)” as “one of the older debates in bankruptcy law”; looking at circuit decisions, the court explains that two courts “have endorsed bad faith dismissals under § 707(a)” but “two have rejected the idea”; although the Seventh Circuit is thus far silent, this court says the “better view” is that § 707(a) does not permit a case to be dismissed on bad faith grounds; in part, the court states that § 707(b) addresses bankruptcy abuses and § 727(a) prevents discharge of debts because of wrongdoing; “[m]isconduct addressed under these specific statutes cannot constitute bad faith under the more general section 707(a)”).

Redemption. (§ 722)

In re Herrera, 454 B.R. 559 (Bankr. E.D.N.Y. 2011) (in this case, a creditor with a lien on a vehicle moved for relief from the automatic stay and the chapter 7 debtor moved to redeem the vehicle from the lien; at an evidentiary hearing, the debtor submitted evidence that the replacement value was \$6,425 after deduction of a repair estimate; as might be expected, the creditor’s valuation was substantially higher, i.e., \$21,800, based upon an appraisal by an expert witness; the bankruptcy court stated that the evidentiary burden is upon the debtor and the debtor must show, by preponderance of the evidence, the replacement value as required by § 506(a)(2); after discussing the competing evidence in detail, the court “splits the baby” and gives the secured creditor’s evidence greater weight, establishing the replacement value for redemption purposes at \$17,000; however, because the debtor failed to timely perform his Statement of Intention within 30 days, the court determined that the automatic stay regarding the vehicle was terminated under § 362(h); in dicta, the court stated that the debtor would still have a right to redeem the vehicle up to the time that the debtor’s rights “are extinguished under applicable state law”).

Discharge. (§ 727)

In re Bronk, 444 B.R. 902 (Bankr. W.D. Wis. 2011) (prior to a chapter 7 bankruptcy filing, a debtor, depending one’s point of view, engaged in “pre-bankruptcy planning” or “hog-like” behavior; upon advice from his attorney, he borrowed \$95,000 on his unencumbered home and cashed in a certificate of deposit in the amount of \$42,000; shortly before filing, the CD was converted to an annuity to be claimed as exempt and the mortgage proceeds were used to fund several education savings plans supposedly for the benefit of the debtor’s grandchildren; the trustee instituted a § 727 adversary proceeding to deny the debtor’s discharge and objected to the debtor’s claimed exemptions in the annuity and the education savings plans; applying binding precedent, In re Smiley, 864 F.2d 562 (7th Cir. 1989), the court determined that the debtor’s discharge would *not* be denied under § 727(a)(2) and the conversions of assets from non-exempt to exempt shortly before bankruptcy was not by itself fraudulent to creditors; the court recognizes that “facts matter” and there was insufficient evidence of extrinsic fraud such as any act which hindered, delayed or defrauded creditors or any existence of the so-called badges of fraud; turning to the specific objections to

exemptions, after a lengthy analysis, the court determined that the Wisconsin statute did not cover the claimed college savings funds and those funds should be turned over to the trustee as property of the estate; however, the court determined, without much information, that the annuity qualified as exempt under the Wisconsin statute).

In re Barry, 451 B.R. 654 (1st Cir. BAP 2011) (in this joint chapter 7 case, the husband was a contractor who was paid \$75,000 under a home building contract but was unable to even complete the demolition, leaving the home in “shambles”; the creditor sued in state court, with an attachment denied because of the debtor-husband’s false affidavit; eventually the creditor received an arbitration award against the debtor-husband in the amount of nearly \$235,000; during the litigation and arbitration process, the debtors granted one mortgage for \$90,000 on their home and four mortgages on investment property to various other creditors to secure repayment of past and future legal services; the creditor who entered into the building contract objected to both debtors’ discharges under § 727(a)(2)(A) because property was transferred within one year before the bankruptcy filing with the intent to hinder, delay or defraud a creditor; the bankruptcy court ruled against both debtors and in favor of the creditor finding proofs were sufficient on all requisite elements; the debtors appealed because they denied fraudulent intent and further argued that the debtor-wife owed the creditor nothing; the BAP discussed the various factors to determine whether fraudulent intent existed and affirmed the bankruptcy court regarding the debtor-husband’s denial of discharge; however, with regard to the debtor-wife, the BAP concluded that a “bankruptcy court may not deny a co-debtor a chapter 7 discharge under § 727(a)(2)(A), regardless of the co-debtor’s intent, in the absence of consolidation, when the complaining party is not his/her creditor as required by § 727(c)(1); the judgment was affirmed as to the debtor-husband and reversed as to the debtor-wife).

In re Gioele, 452 B.R. 581 (Bankr. M.D. La. 2011) (the debtor agreed to pay a creditor \$257,000 for a restaurant which eventually failed, according to the debtor, because of the creditor’s failure to pay taxes and the eventual loss of liquor and video gaming licenses; after the debtor filed for chapter 7 relief, the creditor sought to deny the debtor’s discharge under § 727(a)(2) and (4) because the debtor transferred assets before the bankruptcy filing, lied on his schedules, and attempted to stop the creditor from objecting to discharge; at the § 341 meeting, the debtor “hedged his answers” and first testified he had not transferred any property, then later admitted he had sold a coin collection and a generator before filing; also, the debtor’s original and amended schedules differed “in at least five material ways” and the debtor admitted at trial, on cross-examination, that the schedules remained inaccurate; most troubling to the bankruptcy court (as it would be to any court) was the debtor’s attempt to convince a third-party to kill horses belonging to the creditor’s father after displaying cash and asking “how many of these bills would it take” for the person to kill the horses; after this incident, the third person reported the matter to the sheriff and the debtor was arrested and charged with a crime; however, at trial the debtor suggested the entire incident was “a joke”; examining the facts, the bankruptcy court determined that there were insufficient proofs to find intentionally fraudulent transfers under § 727(a)(2)(A); after stating the elements for false oath under § 727(a)(4)(A), the court found that the debtor

made material false statements with fraudulent intent, rather than resulting from honest mistakes; finally, as a result of the debtor attempting to undermine the bankruptcy process by trying to hire the third person to kill the horses, the debtor “gave, offered . . . or attempted to obtain . . . an advantage for acting or forbearing to act” in connection with the case “knowingly and fraudulently”, thereby meriting denial of discharge under § 727(a)(4)(C); the court noted that this subsection has been addressed by few reported decisions and may penalize “a debtor who commits or attempts extortion or who accepts or offers a bribe”).

Standiferd v. United States Trustee, 641 F.3d 1209 (10th Cir. 2011) (the debtors filed a chapter 13 case, obtained confirmation of a plan, and then willfully violated the confirmation order by failing to advise the chapter 13 trustee about “their post-petition [post-confirmation?] financial condition”; after a motion to dismiss the chapter 13 case was filed, the debtors converted to chapter 7 and the “trustee [UST?] then filed a motion seeking to deny the [debtors’] discharge based on their pre-conversion misconduct”; in this appeal, the Tenth Circuit rules that “a debtor may be denied discharge under § 727(a)(6)(A) based on his pre-conversion refusal to obey the Chapter 13 confirmation order”; the facts that existed included failure to file monthly operating reports, failure to timely file tax returns during the life of the plan, and failure or refusal to advise the trustee of profits or losses from a business, coupled with unsecured indebtedness that “nearly tripled” during the chapter 13 case).

Bankruptcy Rules.

In re Fish, 456 B.R. 413 (9th Cir. BAP 2011) (in this opinion, the BAP reverses the bankruptcy court “to highlight the continuing viability of the informal proof of claim doctrine in the Ninth Circuit”; although a formal proof of claim was not timely filed regarding three loans the debtor received from a credit union, the creditor filed two motions for relief from stay which stated the amount of the debt, “a description of the loans, including interest rates, and attached copies of the loan agreements and titles to the collateral”; in its legal memorandum, the creditor stated it “is entitled to relief from the automatic stay and to file a proof of claim for the deficiency, once the vehicles are recovered and liquidated”; also, the credit union provided details about the loans and the debt in an objection to the debtor’s chapter 13 plan; the BAP restates the five elements to assert a timely informal proof of claim that may be amended after the bar date by filing a formal proof of claim, i.e., “(1) presentment of a writing; (2) within the time for the filing of claims; (3) by or on behalf of the creditor; (4) bringing to the attention of the court; (5) the nature and amount of a claim asserted against the estate”; when discussing cases, the BAP notes that courts focus “not on the type of document, but on its contents and the creditor’s conduct”).

In re Schrag, 464 B.R. 909 (D. Ore. 2011) (creditors objected to a chapter 7 debtor’s discharge one hour and twenty-three minutes after the 60-day deadline established under B.R. 4004(a); the bankruptcy court determined that the lateness resulted from the creditors’ attorney and not as a result of technical problems with the electronic filing system; in reaching its decision, the bankruptcy court relied upon its “own independent

investigation” by contacting the court clerk and the court technology staff who “apparently reviewed computer logs and ran tests;” the district court held that the bankruptcy court’s “fact-finding process was clearly erroneous and its findings are reversed;” ignoring the bankruptcy court’s findings, there was evidence that there were CM/ECF compatibility system problems which resulted in the delayed filing of the complaint; the district court remanded with instructions to reinstate the creditors’ objection to discharge complaint).

In re McVay, 449 B.R. 906 (Bankr. C.D. Ill. 2011) (in this chapter 7 case, a creditor sued the debtor seeking a nondischargeable debt determination and a denial of the debtor’s discharge; the debtor sought to dismiss the complaint asserting that it was untimely under B.R. 4007(c) and 4004(a) which are identical and require a complaint “no later than 60 days after the first date set for the meeting of creditors”; in this case, the 60 day deadline fell on a Sunday and the creditor relied upon B.R. 9006(a) which grants an extension to the next following business day, in this instance, Monday; the debtor argued that, with the advent of electronic filing, the extension of time was no longer necessary and that the 61-day time period was “an unwarranted expansion of Rule 4007(c);” the court properly rejects the debtor’s argument noting that the counterpart to Rule 9006(a) “was held to apply even where the door to the Clerk’s Office was open for business, as ordered, on Saturday mornings” and that electronic filing is not accessible to many *pro se* litigants).

In re NE 40 Partners, Ltd. Partnership, 440 B.R. 124 (Bankr. S.D. Tex. 2010) (this court recognizes the more stringent pleading standards of Bell Atlantic v. Twombly and Ashcroft v. Iqbal, in relation to motions dismiss and B.R. 7009(b) requirements that fraud be pled with particularity; the trustee argued that the higher pleading standard was inapplicable because trustees typically rely upon “second-hand information”; noting that the Fifth Circuit strictly interprets Rule 9(b), that chapter 7 trustees are required to investigate and have the ability to utilize Rule 2004 examinations, and have a duty to investigate a debtor’s financial affairs, this court determines that chapter 7 trustees are held to the same heightened pleading standards as other plaintiffs; however, rather than dismissing the complaint, the court permitted the trustee to amend the complaint under Rule 15(a)).

In re Vanarthos, 440 B.R. 67 (Bankr. S.D.N.Y. 2010) (a credit card company sued a debtor for a nondischargeable debt in the amount of \$3,723, based upon alleged fraud; the defendant-debtor moved to dismiss based upon 12(b)(6); citing Iqbal, this court states that determination of plausibility is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense”; in this adversary proceeding, the creditor has not set forth “the circumstances constituting fraud or mistake” and made no specific allegations of intent to defraud or any actual fraud by the debtor-defendant; the court further commented that the complaint is “devoid of any facts indicating circumstantial evidence that the Defendant intended to defraud the Plaintiff at the time the charges were incurred”; although the facts were insufficient and the complaint did not meet the particularity requirements of Rule 9(b), the court permitted the plaintiff 30 days to amend the complaint).

In re Ortiz, 441 B.R. 73 (Bankr. W.D. Tex. 2010) (the creditor sued the chapter 7 joint debtors to determine a nondischargeable debt based upon fraud under § 523(a)(2)(A); the defendants-debtors moved for judgment on the pleadings under Rule 12(c); after examining the requisite elements to establish fraud, the court determined it could make its conclusions of law based solely on the pleadings; the court rejected the creditor's argument that its pleading under § 523(a)(2)(A) could be considered to state a cause of action under § 523(a)(2)(B) (false financial statement); because there were insufficient plausible facts alleged under Rule 9(b) and the motion was filed under Rule 12(c), the request to amend the complaint was denied because the debtors-defendants were entitled to judgment on the pleadings).

In re Tweeter Opco, 452 B.R. 150 (Bankr. D. Del. 2011) (the debtor and its affiliates filed a chapter 11 petition which was subsequently converted to chapter 7; the trustee sued a creditor to avoid and recover preferential transfers; the creditor moved to dismiss under Rule 12(b)(6) asserting that the complaint lacked requisite information including "the nature of the antecedent debt" and the "identity of the Debtor or Debtors who did business with [the creditor] for which an antecedent debt arose"; the court states that a two-part analysis is required in which "the factual and legal elements of a claim should be separated"; because the trustee's complaint provided no detail of any relationship between the debtors and the creditor "such as the identity of contracts between the parties or any description of goods or services exchanged", the complaint was deemed insufficient; the court granted leave to amend the complaint because it believed there was enough basis for the trustee to allege a claim).

In re Keystone Surplus Metals, Inc., 452 B.R. 554 (Bankr. E.D. Pa. 2011) (the debtor filed a chapter 11 case which was subsequently converted to chapter 7; the trustee sued a principal of the debtor to avoid and recover alleged preferential and fraudulent transfers; the statute of limitations for avoidance actions expired on April 2, 2011; about seven weeks later, the trustee sought to amend the complaint to include other transfers which were alleged to be newly discovered; after quoting B.R. 7015, the court states that "precise delineation of when leave to amend a complaint should be granted or denied is impossible" and that the determination is at the sound discretion of the trial judge; Rule 15(c) discusses when an amendment shall relate back to the original complaint; this court states that the focus should be upon whether there is "a common core of operative facts in the two pleadings"; in this instance, the new claims against the debtor's principal, while based upon alleged fraud, require different "factual predicates"; the court then addresses possible equitable tolling and states that, under Third Circuit precedent, the trustee must show that concealment on the part of the defendant delayed the trustee from learning about the new transfers; after conducting an evidentiary hearing, the court found that equitable tolling was warranted because of the defendant's "apparent active concealment of certain prepetition transfers").

In re IFC Credit Corp., 663 F.3d 315 (7th Cir. 2011) (IFC filed a bankruptcy petition on July 27, 2009, which was signed by its president, who was not an attorney; however, the next day, IFC filed an amended petition properly signed by an attorney; the Seventh

Circuit states that corporations are not permitted to engage in *pro se* litigation; however, this prohibition is not a rule of subject-matter jurisdiction; if the bankruptcy court had discovered that IFC was unrepresented and immediately dismissed, it would be too late to amend the voluntary petition under Rule 1009(a); although Rule 1009(a) does not “mention relation back” because there is no statute of limitations for filing a bankruptcy petition, relation back of the amended petition is permissible).

In re Kayne, 453 B.R. 372 (9th Cir. BAP 2011) (the debtor filed a chapter 7 case together with Schedules and the required SOFA; the debtor’s attorney certified that he had “no knowledge after an inquiry that the information in the schedules [was] incorrect” under § 707(b)(4)(D); at the § 341 meeting, the debtor stated that payments were being received under a nondisclosed note in the amount of approximately \$1,200 a month and the trustee commented “it sounds like an asset to me”; the attorney expressed surprise and stated that the balance on the note would likely be exempt under the wildcard exemption; the debtor and the attorney never amended the schedules, a no asset report was filed, and the case was closed; one month later, the trustee learned that the balance on the note was not \$7,000, but was actually greater than \$61,000; this information caused a reopening of the case; in the subsequent turnover action, the debtor and the attorney failed to appear and the debtor was instructed to turn over the note and the prior \$6,250 in payments received; at a subsequent Rule 2004 examination, the debtor informed the trustee that information about the note, the payments, and a settlement agreement had been given to the attorney before the bankruptcy case was filed; understandably, the trustee requested that sanctions be imposed against the attorney under § 707(b)(4)(C) and Rule 9011; after restating the egregious facts, the BAP affirmed the bankruptcy court because the attorney’s “patently false” statements and meritless arguments justified the imposition of \$20,000 in sanctions; because the attorney’s ability to pay was not raised in the bankruptcy court, the BAP ruled that the argument had been waived on appeal). NOTE: This summary does not do justice to the BAP’s decision and the opinion should be read.

In re Blue Pine Group, Inc., 457 B.R. 64 (9th Cir. BAP 2011) (in another appeal, the BAP discusses B.R. 9011 sanctions in detail; the BAP affirms an imposition of approximately \$109,000 in sanctions against an attorney and his law firm because a corporate bankruptcy case was filed without proper authorization and the attorney failed to conduct a reasonable inquiry into the corporate affairs; even after being placed on notice that proper authorization was lacking, the attorney continued to seek to uphold the improper filing; in discussing Bankruptcy Rule 9011, the BAP reiterated that a bankruptcy court has considerable discretion in determining the amount of sanctions to be awarded and this court properly utilized the ABA Standards for Imposing Lawyer Sanctions such as (1) whether a duty was violated, (2) whether the act was intentional or not, (3) the result of the misconduct and the seriousness of the injury and (4) any mitigating factors that may exist; notwithstanding the attorney’s continued advocacy of his assertion that the bankruptcy case was properly filed, the BAP limited its discussion and ruling as to whether the attorney “made an objectively reasonable inquiry into the legal and factual basis for the bankruptcy filing”).

Barrientos v. Wells Fargo Bank, 633 F.3d 1186 (9th Cir. 2011) (the debtor filed an adversary proceeding to seek contempt for violation of § 524, to seek an injunction, a “coercive fine,” other declaratory relief, and to recover his attorney’s fees; the bank filed a motion to dismiss and ruled that there is no “private right of action to sue for a violation of § 524;” the Ninth Circuit agreed with the bankruptcy and district courts that an adversary proceeding is improper and that civil contempt should be brought in a Rule 9014 motion; the Ninth Circuit notes that Rule 9020 expressly states that “a motion for an order of contempt” shall be governed by Rule 9014).