CONSUMER SESSION

Case Law Update: Significant Consumer Cases over the Last 12 Months

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CONSUMER LAW UPDATE

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

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Jurisdiction

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

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

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

Automatic Stay

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

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

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

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

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

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

Avoidance actions

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

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

Property of Estate

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

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

Exemptions

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

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

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

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

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

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

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

Eligibility

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

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

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

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

Chapter 7 Issues

Priority Claims

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

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

Discharge, Exceptions and Objections

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

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

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

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

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

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

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

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

Reaffirmation

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

Chapter 13 Issues

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

Confirmation Issues

Priority Claims

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

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

Form of Plan

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

Disposable Income

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

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

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

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

Liens

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

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

Length of Plan

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

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

Attorney Fees

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

Dismissal

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

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

Mortgage Litigation

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

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

Fair Debt Collections Practices Act

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

Employment of special counsel

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

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

Claims

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

CONSUMER LAW UPDATE

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

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Automatic Stay

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

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

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

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

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

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

Discrimination

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

Avoidance Actions

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

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

Property of Estate

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

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

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

Exemptions

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

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

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

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

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

Chapter 7 Issues

Means Test

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

Conversion

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

Discharge

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

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

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

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

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

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

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

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

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

Discharge Injunction

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

Reaffirmation

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

Redemption

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

Dismissal

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

Reopening Case

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

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

Chapter 13 Issues

Confirmation Issues

Local Plan Forms

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

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

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

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

Classification

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

Projected Disposable Income

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

Lien Stripping

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

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

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

Surrender

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

Post-confirmation Modification

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

Discharge

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

Mortgage Issues

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

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

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

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

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

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

Conversion and Dismissal

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

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

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

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

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

Attorney Fees

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

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

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

Claims

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

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

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

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

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

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

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

CONSUMER LAW UPDATE

Cases reported from July 1, 2012 through September 28, 2012

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Appeals

Certified appeal of interlocutory order discussed. In a decision rejecting use of § 506(d) as a means to void an unsecured junior mortgage, the Tenth Circuit discussed its jurisdiction over an appeal from a district court order in an interlocutory appeal from the bankruptcy court. The bankruptcy court had denied confirmation of a plan that proposed to use § 506(d) to void the second mortgage, and that denial was not a final order. On interlocutory appeal, the district court affirmed and "purported to certify its interlocutory appeal for a further interlocutory appeal to the [circuit] court under 28 U.S.C. § 158(d)(2)(A)." Although the circuit panel questioned whether that could be done, and engaged in an interesting discussion of interlocutory appeals, the panel ultimately reached the merits, because subsequent to the original appeal, the bankruptcy court had confirmed another plan, putting finality on the disputed confirmation issue. *Woolsey v. Citibank, N.A. (In re Woolsey),* ___ F.3d ____, 2012 WL 3797696 (10th Cir. Sept. 4, 2012). *See* summary of merits under **Chapter 13 Issues.**

Automatic Stay

Chapter 7 debtor had standing for fees as stay violation damages. The Chapter 7 debtor's former spouse and her attorney willfully violated the stay by pursuing state court enforcement of spousal support, and the bankruptcy court awarded the debtor $42,358.36 damages, primarily attorney fees. The Fifth Circuit held that the debtor had standing to bring the stay violation action, and §§ 362(b)(1) and (2) exceptions did not protect the creditor and her attorney, since the state action was a collection action, and it was pursued without regard to whether there was non-bankruptcy estate property from which collection could be made. The fee award was affirmed under § 362(k), since it was for violation of the stay. *MacMaster v. Small (In re Small),* 2012 WL 3531516 (5th Cir. Aug. 16, 2012), slip copy.

IRS did not violate stay by delay in refund. The temporary "freeze" by IRS in manually processing a refund, while it decided whether to file a motion concerning plan default or setoff, and to determine if the refund would be payable to anyone except the debtors, did not violate §§ 362(a)(3) or (6). Also, the hold by IRS did not violate the confirmed plan's provision concerning payment of creditors, including IRS. "This is not a case where the IRS sought to unilaterally vary the plan's terms; it is a case where the IRS halted automatic payment of the refund to consider its rights and responsibilities with regard to the Harchar's bankruptcy, and then filed a motion for relief in the bankruptcy court, as it was expressly permitted to do." The court also cited *Pertuso v. Ford Motor Credit Co.,* 233 F.3d 417 (6th Cir. 2000), to support its conclusion that there was no private right of action for damages under § 1327. *Harchar v. United States of America (In re Harchar),* ___ F.3d____, 2012 WL 3968162 (6th Cir. Sept. 12, 2012).

Contempt sanctions required adversary proceeding. The debtors had filed a motion for contempt sanctions for a stay violation, rather than seeking damages under § 362(k), and the Bankruptcy Appellate Panel held that an adversary proceeding was required, since the underlying issue was whether the vehicle that the creditor had repossessed was property of the estate. Once the creditor took the position that the vehicle was never property of the estate, the bankruptcy court should not have determined the estate's interest outside of an adversary proceeding, but the BAP expressed puzzlement over why the debtors chose to proceed with

contempt rather than under § 362(k). *Jahr v. Frank (In re Jahr),* 2012 WL 3205417 (BAP 9th Cir. Aug. 1, 2012), slip copy.

Debtor entitled to attorney fees on appeal. Distinguishing *Sternberg v. Johnston,* 595 F.3d 937 (9th Cir. 2010), the Bankruptcy Appellate Panel held that attorney fees under § 362(k) were allowable when the debtor defended the damages for stay violation on appeal by the creditor. Defending the appeal was necessary, not only to preserve the damage award, but to "uphold the bankruptcy court's decision that [the creditor] had, indeed, violated the stay. . . Simply put, Debtor's defense of the bankruptcy court's decision was an extension of her efforts to enforce her automatic stay." In *Sternberg,* the point at which the stay violation had been remedied was clear, but in the current case, the debtor's attorney fees on appeal were part of the enforcement of the stay. *Schwartz-Tallard v. America's Servicing Co. (In re Schwartz-Tallard),* 473 B.R. 340 (BAP 9th Cir. 2012).

Property of Estate

Trustee's sale of tenants in common home properly denied. The Chapter 7 trustee attempted to sell a residence owned as tenants in common by the debtor and estranged spouse, free and clear of spouse's interest, but the bankruptcy court found that the equity in the property was solely attributable to the spouse's financial contributions. The benefit to the estate did not outweigh the detriment to the spouse, and the bankruptcy court did not err in denying the sale under § 362(h)(3). *Lovald v. Tennyson (In re Wolk),* 686 F.3d 938 (8th Cir. 2012).

Turnover to trustee was not allowed on unjust enrichment theory. The Chapter 7 trustee sued defendants for recovery of money owed to the debtor, on a theory of unjust enrichment, but such a cause of action is not available under § 542. *Lovald v. Falzerano (In re Falzerano),* 686 F.3d 885 (8th Cir. 2012).

Spendthrift trust principal protected. A Chapter 7 trustee, through strong-arm power, was in the position of judgment creditors, who under the California Probate Code could access amounts payable, not yet distributed, to a spendthrift trust beneficiary, but the Probate Code placed a restriction, limiting the trustee to 25% of the amount payable, to the extent it was not necessary for support of the debtor/ beneficiary. *Bendon v. Reynolds (In re Reynolds),* ___ B.R. ___, 2012 WL 3641488 (BAP 9th Cir. Aug. 24, 2012).

Chapter 7 debtor's tax refund was property of estate. Finding that the debtor's tax refund was based solely on his prepetition earnings, the refund became property of the estate and was subject to turnover to the trustee. The interest in the refund was determined under the IRS Code and Illinois law, under which there was no marital property concept that would give the spouse an interest in the refund, unless the spouses were in a marital dissolution or separation proceeding. *In re Ruhl,* 474 B.R. 596 (Bankr. N.D. Ill. 2012).

Exemptions

Surcharge of exempt assets approved. The First Circuit approved use of § 105(a) by the bankruptcy court in surcharging exempt assets, when the debtor had concealed non-exempt

assets from the trustee. Allowing the surcharge for the trustee's expenses was necessary when the debtor acted fraudulently in concealing assets, "both to protect the integrity of the bankruptcy process and to ensure that a debtor exempts an amount no greater than . . .the Bankruptcy Code permits." In so holding, the First Circuit agreed with the Ninth, *Latman v. Burdette,* 366 F.3d 774 (9th Cir. 2004), that an equitable remedy was appropriate, but the Tenth Circuit held in *In re Scrivner,* 535 F.3d 1258 (10th Cir. 2008), *cert. denied,* 556 U.S. 1126 (2009), that a surcharge was inconsistent with the Code's exemption provisions and beyond the bankruptcy court's equitable authority. *Malley v. Agin,* ____ F.3d ____, 2012 WL 3326629 (1st Cir. Aug. 15, 2012).

Michigan's bankruptcy-specific exemptions are constitutional. Reversing its Bankruptcy Appellate Panel, 455 B.R. 590 (BAP 6th Cir. 2011), the Sixth Circuit panel agreed with the bankruptcy court that Michigan's law was constitutional, in permitting debtors to choose between the § 522(d) exemptions and state exemptions that were available only to debtors in bankruptcy. The bankruptcy-specific homestead exemption, for example, is more generous than § 522(d)(1) and the state's non-bankruptcy homestead, so it was the trustee who objected to the debtor's choice of the more generous exemption. Under the Uniformity Clause of the Constitution, § 522 and the Michigan statute operated uniformly, with "Michigan's decision to distinguish between debtors in bankruptcy and those outside of bankruptcy mak[ing] sense." *Richardson v. Schafer (In re Schafer),* 689 F.3d 601 (6th Cir. 2012).

Kansas bankruptcy-only exemption was constitutional. Chapter 7 trustees objected to debtors' use of a Kansas exemption, contending that the exemption, which was only available in bankruptcy, was unconstitutional. At issue was an exemption in the earned income tax credit, which the 2011 Kansas legislature allowed as exempt for those Kansans filing for bankruptcy relief. Engaging in an analysis of constitutional issues, the court concluded: "Because the Bankruptcy Code expressly accommodates the several states' exemption schemes by allowing states to 'opt out' of the federal exemptions in 11 U.S.C. § 522(b) and because this exemption will apply uniformly to all Kansas debtors in bankruptcy, the Act does not violate either the Bankruptcy or Supremacy Clauses." *In re Earned Income Tax Credit Exemption Constitutional Challenge Cases,* ___ B.R. ____ , 2012 WL 3150065 (Bankr. D. Kan. Aug. 2, 2012).

Debtors entitled to exemptions in cash surrender values of life insurance and annuity contracts under Arizona law. Reversing its Bankruptcy Appellate Panel, at 440 B.R. 814, and agreeing with the bankruptcy court, Chapter 7 debtors were entitled to Arizona's exemptions in cash surrender value of life insurance policies and proceeds of annuity contracts. The court construed the Arizona statute to allow exemption by the debtors under the statutory language that the contracts either named as beneficiary the debtor's surviving spouse, child, parent, brother or sister, or "any other dependent family member." The word "other" was construed to be a "word of differentiation, establishing that a beneficiary can be either a listed beneficiary or some 'other' family member who is dependent." Both debtors involved in the appeals had a life insurance policy or annuity naming an adult, non-dependent child as beneficiary, and under the court's construction of the statute, a debtor's child did not need to be dependent to be a beneficiary. The cash values were exempt. *Tober v. Lang, et al. (In re Tober),* 688 F.3d 1160 (9th Cir. 2012).

Trustee, not debtor, entitled to appreciation of oil and gas royalty value. Applying *Schwab v. Reilly,* 130 S.Ct. 2652 (2010), the Chapter 7 debtor was not entitled to the appreciated value of oil and gas lease royalties, after the debtor claimed on Schedule C specific dollar amounts under the § 522(d)(5) wildcard, under which exemptions are for a debtor's interest in assets, rather than the assets. The claimed exemption was below § 522(d)(5)'s dollar cap, and the debtor did not claim "full" or "100%" interest, only the same dollar amount shown on Schedule B for the asset's value, with the court noting that *Schwab's* reference to "FMV" in claiming exemptions was dicta. Here, the debtor's dollar amount exemption did not give notice to the Chapter 7 trustee that the debtor was attempting to exempt the entire royalty interest, and the "trustee need not have objected to Orton's exemptions to retain the ability to except the lease from abandonment," with the trustee entitled to appreciated value of the lease royalties. *In re Orton,* 687 F.3d 612 (3d Cir. 2012).

Trustee's avoidance of second mortgage prevailed over exemption claim. At the petition date, the debtors had no equity in their home, because of two mortgages, but they scheduled the second mortgage as unsecured and notified the trustee of a defect in its acknowledgement. The Chapter 7 trustee did not object to the exemption claims on the residence, under §§ 522(d)(1) and (5), but the trustee was successful in avoiding the second lien against the home, then moving to value the exemptions on the home at zero, since the avoided lien was for the benefit of the estate under § 551. The property had been sold by the trustee, with some proceeds left after paying the first mortgage. Under *Schwab v. Reilly,* 130 S.Ct. 2652 (2010), the trustee was not required to object to the exemptions, when the debtors had no equity at the time of filing their petition. The debtors' interests were determined as of the filing date, because at that point the second mortgage had not been avoided, and the debtors were not entitled to benefit from the trustee's avoidance. The avoidance recovery was a separate asset from the home, in which the debtors had claimed exemption. *In re Messina,* 687 F.3d 74 (3d Cir. 2012).

Based on debtors' credibility, homestead exemption was properly denied. The bankruptcy court made a factual determination that the debtors did not intend to reside at a specific property, and the Bankruptcy Appellate Panel deferred to that finding, which was based on credibility of the debtors. *Banks v. Washington Trust Bank, et al. (In re Banks),* 2012 WL 3205169 (BAP 9th Cir. July 31, 2012), slip copy.

Under Nevada law, mobile kitchen was a vehicle. The Chapter 13 debtors' mobile kitchen, which was used in their barbeque business, was registered with the Nevada Department of Motor Vehicles and had a vehicle identification number, and the bankruptcy court did not err in allowing the vehicle exemption, over the trustee's objection. Nevada is an opt out state, with an exemption for one "vehicle," a term that was distinct from "motor vehicle." *Leavitt v. Alexander (In re Alexander),* 472 B.R. 815 (BAP 9th Cir. 2012).

Chapter 7 Issues

Chapter 7 Trustee Fees

Statutory trustee fee should not be reduced, absent extraordinary circumstances. The bankruptcy court reduced the Chapter 7 trustee's fees, based on the time spent and lack of

complexity in collecting state tax refunds, but the Bankruptcy Appellate Panel reversed, holding that the statutory fee, which was based on distributions in the case, should not be reduced, absent a showing of extraordinary circumstance. By adding § 330(a)(7) in BAPCPA, Congress treated the § 326 fee as a commission, presumed to be reasonable, if requested by the trustee at the statutory rate. *Hopkins v. Asset Acceptance LLC (In re Salgado-Nava,* 473 B.R. 911 (BAP 9th Cir. 2012).

Dismissal

Case was properly dismissed under totality of circumstances. Although the bankruptcy court denied the U.S. trustee's motion to dismiss on the presumption of abuse standard, it dismissed the case under a totality of circumstances analysis, which was affirmed. The bankruptcy court examined the debtors' income and expenses, finding that voluntary contributions to a 401(k) plan were not reasonably necessary for the debtors' support, that $238.68 ongoing monthly repayment to a pension loan was disallowed as an expense, and that $400 monthly payments on a prepetition tax debt were subject to reduction for purposes of the ability-to-pay creditors' evaluation. The bankruptcy court did not err in finding that the debtors had ability to pay creditors over time, and consideration of the debtors' improvement in income postpetition was not error. The case was properly dismissed under § 707(b)(3)(B). *Ng v. Farmer (In re Ng),* ___ B.R. ____, 2012 WL 3890063 (BAP 9th Cir. Sept. 7, 2012).

Discharge and dischargeability

Creditors could not compel arbitration of dischargeability issues. The Ninth Circuit held that the bankruptcy court did not err in refusing to compel arbitration of §§ 523(a)(2), (4) and (6) claims. Noting that the dischargeability claims at issue were within the bankruptcy court's exclusive jurisdiction under § 523(c), the court distinguished the general recognition of arbitration under the Federal Arbitration Act. The court agreed with the district court's conclusion "that allowing an arbitrator to decide issues that are so closely intertwined with dischargeability would 'conflict with the underlying purpose of the Bankruptcy Code.'" *Ackerman v. Eber (In re Eber),* 687 F.3d 1123 (9th Cir. 2012).

Willful attempt to evade or defeat tax payment or collection affirmed. Reviewing § 523(a)(1)(C), the Fifth Circuit agreed with the Eleventh Circuit, in *In re Fretz,* 244 F.3d 1323 (11th Cir. 2001), that "the plain language of 'willfully attempted. . .contains a mental state requirement (that the attempt was done 'willfully).'" Also, the conduct requirement in § 523(a)(1)(C) "applies equally to attempts to evade or defeat the collection and payment of tax," and not simply to assessment of a tax. "All the Government has to establish in order to satisfy § 523(a)(1)(C)'s mental state requirement is that the debtor (1) had a duty to pay taxes under the law, (2) knew he had that duty, and (3) voluntarily and intentionally violated that duty." *United States v. Coney,* 989 F.3d 365 (5th Cir. 2012).

Document filed late by debtors was not "return" for purposes of § 523(a)(1)(B). Examining the definition of "return" that was added by BAPCPA in a hanging paragraph to § 523(a), and as used in IRS Code § 6020(a), the Bankruptcy Appellate Panel found that the precise meaning of the two sentences in the hanging paragraph, when read together, was not clear. The panel

reviewed the positions that other courts had taken on § 523(a)(1)(B) and the hanging paragraph. However, the debtors at issue did not file their 2001 return until August 2006, after IRS had engaged in "the burdensome process of determining their tax liability, providing the statutory notice of deficiency, assessing the taxes, and attempting collection." Consequently, the late return, filed 17 months after assessment, did not meet filing requirements, and the 2001 tax liability was excepted from discharge. *Wogoman v. IRS (In re Wogoman),* 475 B.R. 110 (BAP 10th Cir. 2012).

Misrepresentations about building permit was nondischargeable. Reversing its Bankruptcy Appellate Panel, at 453 B.R. 452, the First Circuit agreed with the bankruptcy court that the creditor established a § 523(a)(2)(A) exception by the debtor/builder's misrepresentations about a building permit. Examining causation, the facts established that the creditor would have cancelled the home construction contract and recovered a deposit if the debtor had not lied about having a building permit. As to legal cause, the creditor's loss resulted from the misrepresentation on which the creditor reasonably relied. *Sharfarz v. Goguen (In re Goguen),* ___ F.3d ____, 2012 WL 3324236 (1st Cir. Aug. 15, 2012).

Subjective intent to deceive required for § 523(a)(2)(A). Finding that the bankruptcy court used an objective standard of fraudulent intent in finding reckless disregard for the truth, rather than the required subjective standard, the Bankruptcy Appellate Panel reversed and found no evidence to support an exception from discharge under § 523(a)(2)(A). The allegation was that the debtor obtained a loan, misrepresenting ownership of water rights, but the panel concluded that the "bankruptcy court found that a prudent person exercising reasonable diligence *should have known* that [the debtor] did not own 10.4 acre-feet of the Water Right and [the debtor] failed to exercise such care and diligence. The bankruptcy court found a breach of the duty of care and competence in representing ownership, *i.e.,* negligence, but not a breach of the duty of honesty. . . .The bankruptcy court found negligence, not scienter." *DSC Nat'l Properties, LLC v. Johnson (In re Johnson),* ___ B.R. ____, 2012 WL 3399614 (BAP 10th Cir. Aug. 15, 2012).

Common law duties not sufficient for fiduciary exception. Affirming its Bankruptcy Appellate Panel, at 458 B.R. 504, the Eighth Circuit agreed that a Minnesota statute creating a lien relationship between the debtor and creditor did not create a fiduciary obligation. The debtor was owner and manager of a construction company that did not fully pay a subcontractor. The Minnesota statute provided that payments received for improvement of real estate were to be held in trust for benefit of those furnishing labor and materials, but the statute said that no fiduciary liability was created. It is not enough for the statute to create a trust in name; a statutory trust must include a definable res and impose trust-like duties. *Reshetar Systems, Inc. v. Thompson (In re Thompson),* 686 F.3d 940 (8th Cir. 2012).

State court judgment not given preclusive effect on conversion and embezzlement. Since the relevant Michigan statute on conversion does not require fraud, the state court judgment could not have necessarily litigated the fraud requirement for § 523(a)(4). The bankruptcy court's summary judgment based on the preclusive effect of the judgment was reversed and remanded. *Dantone v. Dantone (In re Dantone),* ___ B.R. ___, 2012 WL 4009700 (BAP 6th Cir. Sept. 13, 2012).

Former spouse's claim for overpayment of support was not covered by § 523(a)(5), but was excepted from discharge under § 523(a)(15). The Bankruptcy Appellate Panel affirmed the conclusion that, although the former husband had overpaid spousal support, the debt was not a domestic support obligation, since repayment to him would not be "support." However, the debt did fall within the broader provision of § 523(a)(15), under which the claim arose "in connection with a separation agreement, divorce decree or other order of a court of record." Section 523(a)(15) does not require that the debt be support in nature, and a former spouse is included in the statute. However, the claimant was not entitled to attorney fees for prosecuting the proceeding. *Taylor v. Taylor (In re Taylor),* ___ B.R. ____, 2012 WL 3839318 (BAP 10th Cir. Sept. 5, 2012).

Partial discharge upheld under *Brunner* test. The bankruptcy court did not err in partially discharging student loans, properly applying the *Brunner* test to that portion that was discharged. The first prong of *Brunner* "allows the bankruptcy court to determine the amount of student loan debt that prevents the debtor from maintaining a minimum standard of living and discharge only that amount." *Educational Credit Management Corp. v. Jorgensen (In re Jorgensen),* ___ B.R. ___, 2012 3963339 (BAP 9th Cir. Sept. 11, 2012).

Debtor eligible for Income Contingency Program was not entitled to undue hardship discharge. Applying a totality-of-circumstances test under § 523(a)(8), the Bankruptcy Appellate Panel found no error in the bankruptcy court's finding that the debtors failed to show an inability to continue to earn stable income and that the debtors were able to maintain a basic standard of living. Under *Educ. Credit Mgmt. Corp. v. Jesperson,* 571 F.3d 775 (8th Cir. 2009), a factor to be considered is availability of the Income Contingent Repayment Program for student loans, and the debtor qualified for the Program, under which projected monthly payments would be zero. "The mere possibility of tax consequences at the expiration of the 25-year repayment period is not dispositive of the issue of whether the ICRP represents a viable avenue for repayment of student loan debt." The debtors failed to prove undue hardship. *Nielsen v. ACS, Inc. (In re Nielsen),* 473 B.R. 755 (BAP 8th Cir. 2012).

See also In re Bene, under **Chapter 13 Discharge** for discussion of *Brunner* and the Ford Program.

Reliance on advice of counsel does not protect against § 727(a)(2) objection. When it was clear that the debtor had transferred and concealed property with the intent to hinder, delay or defraud creditors, it was not a defense that the debtor used transferred funds to pay legitimate business or personal debt, or that engaging in the transfers or concealment was on alleged advice of counsel. Reversing the trial court's ruling for the debtor, the Bankruptcy Appellate Panel found, from totality of the record, that "it is implausible that [the debtor] lacked the intent to hinder, delay or defraud his creditors when he transferred significant assets less than a year before filing a petition for chapter 7 relief." *Cox v. Villani (In re Villani),* ___ B.R. ____, 2012 WL 3755525 (BAP 1st Cir. Aug. 28, 2012).

U.S. trustee's complaint did not contain sufficient facts to support judgment on pleadings for §§ 727(a)(3) and (5). The complaint alleged that the debtor had failed to maintain adequate financial records and to explain a loss of assets, but the pleadings did not support the bankruptcy

court's judgment on the pleadings. "Under § 727(a)(3), a debtor's burden to show that his record keeping was reasonable under the circumstances is triggered only after the party seeking to deny his discharge establishes that inadequate records exist. That burden was never triggered here." As to § 727(a)(5), the burden of explaining loss of assets never shifted to the debtor. The debtor's answer to the complaint had denied allegations, and a prebankruptcy state-court judgment did not have preclusive effect. Even though that judgment contained findings of no records of investments with the state-court plaintiff, the debtor was not precluded from defending the § 727 complaint by denying lack of insufficient records. *McDermott v. Swanson (In re Swanson),* 476 B.R. 236 (BAP 8th Cir. 2012).

Debtor's omissions were material for purposes of § 727(a)(4). The Chapter 7 debtor's omissions from schedules of income and undervaluation of assets constituted a false oath, and the "threshold to materiality is fairly low," with an omission or misrepresentation of relatively modest assets being sufficient. "By undervaluing his interests, the Debtor sent a message to the Trustee that there was no need to inquire further." Section 727(a)(4)(A) requires full and complete disclosure. *Kaler v. Charles (In re Charles),* 474 B.R. 680 (BAP 8th Cir. 2012).

Discharge Revocation

Revocation complaint was time-barred. Equitable concepts do not overcome § 727(e)'s time requirements for filing complaints to revoke discharge, and Rule 60 relief is not available for these complaints, under Fed. R. Bankr. P. 9024. Section 727(e)'s timing is not a mere statute of limitations; it is jurisdictional. *The Cadle Co. v. Andersen (In re Andersen),* ___ B.R. ____, 2012 WL 3578669 (BAP 1st Cir. Aug. 17, 2012).

Reaffirmation

Ride through eliminated only as to personalty. Sections 362(h), 521(a)(2), 521(a)(6) and 521(d), as amended by BAPCPA, effectively eliminated the ride-through option, but only as to personalty. "To the extent the subject property is real property and the debtor is current on her obligations to the creditor, retention of the property does not require the debtor to specify redemption or reaffirmation on her statement of intentions." The home mortgage creditor's motion to require the debtor to complete reaffirmation, redemption or surrender was denied. *In re Covel,* 474 B.R. 702 (Bankr. W.D. Ark. 2012).

Chapter 13 Issues

Eligibility

No per se rule against simultaneous Chapter 20 cases. Reversing dismissal of a Chapter 13 case filed while a prior Chapter 7 was still pending, the district court concluded that there was no per se rule against such a filing; rather, on remand, the bankruptcy court must determine if the Chapter 13 was filed in good faith, or if other grounds existed for dismissal. *Sood v. Business Lenders, LLC,* 2012 WL 2847613 (D. Md. July 10, 2012), slip copy.

Joint petition by mother and son constituted two petitions. Although the joint petition filed by a mother and her son was improper, not entitled to joint administration, and the petition of the mother was then dismissed, the filing constituted the commencement of a case by each party, triggering the automatic stay for each. Each party owed a filing fee. The son's petition was still active when a foreclosure took place, in violation of the stay. *Stancil v. Bradley Investments, LLC (In re Stancil),* ___ B.R. ___, 2012 WL 2320883 (Bankr. D. Dist. Col. June 19, 2012).

Eligibility calculation includes in rem debt left after Chapter 7 discharge. Agreeing with the majority view, although the debtor's in personam liability had been previously discharged, the in rem claim must be included in the § 109(g) calculation, and the debtor was ineligible. The opinion discusses, and disagrees with, the contrary authority. *In re Branam,* ___ B.R. ____, 2012 WL 3309704 (Bankr. S.D. Fla. Aug. 13, 2012). *See also In re Rios,* ___ B.R. ____, 2012 WL 3627596 (Bankr. D. Mass. Aug. 21, 2012), which looked to the undersecured mortgage creditor's proof of claim, not simply to the debtor's schedules, holding that the unsecured portion of the undersecured claim must be counted for eligibility.

Confirmation Issues

Attorney-fee only plan not per se bad faith. See summary of *Sikes v. Crager (In re Crager),* ___ F.3d ___, 2012 WL 3518473 (5th Cir. Aug. 16, 2012), below under **Attorney Fees**.

Applicable Commitment Period

Debtor with no projected disposable income may confirm less than 60-month plan. The Ninth Circuit held that its precedent in *In re Kagenveama,* 541 F.3d 868 (9th Cir. 2008), survived *Hamilton v. Lanning,* 130 S.Ct. 2464 (2010), with *Kagenveama*'s construction of the applicable commitment period still valid. The debtors proposed a 36-month plan, with 1% distribution to unsecured creditors, and the trustee objected, on the basis that *Lanning* required a full 60-month plan. After an initial appeal to the BAP, the bankruptcy court certified the plan duration issue for direct appeal. The facts were not in dispute, with the debtors' current monthly income above the median income in their location, but their monthly disposable income was negative. Although the Code defines "applicable commitment period," the panel observed that "its role in defining the duration of the Debtor plan of reorganization is not [defined]." The panel discussed the pre-*Lanning* interpretations of § 1325(b), with *Lanning* adopting the forward-looking approach to projected disposable income. The panel then discussed the divergent views on applicable commitment period, concluding that *Lanning* did not address that issue and that the applicable commitment portion of *Kagenveama* was not "clearly irreconcilable" with *Lanning*. The majority of the panel ended its opinion with the observation that it was not deciding the applicable commitment period issue as a matter of first impression; rather, it was bound by *Kagenveama*. "Only the Supreme Court or an en banc panel of this court may revisit *Kagenveama*'s holding regarding the applicable commitment period." *Danielson v. Flores (In re Flores),* ___, F.3d ___, 2012 WL 3803936 (9th Cir. Aug. 31, 2012).

Discrimination

Separate classification of student loan debt was unfair discrimination. The plan proposed to separately classify student loan debt, treating it as long-term debt, to be paid with interest, resulting in that debt receiving 47% dividend, while other unsecured creditors would receive 1% distribution. Section 1322(b)(1) placed a fairness limitation on § 1322(b)(5) treatment of long-term unsecured debt, and the court found the plan to unfairly discriminate against other unsecured creditors. Also, § 1322(b)(10), added by BAPCPA, prevents payment of interest on unsecured nondischargeable debt, such as student loan, unless disposable income is sufficient to pay allowed claims in full. The court noted that this provision essentially mooted the fairness inquiry in this case. *In re Kubeczko,* 2012 WL 2685115 (Bankr. D. Colo. July 6, 2012), slip copy. See also *Gorman v. Birts (In re Birts),* 2012 WL 3150384 (E.D. Va. Aug. 1, 2012) (Plan paying student loan as long-term debt, with interest, unfairly discriminated against other unsecured creditors receiving 7% distribution.).

Inheritance—Property of Estate

Inheritance received more than 180 days after commencement was included in estate. Citing dicta from the Eleventh Circuit, *Waldron v. Brown (In re Waldron),* 536 F.3d 1239 (11th Cir. 2008), the bankruptcy court held that an inheritance received by the debtor more than 180 days after the petition filing became property of the estate under § 1306(a). The *Waldron* court had cited *In re Noe,* 269 B.R. 250 (Bankr. M.D. Fla. 2000), in which the inheritance was received about two years postpetition, as "an example of a post-petition inheritance that was properly included in a chapter 13 estate." The bankruptcy court concluded that "not applying the 180-day limitation under § 541(a)(5), when determining what is included within a chapter 13 estate under § 1306(a), is consistent with a major distinction between chapters 13 and 7." *In re Tinney,* 2012 WL 2742457 (Bankr. N.D. Ala. July 9, 2012), slip copy.

Disposable Income

Household size may be determined by use of fractional economic unit. In a direct appeal, the Fourth Circuit affirmed the bankruptcy court's method of determining the debtor's household size for purposes of § 1325(b)'s disposable income, when the bankruptcy court found the number of individuals with income and expenses, intermingled with the debtor's, and used a "fractional economic unit" approach to calculate how much the part-time residents were members of the debtor's household. The debtor had custody of two minor children from a first marriage 204 days of the year, and her current husband had custody of three children from a prior marriage 180 days of the year, resulting in fluctuating expenses for the care of those seven persons, five of whom resided in the home part-time. The bankruptcy court had identified three methods of finding what constitutes a "household," a term not defined in the Code: (1) "heads-on-bed" approach, using the Census Bureau's definition; (2) "income tax dependent" approach; and (3) economic unit approach, and the Circuit Court approved use of the latter, even though it meant dividing the minor children into fractions. The "§ 707(b) means test calculation will be affected by the threshold determination of how many people are part of [the debtor's] 'household,' as determined for purposes of § 1325(b)." Household size is relevant to the calculation of the "amounts reasonably necessary to be expended," under § 1325(b)(3). Use of the "heads-on-bed"

approach is an overly broad definitional basis for "household, . . . too removed from the purposes of § 1325(b)," with the Circuit Court agreeing with the majority of bankruptcy courts that this approach was "inconsistent with the purpose and objectives of the Code." In contrast, the "economic unit" approach was consistent with § 1325(b) and the Code as a whole. "The approach is flexible because it recognizes that a debtor's 'household' may include non-family members and individuals who could not be claimed as dependents on the debtor's federal income tax return, but who nonetheless directly impact the debtor's financial situation. . . . In other words, those whose income and expenses are interdependent with the debtor's are part of his or her 'household' for purposes of § 1325(b)." *Johnson v. Zimmer,* 686 F.3d 224 (4th Cir. 2012).

Disposable income issue not preserved for appeal. When the bankruptcy court confirmed a plan, and there was no reservation of the disputed issue raised by the trustee over a personal injury claim being disposable income or exempt, there was no jurisdiction for appeal of the exemption claim. *Boyajian v. Vargas (In re Vargas),* 2012 WL 2450170 (BAP 1st Cir. June 8, 2012), slip copy.

Voluntary postpetition contributions to retirement account are not excluded from disposable income. Pointing out the split of authority and agreeing with *In re Seafort,* 669 F.3d 662 (6th Cir. 2012), and *In re Prigge,* 441 B.R. 667 (Bankr. D. Mont. 2010), the Bankruptcy Appellate Panel held that although § 541(a)(7)(A) excludes from property of the estate withholding by an employer for contributions to specified retirement accounts, § 1306(a) brings into the Chapter 13 estate the debtor's postpetition earnings. Section 541(a)(7)(A) provides protection for amounts held by employers at the time of case commencement, and is limited to prepetition contributions. The "except that" clause hanging to § 541(a)(7) excludes those prepetition withholdings from property of the estate and disposable income, with postpetition, voluntary contributions by the debtor not protected from inclusion in disposable income. *Parks v. Drummond (In re Parks),* 475 B.R. 703 (BAP 9th Cir. 2012).

Social Security always excluded from projected disposable income, and amount required for home mortgage arrearage is presumptively reasonable. The trustee objected to confirmation, for failure to dedicate all projected disposable income, but the court agreed with *Baud v. Carroll,* 634 F.3d 327 (6th Cir. 2011), that Social Security income was always excluded from the projected disposable income calculation, as supported by Form 22C's deduction of the Social Security income from current monthly income. Although Schedule I includes the income, that Schedule does not determine projected disposable income. As to the trustee's objection to arrearage, the court noted that curing home mortgage default was one of the primary reasons to file Chapter 13, and the amount necessary to cure the prepetition arrearage was presumptively reasonably necessary and deductible in arriving at projected disposable income. Also, it does not violate confirmation requirement that the debtor will have negative projected disposable income in the first months of the plan, because of mortgage arrearage payments, since the debtor voluntarily "can dip into his Social Security income" to make the proposed plan payments, and after the arrearage is cured, the debtor would have positive monthly disposable income. *In re Wise,* ___ B.R. ____, 2012 WL 3536469 (Bankr. D. Dist. Col. Aug. 16, 2012).

Lien Modification and Stripping

Section 506(d) not available to void unsecured lien. The Tenth Circuit has rejected the debtor's reliance on § 506(d)'s voiding language as a means to strip a wholly unsecured junior mortgage. Noting that the debtors may have had a valid lien stripping method under § 1322(b)(2), joined with § 506(a), the debtors "repudiated the only possible winning argument they may have had," by specifically declining the panel's invitation to use that approach. In supplemental briefing requested by the panel, the debtors "announced '[t]here is no Code provision other than 11 U.S.C. § 506(d) that declares void a wholly unsecured lien.'" The panel, therefore, held that it was bound by *Dewsnup v. Timm,* 502 U.S. 410 (1992), although a Chapter 7 case, because the *Dewsnup* Court held that § 506(d)'s term "allowed secured claim" includes a lien that is valid under applicable state law, without regard to whether there is value to support the lien. The mortgage at issue before the Tenth Circuit was valid under Utah law and was an allowed claim. Section 506(d) applies in Chapter 13, as well as Chapter 7, and, although the Circuit panel acknowledged that it was difficult to justify the Supreme Court's reasoning, it was bound by *Dewsnup*. It seems clear that the panel would have followed other appellate authority in recognizing that a wholly unsecured lien may be stripped by use of §§ 506(a) and 1322(b)(2), commenting "that *Dewsnup* has lost every away game it has played: its definition of 'secured claim' has been rejected time after time elsewhere in the code and seems to hold sway only in § 506(d)." *Woolsey v. Citibank, N.A. (In re Woolsey),* ___ F.3d ____, 2012 WL 3797696 (10th Cir. Sept. 4, 2012).

Mandamus not appropriate to compel bankruptcy judge to follow district court decision. The district court rejected debtors' petition for writ of mandamus, in which they sought to compel a bankruptcy judge to follow another district judge's decision on stripping of wholly unsecured liens, in *Carroll v. Key Bank,* 2011 WL 6338912 (D. Utah 2011). The debtors did not show that they had no alternative means to obtain relief, with the district court pointing out that they must appeal any adverse ruling. Also, the court discussed the "mandate" rule, concluding that it applied to bankruptcy courts, but that there was no "law of the district," since each district judge is not required to follow as precedent a decision of another district judge. The "mandate rule" simply requires a bankruptcy judge to follow an appellate court's ruling on a specific issue in the same case. *Hall, et al. v. Thurman (In re Walk),* 2012 WL 3292934 (D. Utah Aug. 10, 2012), slip copy.

Antimodification and cure-maintain provisions mutually exclusive. Sustaining the mortgage creditor's objection to a "hybrid" plan that proposed to modify the claim, by stripping down the secured portion and paying it beyond the plan life, the bankruptcy court held that when the mortgage is subject to modification, the secured portion must be paid within the life of the plan. The mortgage at issue was subject to modification, but the plan's proposal to pay the stripped down secured portion, while continuing payments under terms of the original note, was in conflict with § 1322(d)'s requirement that payments be no longer than five years, and it violated § 1325(a)(5)(B)(ii)'s "present value" requirement. Acknowledging that the genesis of this "hybrid" plan was *In re McGregor,* 172 B.R. 718 (Bankr. D. Mass. 1994), the court found the proposal in conflict with *Nobelman v. American Savs. Bank,* 508 U.S. 324 (1993). The court concluded that "§§ 1322(b)(2) and (5) are mutually exclusive and that a plan that proposes to both modify the rights of the secured claim holder and thereafter cure and maintain payments on

the secured portion of the claim for period that exceeds the term of the plan cannot be confirmed over the creditor's objection." *In re Bullard,* ___ B.R. ___, 2012 WL 3018055 (Bankr. D. Mass. July 24, 2012). See also *In re Hinkle,* ___ B.R. ____, 2012 WL 2510344 (Bankr. M.D. Pa. July 2, 2012) (reaching same conclusion, with a modified loan subject to § 1322(d)'s time limitation).

Plan by debtors ineligible for discharge, attempting to strip lien, was not in good faith. The debtors received Chapter 7 discharges in 2009, then filed the Chapter 13 in which they filed a proof of claim on behalf of a second mortgage holder and an adversary proceeding seeking to declare the mortgage wholly unsecured. The debtors then attempted to withdraw the proof of claim they had filed, and the trustee objected to confirmation of grounds of lack of good faith. The court first held that the debtors could not withdraw the proof of claim, agreeing with other courts that Rule 3006 only permits the creditor to withdraw a claim. Although a default judgment was entered in the adversary proceeding, it only declared the lien wholly unsecured and did not disallow the creditor's unsecured *in rem* claim. The plan, therefore, must treat the creditor as unsecured, and the debtors had sufficient disposable income, an actual monthly surplus, precluding them from paying nothing to the unsecured mortgagee. In fact, their disposable income was sufficient to pay unsecured claims in full. The plan was not proposed in good faith, and it violated § 1325(b)(1)(B). *In re Renz,* ___ B.R. ___, 2012 WL 3200874 (Bankr. E.D. N.Y. Aug. 1, 2012).

Time for valuing residence for lien stripping purposes. When the debtor's adversary proceeding seeking to strip off a wholly unsecured junior mortgage was not a part of the confirmation process, the time to determine value of the residence was not at confirmation, with the district court holding that § 1325(a)(5)(B)(ii)'s "as of the effective date of the plan" referred to the value of property to be distributed under the plan, not to the allowed amount of the secured claim. The proceeding was remanded for determination of the appropriate date for fixing the residence value, which might be the time of judgment in the adversary proceeding. *Marsh v. United States Dep't of Housing & Urban Dev. (In re Marsh),* 475 B.R. 892 (N.D. Ill. 2012).

Condominium lien is statutory. Discussing the split of authority on whether a lien held by a condominium association is a statutory lien or a security interest, the district court held that under § 101(53) and Pennsylvania law, the lien was statutory, because the lien automatically and solely arose under the state's statute when the association's assessment became due. Even though the state statute permitted the association to enforce its lien by foreclosure, it was not converted to a security interest. *Young v. 1200 Buena Vista Condominiums*, 2012 WL 3705004 (W.D. Pa. Aug. 27, 2012), slip copy.

Modification

Modification based on recalculation of disposable income denied. The trustee moved to modify the confirmed plan, based on debtors having more disposable income than at time of confirmation, but the court concluded that § 1325(b)'s disposable income test does not apply to postconfirmation modifications. Disposable income is determined based on "current monthly income," and the trustee's modification depended on recalculating the disposable income. While modification may be based on changes in circumstances related to income and expenses, the trustee's motion depended on recalculation of disposable income, with no proof offered of

change in circumstances or that the debtors were able to pay more than currently paying. *In re Coay,* 2012 WL 2319100 (Bankr. C.D. Ill. June 19, 2012), slip copy.

Debtors may modify to pay lump sum before end of applicable commitment period. Overruling the trustee's objection, the debtors were permitted to modify their confirmed plan, paying the remaining plan payments in lump sum, funded by relatives, before expiration of the applicable commitment period. The court concluded that "§ 1329 does not incorporate § 1325(b), and thus a chapter 13 plan may be modified so that it has a term shorter than the applicable commitment period, so long as the plan as modified satisfies the other requirements of § 1329 including the specifically incorporated provisions of §§ 1322(a), 1322(b), and 1323(c) and the requirements of § 1325(a)." In the original plan, because the debtors were above the median income, the applicable commitment period was five years, and the plan proposed to pay unsecured creditors 6.8% over that term. The cash gift from a relative was conditioned on using it to pay off the plan four years early in lump sum, Noting the split of authority on allowing modification to pay off the plan in a shortened term, the court concluded that § 1325(b) is a prerequisite to confirmation, but the "Code does not require that a modified plan have a particular minimum term. Section 1329 recognizes that modification may require an extension or reduction in the time for payments." No one suggested that the modification was lacking good faith. The court distinguished *Whaley v. Tennyson (In re Tennyson),* 611 F.3d 873 (11th Cir. 2010), which dealt with confirmation, not modification. *In re Tibbs,* ___ B.R. ____, 2012 WL 3800784 (Bankr. S.D. Fla. Sept. 4, 2012).

Discharge and Dischargeability

***Brunner* doesn't necessarily require debtor to "indenture" herself to Ford Program for purposes of § 523(a)(8).** Discussing the precedent of *In re Brunner,* 831 F.2d 395 (2d Cir. 1987), in the context of whether a debtor is required to participate in the current William D. Ford program for student loan repayment, the bankruptcy court concluded that the *Brunner* test remained binding, but that it must be interpreted in light of changes since 1987. The *Brunner* test does not require that the 64-year old debtor indenture herself to another 25 years of debt repayment, under the Ford Program's adjusted payments. The totality of circumstances was applied to a debtor who passed the *Brunner* test, finding that the debtor had no hope of improved job or income; that the debt was 24-years old, increasing from $16,931 borrowed to $56,000 at time of bankruptcy; that the debtor had paid all she could on the student loan debt; and that the debtor was close to complete reliance on Social Security income. Agreeing with *Collier on Bankruptcy,* the Ford Program should not be "viewed as an implied repeal of 11 U.S.C. § 523(a)(8)," and the debtor had established that repayment would be an undue hardship. *Bene v. Educational Credit Management Corp. (In re Bene),* ___ B.R. ___, 2012 WL 2412037 (Bankr. W.D. N.Y. June 26, 2012).

Rule 1019 is silent as to new period for complaints when Chapter 13 is converted to Chapter 11. In a case filed under Chapter 13 and then voluntarily converted to Chapter 11, the time for filing § 523(a)(2) complaints did not begin to run anew. The time had expired in the Chapter 13 case, without a motion to extend, and Rule 1019 does not address the renewal of time when the case is converted to Chapter 11. Section 523(a)(2) debts are excepted from discharge in both Chapters 13 and 11, and the creditor had the same incentive to file a timely complaint in

the Chapter 13 phase of the case. Under § 348, conversion did not create a new case. The complaint was untimely and dismissed. *Bank of Commerce v. Schupbach (In re Schupbach),* ___ B.R. ____, 2012 WL 2076439 (Bankr. D. Kan. June 7, 2012).

Discharge Injunction

Student loan creditor violated discharge injunction. Education Credit Management Corp. (ECMC) filed a proof of claim for $55,000, to which the debtor objected, with the objection served on ECMC, which did not respond nor attend the objection hearing. The debtor's objection stated that the student loan debts had not been adequately documented and that one had been satisfied fully before bankruptcy. At the evidentiary hearing, the debtor testified and subsequently filed an affidavit, with an order entered sustaining the objection and allowing the claim in the amount of -0-. After the debtor received a discharge, ECMC contacted the debtor, stating that the debts were not discharged and that collection would be pursued. After the debtor reopened the case and filed a complaint, a declaratory judgment was entered, with $9,134.72 remedial sanction for the debtor's costs, related to ECMC's violation of the discharge injunction. The Bankruptcy Appellate Panel affirmed, holding that the issue involved the disallowance of ECMC's proof of claim under § 502(b), rather than whether an allowed student loan debt was dischargeable. The debtor invoked the claims allowance procedure, and the resulting disallowance order determined both the validity and amount of the claim. Since there was no liability on the claim, there could be no collection post-discharge by ECMC. ECMC's attempt on appeal to couch the issue in terms of dischargeability ignored the res judicata effect of the order disallowing its claim. ECMC's collection attempts violated the discharge injunction, for which sanction in the amount of the debtor's attorney fees was appropriate. *Hahn v. Educational Credit Management Corp. (In re Hahn),* ___ B.R. ____, 2012 WL 3195135 (BAP 1st Cir. Aug. 7, 2012).

Dismissal

Dismissal for unreasonable delay affirmed. When the debtor had not obtained confirmation, after filing five proposed plans, the bankruptcy court did not err in finding that the debtor had delayed unreasonably, that the plans did not provide for secured claims, that the plans lacked detail as to proposed liquidation of assets, from which proposed payments would be made, and that disposable income was "mythical." The debtor's motion for new trial or amendment of the dismissal judgment was also properly denied, when the debtor merely addressed the same issues already litigated. *Paulson v. Wein (In re Paulson),* ___ B.R. ____, 2012 WL 4123397 (BAP 8th Cir. Sept. 20, 2012).

Mortgage Litigation

Attorney fees under mortgage penalty clause were properly reduced. Applying Puerto Rico law, as required by § 1322(e), the bankruptcy court did not abuse its discretion when it reduced the mortgagee's attorney fees from $7,600 to $2,000. The contractual penalty clause was subject to "moderation" under Puerto Rico law, and the requested penalty was larger than the $6,400 arrearage. *RNPM, LLC v. Alvarez (In re Alvarez),* 473 B.R. 853 (BAP 1st Cir. 2012).

Attorney Fees

No per se bad faith in attorney-fee-only plan. The Fifth Circuit reversed the district court, affirming the bankruptcy court's confirmation of a plan that essentially paid only the debtor's attorney fees, concluding that there is no per se violation of the good faith requirement in such a plan. Under the totality of circumstances, the bankruptcy court did not err in finding the plan in good faith, when there was credible evidence that the debtor had good reasons to file under Chapter 13 rather than 7. The debtor had only Social Security and modest food stamp income, and her only debts were a home mortgage and credit card debt. She was current on the mortgage and credit cards at filing, but it would take 20 years of minimum payments to pay the $7,855 credit card debt. The bankruptcy court had found that it would "border on malpractice" for her attorney to advise filing Chapter 7. In addition, the attorney's $2,800 no-look fee was reasonable, with the Circuit panel noting that the trustee's plan objection turned a simple case into a complicated one for the attorney. *Sikes v. Crager (In re Crager),* ___ F.3d ____, 2012 WL 3518473 (5th Cir. Aug. 16, 2012).

Claims

Local rule not grounds for claim disallowance, but local rule remained valid. A mortgage creditor challenged whether the district's Local Rule 3001-1 was preempted by new Federal Bankruptcy Rule 3001, with Local Rule 3001-1 requiring the mortgage creditor to include with a proof of claim a detailed loan history in a specific format. Finding that the two rules were not incompatible, while compliance with Federal Rule 3001 gave the proof of claim prima facie validity, and non-compliance with Local Rule 3001-1 was not a basis for objection to the claim, the Local Rule may nevertheless impose a duty on a creditor. The Local Rule requires additional information that is not duplicative of the Federal Rule, with both rules serving "the salutary purpose of providing information with respect to the basis of a home mortgage proof of claim." The mortgage creditor was required to comply with the Local Rule, but "noncompliance does not alter the prima facie validity of [its] proof of claim." *In re Armistead,* 2012 WL 3202964 (Bankr. S.D. Tex. Aug. 3, 2012), slip copy.

Bankruptcy court had authority to submit proposed findings and conclusions in core proceeding, involving proof of claim issue. In a proceeding remanded by the circuit court, 665 F.3d 906, after which the bankruptcy court revised its summary judgment decision into a recommended one, 464 B.R. 807, the district court held that, although the proceeding was core, as found by the circuit court, and 28 U.S.C. § 157(c)(1) does not explicitly authorize proposed findings and conclusions in core proceedings, the bankruptcy court did not exceed its statutory authority in such a recommendation. "When § 157 is read in light of *Stern,* it seems obvious that bankruptcy courts have authority to issue proposed findings of fact and conclusions of law in core proceedings in which they lack authority to enter final judgments." The proceeding involved Aurora Health Care's violation of a state statute when it attached unredacted medical information to its proofs of claim. The district court denied the recommended summary judgment and withdrew the reference. *Ortiz v. Aurora Health Care, Inc. (In re Ortiz),* ___ B.R. ____, 2012 WL 3574066 (E.D. Wis. Aug. 21, 2012).

CONSUMER LAW UPDATE

Cases reported from October 1, 2012
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Automatic Stay

After plan's surrender of home, debtors lacked standing to appeal stay relief. The confirmed plan surrendered the home to a specific mortgage creditor, but another mortgage creditor then moved for and was granted stay relief. The debtors lacked standing to appeal the stay relief order, since they had surrendered their interest in the property, and they lacked standing to pursue any objections on behalf of the creditor to whom they had surrendered. *Tikhonov v. The Bank of New York Mellon Trust Co. (In re Tikhonov),* 2012 WL 6554742 (BAP 9th Cir. Dec. 14, 2012), slip copy.

Mortgagee had colorable standing for stay relief. Under California law, party with right under nonbankruptcy law to commence foreclosure may have prudential standing—colorable claim to the property sufficient to seek stay relief. It was not necessary to show possession of the note to have such a colorable claim. Failure of the debtor to make eleven postpetition payments was cause for stay relief. *Marks v. Dockery (In re Marks),* 2012 WL 6554705 (BAP 9th Cir. Dec. 14, 2012), slip copy.

Factors for annulment of stay. Applying the factors for consideration in annulling the automatic stay, from *In re Fjeldsted,* 293 B.R. 12 (BAP 9th Cir. 2003), the debtor's remaining silent about bankruptcy filing for a long period while state court jury trial went to judgment was cause for annulment of the stay. *Rodarte v. Estates at Monarch Community Assoc. (In re Rodarte),* 2012 WL 6052046 (BAP 9th Cir. Dec. 6, 2012).

State court clerk did not violate stay by ministerial act. Prior to filing bankruptcy, the debtor had been declared a vexatious litigant by the state court, and the state court clerk's failure to change the designation on a suit in which the person was a defendant rather than plaintiff was a ministerial act that did not violate the automatic stay, and that failure did not deprive the debtor of Due Process rights. The Rooker-Feldman Doctrine prevented the federal court from setting aside the vexatious litigant label that had been imposed three years before the bankruptcy filing. *Beste v. Lewin,* ___ B.R. ____, 2012 WL 5877483 (N.D. Cal. Nov. 20, 2012).

Automatic stay and restitution. The government sought a declaratory judgment that the stay did not prevent enforcement of prepetition restitution judgment. Although the automatic stay did not prevent the federal government from pursuing a criminal action against the debtor, it did prevent proceeding against properly of the Chapter 13 estate. The government could proceed in prepetition restitution judgment against an IRA that the debtor claimed as exempt and against two vehicles that were unnecessary, but not against a vehicle that was necessary for the debtor's employment, since wages were necessary to fund the plan. *United States v. Robinson (In re Robinson),* ___ B.R. ____, 2012 WL 5898497 (Bankr. W.D. Tenn. Nov. 21, 2012).

Avoidance

Judicial lien avoidance order not entered until debtors obtained discharge. Although a judicial lien was avoidable, as impairing the debtors' exemptions, an avoidance order would not be entered until the Chapter 13 debtors received discharge, with the court finding that § 349(b)'s provision that a lien was reinstated upon case dismissal was not total protection for the creditor, and the practical difficulty of reinstating a lien was noted. For example, if a debtor sold the property after lien avoidance and the case were then dismissed, lien reinstatement would be meaningless. The court found delay of avoidance to be the majority view, but noted the minority view that 522(f) lien avoidance is not subject to a subsequent event. *In re Harris,* 482 B.R. 899 (Bankr. N.D. Ill. 2012).

Trustee failed to prove actual or constructive fraud in marital dissolution property division. Although the Chapter 7 debtor was insolvent when Illinois divorce court approved property division, the trustee failed to prove that the property debtor received was not reasonable equivalent value for what he would have received under the Illinois Dissolution Act, and the trustee did not prove that the debtor had acted with intent to defraud creditors. Also, there was no proof of an actual creditor in existence at the time of division of proceeds from sale of the marital home, preventing the trustee from using the strong-arm avoidance under state law. *Voiland v. Kimmell (In re Kimmell),* 480 B.R. 876 (Bankr. N.D. Ill. 2012).

Exemptions

Debtors not entitled to exempt portion of federal child tax credit. Construing the Colorado exemption for "the full amount of any federal or state income tax refund attributed to an earned income tax credit or child tax credit," the Tenth Circuit reversed its BAP, holding that the state exemption applied only to "refunds" and not to a nonrefundable portion of the child tax credit. The nonrefundable portion of the credit on tax form 1040 never gave rise to a refund. Only items treated as a payment, including the earned income tax credit, produced a refund, to the extent they exceeded tax liability. Since no refund was triggered by the child tax credit, there was no exemption under the state law. *Cohen v. Borgman (In re Borgman),* 698 F.3d 1255 (10th Cir. 2012).

Retirement account not exempt under California exemption. The Chapter 7 debtor claimed exemption in a Met-Life Non-qualified Retirement Account that she had received as a part of the marital settlement agreement with her former spouse, claiming the exemption under California's exemption for alimony, support or maintenance to the extent reasonably necessary. The trustee objected to the exemption, and the disallowance of the exemption was affirmed, without deciding whether the § 523(a)(5)

criteria should be applied to the exemption analysis. Instead, the panel found the marital settlement agreement's language to be clear and that the retirement account was intended to be a part of property division, rather than for support. *Diener v. McBeth (In re Diener),* 483 B.R. 196 (BAP 9th Cir. 2012).

State common law did not create exemption under opt out. The fact that Missouri had opted out of the federal bankruptcy exemptions did not mean that the debtors could rely on state common law to exempt a personal injury claim. The state's opt out statute refers to other state statutes. *Abdul-Rahim v. LaBarge (In re Abdul-Rahim),* 477 B.R. 747 (BAP 8th Cir. 2012).

Property of Estate

Judicial estoppel did not bar trustee's pursuit of negligence claim. The Chapter 7 debtor did not schedule a prepetition claim for negligence related to an automobile accident, but judicial estoppel did not prevent the trustee's substitution as the real party in interest, agreeing with other circuit authority reaching this conclusion. Moreover, the debtor had told the trustee of the cause of action, and his attorney communicated with the trustee about how to handle the litigation, causing the panel to find that the debtor's omission was inadvertent, and that judicial estoppel did not bar the prepetition suit filed by the debtor. *Stephenson v. Malloy,* 700 F.3d 265 (6th Cir. 2012).

Chapter 7 debtor lacked authority to pursue age discrimination suit. The debtor was fired four days before filing Chapter 7, and her age discrimination cause of action became property of bankruptcy estate, depriving the debtor of authority to pursue the action after her discharge, when the trustee had not abandoned it. The trustee knew of the cause of action, but the schedules were never amended to disclose it, and the trustee hired counsel to pursue the action after discharge was entered. Without reaching the issue of judicial estoppel, the panel held that the former debtor simply had no authority over an estate asset. The district's court's dismissal was vacated, with substitution of the trustee as plaintiff ordered. *Auday v. Wet Seal Retail, Inc.,* 698 F.3d 902 (6th Cir. 2012).

Levied funds became property of estate, subject to turnover. Prior to the Chapter 7 filing, the debtor's account had been levied upon, but the applicable California statute did not specify that ownership interest in the funds had been transferred upon levy, and the debtor continued to have an exempt property interest in the levied funds. There was still an interest that became property of the bankruptcy estate, and the turnover order enabled the debtor to exercise the exemption right. *Collect Access LLC v. Hernandez (in re Hernandez),* ___ B.R. ___, 2012 WL 6522748 (BAP 9th Cir. Dec. 14, 2012).

Abandonment under § 554(c) and (d)'s "unless the court orders otherwise." Although an unscheduled receivable had not been abandoned formally, the bankruptcy

court properly exercised its discretion in deeming the receivable abandoned under the "unless the court orders otherwise" language of § 554(c) and (d). The receivable was a debt owing from the Chapter 7 debtor's former spouse, and, although not scheduled, the trustee had been told of the receivable at the § 341 meeting, as well as advised of competing claims for unpaid child support, but the trustee did not administer the asset and then filed a no asset report. The debtor and former spouse had entered into a settlement of contested proceedings in the divorce court, and abandonment of the receivable to the former spouse was ordered by the bankruptcy court to avoid a miscarriage of justice. *In re DeGroot,* ___ B.R. ____, 2012 WL 6719113 (BAP 6th Cir. Dec. 27, 2012).

Which state's law controls validity of spendthrift trust? In a Chapter 7 case filed in California, the Bankruptcy Appellate Panel examined choice of law rules for a spendthrift trust created under Hawaii law, which fully recognized validity of the trust if not self-settled, while California law allows a judgment creditor to obtain up to 25% of funds otherwise available to the trust beneficiary. California had no greater interest than Hawaii in whether the spendthrift provision was valid and the trust corpus was excluded from the bankruptcy estate, under Hawaii's law. The panel also affirmed the conclusion that § 541(a)(5)(A) did not apply to inter vivos trusts; therefore, postpetition distributions to the debtor did not become property of the estate. *Green v. Zukerkorn (In re Zukerkorn),* ___ B.R. ___, 2012 WL 6608887 (BAP 9th Cir. Dec. 19, 2012).

Discharge and Dischargeability

Fees under § 523(d) affirmed. When the plaintiff, assignee of mortgage loan, did not appeal summary judgment for the debtor on its § 523(a)(2) complaint, it was collaterally estopped from arguing that summary judgment was in error when it appealed a $9,000 fee award under § 523(d). The panel reviewed the statutory development of § 523(d) and what a creditor must show to establish substantial justification for filing the complaint—"a reasonable factual and legal basis for its claim." *Heritage Pacific Financial, LLC v. Machuca (In re Machuca),* ___ B.R. ___, 2012 WL 6523187 (BAP 9th Cir. Dec. 14, 2012).

Nonlawyer attorney-in-fact lacked authority to sign complaint for claimant. Discussing California's and other jurisdictions' authority, the nonlawyer, who was attorney in fact for a claimant, could not sign the dischargeability complaint on behalf of the true plaintiff, but the complaint should have been dismissed without prejudice, giving opportunity for the plaintiff to amend the complaint with her signature or to obtain an attorney to represent her. *Foster v. Sligar (In re Foster),* 2012 WL 6554718 (BAP 9th Cir. Oct. 19, 2012), slip copy.

Correct reasonable reliance standard applied in § 523(a)(2)(B), and debtor consented to final order on state-law counterclaim. When the bank filed its § 523(a)(2)(B) complaint alleging a false financial statement, the Chapter 7 debtor filed a counterclaim alleging violations by the bank of Nebraska laws. The debtor "impliedly consented to the bankruptcy court's entering a final judgment on the state law counterclaims." The debtor did not object to the bankruptcy court's jurisdiction until it ruled against him, and the bankruptcy estate included any potential causes of action asserted by the debtor. The bankruptcy court applied the correct standard in finding that the debtor used a materially false financial statement, with intent to deceive, upon which the bank reasonably relied. *Bank of Nebraska v. Rose (In re Rose),* ___ B.R. ___, 2012 WL 6621185 (BAP 8th Cir. Dec. 20, 2012).

Assignee had standing for § 523(a)(2) complaint. An individual executed a residential lease with the debtors, signing it personally "for" the titled owner, and when standing was contested, the individual testified that there was an assignment from the owner to him to rent the property. The debtors did not contend that an assignment did not exist, and although the assignment was not introduced into evidence, the prepetition state court had necessarily determined standing when it entered monetary judgment for the same individual filing the § 523(a)(2) complaint. *Sung Ho Cha v. Rappaport (In re Sung Ho Cha),* ___ B.R. ____, 2012 WL 6044413 (BAP 9th Cir. Dec. 5, 2012).

After remand of § 523(a)(3) complaint, bankruptcy court could not dismiss complaint on new grounds. After the Bankruptcy Appellate Panel had remanded and reversed dismissal of a § 523(a)(3) complaint, with the dismissal having been on grounds of failure to state a claim, the bankruptcy court again dismissed the complaint on the basis that it was untimely filed, but the BAP found this dismissal to be in violation of "the spirit, if not the letter of the remand, and was contrary to the law of the case." The dismissal was vacated and remanded for consideration of the merits of the complaint. *Gonsalves v. Belice (In re Belice),* 480 B.R. 199 (BAP 1st Cir. 2012).

ERISA created technical trust for purposes of § 523(a)(4). ERISA sufficiently established a technical trust for the debtor exercising control over funds that were unpaid pension, health and annuity contributions. The panel examined divided judicial authority on whether one acting in a fiduciary capacity under ERISA satisfies § 523(a)(4). *Raso v. Fahey (In re Fahey),* 482 B.R. 678 (BAP 1st Cir. 2012).

Debtor, as manager of LLC, was in fiduciary relationship in construction contracts. The individual acted as *de facto* manager of an LLC, when he negotiated contacts on behalf of the LLC and decided which suppliers and subcontractors to pay. New Mexico's Contractors Act created a technical trust in this situation, and the individual was liable for mishandling funds entrusted to the LLC. *Hawks Holdings, LLC v. Kalinowski (In re Kalinowski),* 482 B.R. 334 (BAP 10th Cir. 2012).

Rooker-Feldman did not apply to state court's § 523(a)(5) decision entered after bankruptcy filing. When the state court ruled after the Chapter 7 filing that it retained jurisdiction to decide that attorney fees were nondischargeable child support, the Rooker-Feldman Doctrine did not prevent the bankruptcy court's jurisdiction, since that Doctrine only applies "when the state court loser files a new lawsuit in federal court *after* the state court adversely rules," distinguishing "properly invoked concurrent jurisdiction . . . if a state court reaches judgment on the same or related question while the case remains *sub judice* in a federal court." However, the lower courts correctly held that the fee awards were domestic support obligations, and the size of the awards ($100,000) in child custody litigation did not necessarily mean that they were unreasonable under *Sorah v. Sorah,* 163 F.3d 397 (6th Cir. 1998). *Rugiero v. DiNardo (in re Rugiero),* 2012 WL 4800059 (6th Cir. Oct. 10, 2012), slip copy.

Expert testimony unnecessary to support undue hardship discharge. When the bankruptcy court heard the debtor's testimony about her mental health issues that adversely affected her completing education as a chiropractor and obtaining employment, and the defendant put on no proof to the contrary, it was not necessary that the bankruptcy court have expert testimony to support its determination of undue hardship. Also, the facts that the debtor had overspent in the past and made unwise financial decisions did not mean that the debtor's hardship was due to self-imposed limitations. The bankruptcy court had opportunity to judge the debtor's credibility on why she dropped out of chiropractic education. *Shaffer v. U.S. Dept. of Education (In re Shaffer),* 481 B.R. 15 (BAP 8th Cir. 2012).

Lien Stripping

Chapter 7 debtor could not strip wholly unsecured junior lien. The district court held that lien stripping in Chapter 13 cases is based on § 1322(b)(2), rather than on § 506(a), which was rejected by *Dewsnup* as a means for stripping in Chapter 7. Also, a Chapter 7 debtor may not use § 506(d) to strip such a lien, based on *Dewsnup. Wachovia Mortgage v. Smoot,* 478 B.R. 555 (E.D. N.Y. 2012).

Reaffirmation

Postpetition renewal of obligation was unenforceable reaffirmation. In a case converted from Chapter 13 to 7, the debtor entered into an agreement postpetition with an unscheduled creditor to pay an $81,000 personal loan in weekly installments. The creditor claimed to have extended additional credit based on the debtor's assurance that the prepetition debt would not be included in the bankruptcy. An agreement to renew a prepetition debt is a reaffirmation, unenforceable in the absence of bankruptcy court approval in compliance with § 524. The bankruptcy court had properly sanctioned the creditor and his attorney, ordering dismissal of a state court suit and awarding

$1,500 attorney fees to be paid by attorney to the debtor. *Williams v. King (In re King),* 480 B.R. 321 (BAP 8th Cir. 2012).

Dismissal

Ability to pay debts may be considered in abuse dismissal. In applying the § 707(b)(3) totality-of-circumstances test, the bankruptcy court properly considered the debtors' ability to pay debts. "Congress was doubtless aware when it codified the totality-of-circumstances standard that the relevant pre-BAPCPA jurisprudence took into consideration a debtor's ability to pay his or her debts." The court found only one judicial opinion going the other way. *Witcher v. Early (In re Witcher),* ___ F.3d ____, 2012 WL 6200619 (11th Cir. Dec. 13, 2012).

Chapter 13 Issues

Eligibility

Dismissal after stay relief motion was granted made debtor ineligible. When the debtor dismissed the case after a grant of stay relief and refilled a new case on the same day, § 109(g)(2) was triggered, along with § 362(b)(21)(A), with no stay going into effect in the second case. *Leafty v. Aussie Sonoran Capital, LLC (In re Leafty),* 479 B.R. 545 (BAP 9th Cir. 2012).

Whether debtor violated § 109(g)(1) and is ineligible requires evidentiary hearing. In a dispute over whether the automatic stay applied in the debtor's third case to stop foreclosure, with the creditor arguing for dismissal because the second case had been dismissed for failure to comply with an order to file required schedules and documents, the court held that a finding of willfulness under § 109(g)(1) could not be inferred, but was rather a question of fact requiring evidence. *Anjos v. Bank of American, N.A. (In re Anjos),* 482 B.R. 697 (Bankr. D. Mass. 2012).

Debtor not ineligible under § 109(g)(2). Discussing the conflicting views of § 109(g)(2), the meaning of "following" in the statute must be determined by the statute's context, concluding that the most reasonable meaning is "as a result of," a causation relationship. "In this context, causation is the focus of the relationship, not simply chronology. Here, the debtor did not seek voluntary dismissal as a result of the motion for stay relief, because the motion had been granted and the moving creditor's collateral returned years before the dismissal." Section 109(g)(2) did not make this debtor ineligible. *In re Payton,* 481 B.R. 460 (Bankr. N.D. Ill. 2012).

Attorney fees

Fee reduction affirmed. Although the debtors' attorney was attempting to contest that the district's fee formula was "parsimonious," the Bankruptcy Appellate Panel could only

consider the facts in the present case, and the bankruptcy court did not err in reducing the requesting $9,000 fee to $3,500 in what was a "mill-run chapter 13 case," in which the attorney had spent excessive, unnecessary time. *In re Little,* ___ B.R. ___, 2013 WL 69186 (BAP 1st Cir. Jan. 4, 2013). *See also Bada v. Curry (In re Santana),* 2012 WL 6605993 (BAP 9th Cir. Dec. 19, 2012), slip copy, in which the attorney's appeal of a disgorgement order was dismissed as untimely, when the attorney did not appeal the first, final order.

On remand, no special circumstances to justify fee-only plan. After the Second Circuit, at 674 F.3d (2d Cir. 2012), held that attorney fee-only plans were not per se filed in bad faith and remanded for determination of whether special circumstances existed to justify the plan in this case, the bankruptcy court found that there were no such circumstances and that the attorney's services were worthless to the debtor. The debtor was 32 years old, employed, in good health, and living with his parents. After paying the attorney a $500 retainer, he waited ten months to file the case, with a plan that would pay the balance of the attorney fees and little else. The attorney was only allowed reimbursement of the filing fee and ordered to disgorge the balance of the retainer. *In re Puffer,* 478 B.R. 101 (Bankr. D. Mass. 2012).

Law firms' advances of filing fees were loans and prepetition claims. Law firm that provided clients with "no money down" bankruptcy filing and that advanced required filing fees had made loans to the clients, distinguishing those advances from normal expenses. As a result, the advanced filing fees were not reimbursable expenses under § 330(a)(4)(B), with the court also construing "compensation" narrowly. The advances were not "actual and necessary" expenses under that Code section, since the expense "did not arise from a transaction with the bankruptcy estate." The treatment in plans of those advanced fees as administrative expenses was unfair discrimination, favoring one class of prepetition unsecured claims over others. *In re Marotta,* 479 B.R. 681 (Bankr. M.D. N.C. 2012).

Fee disclosure should include overhead charge. Although the law firm should have disclosed a $50 to $150 fee charged to clients as recurring overhead costs, under § 329 and Rule 2016, the firm had self-reported the disclosure violations and disgorgement of all fees would be overly harsh. However, the firm was sanctioned and ordered to pay $8,750 to the United States Trustee, $8,000 to a pro bono organization, and $42,675 disgorgement to the Chapter 13 trustee in pending cases. *In Matter of the Dellutri Law Group,* ___ B.R. ___, 2012 WL 5328626 (Bankr. M.D. Fla. Oct. 26, 2012).

Confirmation Issues

Social Security benefits excluded from projected disposable income. The Fifth Circuit adopted the position of the Sixth and Eighth Circuits, holding that Social Security

benefits were excluded from projected disposable income. Congress had specifically excluded those benefits from current monthly income, which is the starting point for a projected disposable income analysis. *Beaulieu v. Ragos (In re Ragos),* 700 F.3d 220 (5th Cir. 2012). *Accord Anderson v. Cranmer (In re Cranmer),* 697 F.3d 1314 (10th Cir. 2012), in which the Tenth Circuit agreed that Social Security benefits need not be included in projected disposable income, holding that the debtor's failure to dedicate benefits could not be the basis for determination that the plan was not proposed in good faith.

Railroad Retirement annuity is included in projected disposable income. In contrast to Social Security benefits, an annuity under the Railroad Retirement Act (RRA) is included in the calculation of projected disposable income. It is not excluded from current monthly income, nor does the RRA protect it. The court relied on *Hisquierdo v. Hisquierdo,* 439 U.S. 572 (1979), where the Supreme Court construed the word "anticipated" in the RRA as referring to a premature receipt of payment. "Taking RRA annuity income into account when calculating a debtor's projected disposable income does not 'anticipate' that income in the trust law sense of the term, [as construed by the *Hisquierdo* Court.] Doing so merely allows the bankruptcy court to calculate the amount of future income a debtor will in fact have available to repay creditors. . . .There is no sense in which RRA annuity payments are 'anticipated' as that term is used in 45 U.S.C. § 231m(a)." *Meyer v. United States Trustee (In re Scholz),* 699 F.3d. 1167 (9th Cir. 2012).

Classification and preferred treatment of unsecured, non-priority tax claims was unfair discrimination. The bankruptcy court did not err in confirming a plan over the debtors' objection, when the debtors' original plan had proposed to pay unsecured, non-priority state tax claims ahead of other unsecured claims, which would have been unfair discrimination. The fact that the taxes would be nondischargeable did not, standing alone, justify the discrimination. The debtors were essentially asking other unsecured creditors "to pay for the Debtors' failure to file timely tax returns." *Copeland v. Fink (In re Copeland),* __ B.R. ___, 2012 WL 5846263 (BAP 8th Cir. Nov. 20, 2012).

Objection to exemption mixed with plan objection. The trustee had not objected to confirmation or raised failure to devote projected disposable income, when the trustee objected to claim of exemption in tax refunds. Although an exemption objection may be a "placeholder" for a plan objection under § 1325(b), here the exemption objection was sustained on the basis that failure to devote the tax refund to plan payments would violate § 1325(b)(1), but by that time the debtor had amended the plan, dedicating non-exempt tax refunds to fund the plan. An objection based on projected disposable income was not ripe when the order denying the exemption was entered, since the trustee had not raised a plan objection at that point. *Matos v. Rivera (In re Matos),* 478

B.R. 506 (BAP 1st Cir. 2012). *Accord Santiago v. Rivera (In re Santiago),* 478 B.R. 516 (BAP 1st Cir. 2012).

Local plan requirements upheld. The district court held that the trustee's requirement that payments be made only by certified funds, automatic wage deduction or electronic transfer was reasonable and that it was "simply a way to ensure the efficient and reliable transfer of the required currency payments." A required model form confirmation order was also approved; it did not make the confirmation process burdensome for debtors or their attorneys. A requirement that debtors review all proofs of claim and resolve discrepancies in claims and the plan before submitting a plan for confirmation was upheld, as not impermissibly shifting the burden on claim objections. A requirement that the confirmation order contain a provision that it did not constitute an informal proof of claim for any creditor was valid and did not violate any Ninth Circuit precedent. A provision that a modified plan did not supersede any trustee request for documentation or information was upheld. A remand was required as to one objection concerning the bankruptcy court's rejection of a plan's provision that payments on secured claims shall be applied first to principal and then to interest, with further factual proof needed on how the proposed plan would affect adequate protection for secured claims. *Reyes v. Brown (In re Reyes),* 482 B.R. 603 (D. Ariz. 2012).

Transfer of homestead between debtors within 1215 days triggered cap. When the Chapter 7 debtors had transferred their homestead property between themselves within the 1215 days before filing, the exemption was subject to § 522(p)'s $146,450 cap, but each debtor was entitled to the capped exemption under § 522(m). The fact that the debtors had continually resided in the residence as their homestead did not overcome the effect of the transfer between spouses. After transfer to the wife, the property had been transferred back as tenants by entirety. *In re Gentile,* 483 B.R. 50 (Bankr. D. Mass. 2012).

Kansas law permitted homestead exemption after transfer to self-settled trust, and § 522(p) was not triggered. Under Kansas law, a debtor may claim residential exemption in an equitable interest in land, after transfer of the legal title to a self-settled, living, revocable trust. Here, the trust had transferred legal title back to the debtor within 1215 days, to enable the debtor to mortgage the property. When the trust deeded the property back, the debtor acquired no equity value that he did not already have under his equitable interest; therefore, § 522(p)'s cap was not triggered. The court distinguished a First Circuit opinion, *Aroesty v. Bankowski (In re Aroesty),* 385 B.R. (BAP 1st Cir. 2008), on the basis of difference in Massachusetts and Kansas homestead law. *In re Peake,* 480 B.R. 367 (Bankr. D. Kan. 2012).

Hybrid plan prohibited. Absent the secured creditor's consent, a plan may not treat bifurcated mortgage on rental property, paying the prepetition mortgage arrearage over

a sixty-month period in reduction of the bifurcated secured portion, while paying the remaining secured portion as long-term debt. Section 1322(d) imposes a maximum five-year limit on paying the bifurcated secured claim. Discussing conflicting authority, the court concluded that a debtor may not combine §§ 1322(b)(2) and (b)(5) for treatment of the same claim. *In re Fortin,* 482 B.R. 35 (Bankr. D. Mass. 2012).

Applicable Commitment Period

En banc review in *Flores* by Ninth Circuit. The Ninth Circuit has granted en banc hearing of the decision in *Danelson v. Flores (In re Flores),* 692 F.3d 1021 (9th Cir. 2012), in which the panel held that prior precedent, *In re Kagenveama,* 541 F.3d 868 (9th Cir. 2008), was still valid, and that an above-median income debtor with no projected disposable income could confirm less than a sixty-month plan. *Danelson v. Flores (In re Flores),* ___ F.3d ____, 2012 WL 6618328 (9th Cir. Dec. 19, 2012).

Valuation and Lien Stripping

Stripping lien by debtor ineligible for discharge was not final order for appeal. Although the Bankruptcy Appellate Panel held that a Chapter 13 debtor who was not eligible for discharge could strip off a wholly unsecured junior lien, *In re Fisette,* 455 B.R. 177 (BAP 8th Cir. 2011), that was not a final order subject to appeal, since the BAP had remanded for consideration of other confirmation issues. *Fisette v. Keller (In re Fisette),* 695 F.3d 803 (8th Cir. 2012).

Petition, rather than confirmation, date for purposes of § 1322(b)(2). When the purpose of valuation is to determine if the claim is protected by § 1322(b)(2), or whether the creditor is entitled to stay relief, the time for valuation is the petition date, with the district court citing *In re Benafel,* 461 B.R. 581 (BAP 9th Cir. 2011). *TD Bank v. Landry,* 479 B.R. 1 (D. Mass. 2012). *See also BAC Home Loans Servicing v. Nieto (In re Nieto),* 2012 WL 6097983 (BAP 9th Cir. Nov. 28, 2012), slip copy, applying *Benafel. Contrast In re Williams,* 480 B.R. 813 (Bankr. E.D. Tenn. 2012), holding that for purpose of deciding lien stripping of a junior mortgage and its valuation, the time for valuation was plan confirmation, rather than the petition date. The court cited in support the *Landry* bankruptcy court's opinion, which was subsequently reversed above, but the *Williams* court specifically found that valuation was in the context of confirmation, with two competing appraisals having been conducted postpetition. For valuation purposes, the *Williams* court also concluded that the proper standard for lien stripping purposes was price at which comparable properties had sold in arm's length sales transactions, with an appraisal using only foreclosure transactions more appropriate for surrendered property than for a residence that the debtor proposed to retain.

Effect of Confirmation

Former wife bound by confirmed plan. The confirmed plan provided for payment of a $78,000 domestic support obligation, less than an asserted $139,199.06 claim, but the ex-wife participated in the confirmation process and was bound by the confirmed plan. However, only $78,000 of the prepetition domestic support obligation would be discharged upon plan completion, with the remaining balance excepted from discharge under § 1328(a) and § 523(a)(5). Despite § 362(b)(2)'s exceptions from the stay, the ex-wife was bound by confirmation and must await plan completion and discharge before resuming attempts to collect the nondischargeable portion. Collection of any postpetition domestic support obligation was not stayed. *In re Hutchens,* 480 B.R. 374 (Bankr. M.D. Fla. 2012). *See also* for discussion of DSO claims, *In re Angelo,* ___ B.R. ___, 2012 WL 4484917 (Bankr. D. Mass. 2012); *In re Ashworth,* 2012 WL 4596217 (Bankr. C.D. Cal. Oct. 1, 2012), slip copy; *In re Conte,* 2012 WL 4739339 (Bankr. E.D. N.Y. Oct. 3, 2012), slip copy;

Conversion

Funds held by trustee at conversion to Chapter 7 must be returned to debtor. The Third Circuit, with a dissent, held that plan payments not yet distributed to creditors and held by the trustee at the time of conversion to Chapter 7 must be returned to the debtor, in the absence of bad faith. Funds had accumulated in the trustee's hands after stay relief had been granted to allow foreclosure, but the debtor had not modified the confirmed plan to reduce plan payments. The Circuit concluded that § 348(f) did not completely resolve the legal issue of what the trustee should do with such funds when the case was converted, but on conversion to Chapter 7, "the order converting the case is effectively backdated to the time of the order for relief under Chapter 13," suggesting that property of the Chapter 13 estate acquired postpetition is excluded from property of the Chapter 7 estate. Since confirmation vests property in the debtor, under § 1327(b), "the implication is that property held by the Chapter 13 trustee after plan confirmation is 'under the control of the debtor as of the date of [a later] conversion' for purposes of § 348(f)(1)." Returning undistributed funds to the debtor better aligns with termination of the Chapter 13 trustee's duties, except for accounting for funds by filing a final report under Rule 1019; the trustee is not authorized to distribute funds under a plan that is no longer operative. A textual reading of § 348(f), along with its legislative history, led the panel "to conclude that undistributed plan payments held by a Chapter 13 trustee at the time of conversion must be returned to the debtor absent bad faith." *In re Michael,* 699 F.3d 305 (3d Cir. 2012).

Bad faith justified conversion and denial of debtor's motion to dismiss. Applying *Jacobsen v. Moser (In re Jacobsen),* 609 F.3d 580 (5th Cir. 2010), the debtor's bad faith, including misrepresentations in schedules, provided cause for the bankruptcy

court's conversion of the case to Chapter 7 and denial of the debtor's motion to voluntarily dismiss. *Elliott v. Sutton (In re Elliott),* 2013 WL 69285 (5th Cir. Jan. 7, 2013), slip copy.

Fees to Chapter 7 trustee and sanction for appealing consent orders affirmed. In appeals of fees awarded to Chapter 7 trustee after conversion, the debtors also appealed from some consent orders. Most of the appeals were properly dismissed by the district court as untimely or for lack of standing of the debtors, but the district court properly sanctioned the appeal of the consent orders under Rule 11. Appeal of consent orders is permitted only under limited exceptions: (1) the party did not actually consent; (2) the court did not have subject matter jurisdiction to enter an order approving the consent; or (3) the consent order "explicitly reserves the right to appeal." In re *Mondelli,* 2012 WL 6685476 (3d Cir. Dec. 26, 2012), slip copy.

Dismissal

Case dismissal for failure to attend § 341 meeting affirmed. The pro se debtor had filed a second Chapter 13 case after foreclosure of her home, and there were deficiencies in the petition and schedules, with the debtor failing to attend the § 341 meeting, despite requesting and obtaining two resettings of that meeting. There was no abuse of discretion in the dismissal. *Oliver v. United States Trustee (In re Oliver),* 2012 WL 5232201 (9th Cir. Oct. 23, 2012), slip copy. *Accord, Zapata v. United States Trustee (In re Zapata),* 2012 WL 4466283 (9th Cir. Sept. 28, 2012), slip copy.

Mortgages

RESPA violation did not cause foreclosure, but damages may have resulted. The Sixth Circuit affirmed a finding that the home mortgage lender's failure to respond to the borrower's qualified written request about a dispute over payments did not cause the foreclosure. The former Chapter 13 debtor had made mortgage payments in her plan, but had not made payments after receiving a discharge, despite the trustee's instructions for her to resume payments. Also, the borrower did not seek to stay the foreclosure, nor did she seek to redeem the property after foreclosure, under applicable Michigan law. However, the Circuit remanded to the district court for determination of whether the borrower was entitled to monetary damages, if any, that could be traced to the RESPA violation. *Houston v. U.S. Bank Home Mortgage Wisconsin Servicing,* 2012 WL 5869918 (6th Cir. Nov. 20, 2012), slip copy.

Class properly certified for injunctive relief to former debtors curing arrearages. The Fifth Circuit affirmed a class certification by the bankruptcy court for former Chapter 13 debtors who had cured home mortgage arrearages and received discharges, in a complaint alleging that Countrywide misapplied plan mortgage payments to pay unauthorized fees. The bankruptcy court had held that Rule 2016 applied to mortgage

lenders as to fees assessed during the bankruptcy cases but not collected until after discharges. The bankruptcy court complied with *Wilborn v. Wells Fargo Bank, N.A.,* 609 F.3d 748 (5th Cir. 2010), in certifying a narrowly defined class for injunctive relief and denying class certification on damages, which would require a case-by-case analysis for each debtor. *(In re Rodriquez),* 695 F.3d 360 (5th Cir. 2012).

Debtors bound by judicial estoppel effect of prior case's confirmation and consent orders. In their prior case, the debtors obtained confirmation of a plan that included the secured mortgage claim and they had entered into two consent orders related to the mortgagee's stay relief, without reserving any right to contest standing of the creditor. In the second case, the debtors again scheduled SunTrust Mortgage as a secured mortgage. Judicial estoppel was triggered by the prior positions. Moreover, under Missouri law, the note was a negotiable instrument, and the note and deed of trust were enforceable by SunTrust. *Knigge v. SunTrust Mortgage, Inc. (In re Knigge),* 479 B.R. 500 (BAP 8th Cir. 2012).

Claims

Judicial estoppel did not apply to mortgage creditor's proof of claim. Reversing, the Fifth Circuit held that lower courts interpreted § 1305 overly broadly, by applying judicial estoppel to the mortgage creditor's failure to include all of its arrearages in proofs of claim filed in the first Chapter 13 case. Under prior precedent, judicial estoppel does not apply when "a party's change of position is merely implied rather than clear and express." There is no Code or Rule requirement that Wells Fargo include all of its postpetition arrearages in the proofs of claim it filed in the first case; therefore, the amount claimed in the second case is not inconsistent as a matter of law. Also, the fact that the first case was dismissed without grant of discharge indicates that the bankruptcy court's acceptance of the plan, even if based on the claims filed, "was negated and the parties were no longer bound by its terms." *Wells Fargo Bank, N.A. v. Oparaji (In re Oparaji),* 698 F.3d 231 (5th Cir. 2012).

Mortgage creditor's failure to file proof of claim did not result in loss of lien. The mortgage creditor had elected not to file a proof of claim, but the attorney for Chapter 13 debtors filed two claims on the creditor's behalf, to which the trustee objected. With no response from the creditors, the claims were disallowed. The debtors then began an action to void the mortgage lien under 506(d), arguing that the claims filed by the debtors were disallowed. Subsequent to the claims disallowance, the debtors admitted that Bank of America held a valid lien; therefore, the claims disallowance had nothing to do with the actual substance of the lien or claim. Pointing out that a debtor's use of § 501(c) to file a claim on behalf of the creditor and then use of § 506(d) to attempt lien voiding may run afoul of *Dewsnup,* issue was avoided by reconsideration of the claims disallowance under § 502(j), with the disallowance set aside. *Oudomsouk v. Bank of*

American, N.A. (In re Oudomsouk), ___ B.R.___, 2012 WL 6584979 (Bankr. M.D. Tenn. Nov. 19, 2012). *See also Shelton v. CitiMortgage, Inc. (In re Shelton),* 477 B.R. 749 (BAP 8th Cir. 2012), in which the BAP held that a secured creditor's lien is not avoided under § 506(d) solely because the creditor's claim was disallowed for untimeliness. "Liens pass through bankruptcy unless avoided on their merits."

Debtors could not file proof of claim for postpetition taxes. Distinguishing *In re Hight,* 670 F.3d 699 (6th Cir. 2012), in which the debtors could file a proof of claim for the tax creditor for a taxable year ending before the petition date, here the petition was filed before the taxable year ended and the debtors could not force the tax creditor into the case for a postpetition claim. *In re White,* 482 B.R. 905 (Bankr. W.D. Ark. 2012).

Claim for overpayment of child support was domestic support obligation. Discussing the conflicting judicial authority on the issue, the Chapter 7 debtor's former husband had overpaid child support, in an amount fixed by a prebankruptcy state court, at the same time he was paying at least half of the child's support while in his custody, and the court concluded that the overpayment claim was a domestic support obligation entitled to § 507(a)(1)(A) priority. *Kerr v. Meadors (in re Knott),* 482 B.R. 852 (Bankr. N.D. Ga. 2012).

Amended claim was new claim, untimely filed. Reviewing the standard for when an amended claim is permitted, amendments are freely allowed "where the purpose is to cure a defect in the claim as originally filed, to describe the claim with greater particularity or to plead a new theory of recovery on the facts set forth in the original claim," but here the amended claim would reclassify a portion of the original claim as unsecured, having a significant impact in the case, detrimental to other unsecured creditors. "If a secured creditor wishes to preserve its unsecured deficiency claim for treatment in a chapter 13 case, it must formally file an unsecured claim in a timely manner." Moreover, the effect of confirmation barred the attempted new claim. *In re Jackson,* 482 B.R. 659 (Bankr. S.D. Fla. 2012).

Scheduling but then objecting to every claim was violation of Rule 9011. Affirming, the district court upheld $500 sanction against debtors' counsel, who objected to every credit card claim scheduled on grounds of insufficient documentation. There was no evidence that debts were not owed or that substantive defenses existed. *In re Armstrong,* 2012 WL 4355464 (E.D. Tex. Sept. 21, 2012).

Debtor bound by judicial estoppel effect of scheduling claims in same amounts as proofs of claim. When the Chapter 13 debtor scheduled all of the credit card claims in the same amount as the proofs of claim filed, even though checking them as "disputed," the debtor was prevented from objecting to those claims on lack of documentation grounds. Also, the court held that failure to attach documentation was

not grounds for disallowance under § 502(b) or revised Rule 3001(c). "The across-the-board disputing of a debtor's schedules of debts which the debtor knows or should know she owes, as a part of a strategy to minimize the amount she will have to pay under a chapter 13 plan, is an abuse of the bankruptcy process." *In re Rehman,* 479 B.R. 238 (Bankr. D. Mass. 2012). *See also In re Muller,* 479 B.R. 508 (Bankr. W.D. Ark. 2012), in which debtors scheduled credit card debt in almost same amount as proof of claim, and judicial estoppel prevented debtors from disputing owing at least amount they scheduled. The court also reviewed rules governing documentation of proofs of claim.

Objection to standing is substantive claim objection under § 502(b)(1). The debtor's challenge to a creditor's standing to file a proof of claim is a substantive objection, triggering 502(b)(1) as basis to disallow the claim that is unenforceable under applicable law; "if a claimant has not proven it is the owner of a claim with a right to payment (i.e. the party with standing), the claim is unenforceable against the debtor under state law." *In re Richter,* 2012 WL 3763657 (Bankr. D. Colo. Aug. 29, 2012), slip copy.

Fair Debt Collections Practices Act

IRS agent not debt collector under Fair Debt Collection Practices Act. The IRS agent was collecting in the performance of official duties, and the FDCPA excludes from "debt collector" any officer or employee of the United States or any state who is collecting within that scope. However, the former Chapter 7 debtor had stated a claim for violation of the discharge injunction, surviving a motion to dismiss. *Pomerenke v. IRS,* 2012 WL 5416536 (8th Cir. 2012), per curiam.