Consumer Workshop III and IV: Staking and Maintaining Your Claim: Pre-Bankruptcy Planning, Parts I and II

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Student Loan Planning: Anticipating Issues Based on Recent Decisions

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

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

Debtor's financial situation between filing case and adversary proceeding is relevant to student loan discharge. Affirming its BAP and the bankruptcy court, the Eighth Circuit held that the bankruptcy court properly considered the Chapter 7 debtor's financial circumstances existing between the filing of the case and the § 523(a)(8) complaint. Although the Circuit panel questioned the bankruptcy court's consideration of voluntary withholdings from one debtor's pay stubs, the creditor failed to object to the pay stub evidence at trial, leaving the Circuit panel with no means of reviewing the alleged double-counting of payroll deductions. Even if the disputed payroll deductions were excluded from consideration, the debtors' expenses left a deficit over income, and the size and special needs of the debtor's family (five children, two autistic) left the panel with a realty that the debtor could not make payments on the student loan and maintain a minimal standard of living. *Walker v. Sallie Mae Servicing Corp. (In re Walker),* 650 F.3d 1227 (8th Cir. 2011).

Attorney fees and collection costs incurred in § 523(a)(8) discharge litigation were contractual damages. First agreeing that loan funds were "educational" by looking to the purpose of the loan, the imposition of costs and attorney fees was permitted under the contract or loan, and such fees are allowable unless the Bankruptcy Code provides otherwise. Although § 523(a)(8) does not refer to fee recovery, the contract may so provides. *Sokolik v. Milwaukee School of Engineering (In re Sokolik),* 635 F.3d 261 (7th Cir. 2011).

Bankruptcy court lacked jurisdiction to determine postpetition interest. "[T]he bankruptcy court lacked subject matter jurisdiction to determine the issues of post-petition interest and collection costs to award ECMC. ECMC's claim to post-petition interest and collection costs is not a matter 'under Title 11,' nor is it a civil proceeding 'arising in,' or 'related to' Kirkland's bankruptcy petition. This is so because ECMC's claims to post-petition interest and collection costs arose entirely independent from Kirkland's bankruptcy proceeding."). *Educational Credit Management v. Kirkland (In re Kirkland),* 600 F.3d 310 (4th Cir. 2010). *Accord Uber v. Nelnet, Inc. (In re Uber),* 443 B.R. 500 (Bankr. S.D. Ohio 2011).

Discharge determination ripe at first of case. The dischargeability of a student loan debt is constitutionally ripe at the beginning of a Chapter 13 case. *Cassim v. Educational Credit Management (In re Cassim),* 594 F.3d 432 (6th Cir. 2010).

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),* 479 B.R. 79 (BAP 9th Cir. 2012). *See also In re Kinney,* 2010 WL 5376217 (Bankr. E.D. N.C. 2010). Partial discharge of student loan required filing adversary proceeding.

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),* 476 B.R. 344 (BAP 1st Cir. 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).

Failure to apply for Ford program was bad faith. Applying third prong of *Brunner,* failure to minimize expenses and to apply for loan modification through Ford program indicated lack of good faith. Student loan debt was nondischargeable. *Educational Credit Management v. Kelly,* 2012 WL 1378725 (W.D. Wash. 2012). *See also Educational Credit Management v. Rhodes,* 464 B.R. 918 (W.D. Wash. 2012). Debtor failed to show that he could not maintain minimum standard of living if required to repay loans. Debtor did not suffer from mental condition

affecting ability to work and did not prove good-faith efforts to repay student loans. In Ninth Circuit, debtor's failure to negotiate repayment plan for student loan debt is evidence of lack of good-faith attempt to repay, citing *Educational Credit Management Corp. v. Mason (In re Mason),* 464 F.3d 878 (9th Cir. 2006). *See also Daniels v. Bank One (In re Daniels),* 2010 WL 37338889 (Bankr. D. Mont. 2010). Good faith was not established by debtor who did not consider income contingent repayment.

***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),* 474 B.R. 56 (Bankr. W.D. N.Y. 2012).

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.). *Comare In re Boscaccy,* 442 B.R. 501 (Bankr. N.D. Miss. 2010). Separate classification and more favorable treatment of student loan was not unfair discrimination when it did not significantly decease percentage for other unsecured creditors.

Income contingency program only one factor. Applying totality-of-circumstances test from *Bronsdon v. Educational Credit Management Corp. (In re Bronsdon),* 435 B.R. 791 (B.A.P. 1st Cir. 2010), availability of Income Contingency Repayment Program was merely one factor in analysis.). *Stevenson v. Educational Credit Management Corp. (In re Stevenson),* 2011 WL 1362595 (Bankr. D. Mass. 2011). *See also Hart v. ECMC (In re Hart),* 438 B.R. 406 (E.D. Mich. 2010). Eligibility for Income Contingency Repayment Program was appropriate factor.

CONSUMER WORKSHOP - I

BANKRUPTCY CRIMES
CASES & ISSUES

18th ANNUAL ROCKY MOUNTAIN BANKRUPTCY CONFERENCE

JANUARY 24-25, 2013
FOUR SEASONS HOTEL
DENVER, COLORADO

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INTRODUCTION

BANKRUPTCY CRIMES

At the heart of the present bankruptcy crimes provisions is 18 U.S.C. § 152. Section 152 "attempt[s] to cover all of the possible methods by which a debtor or any other person may attempt to defeat the intent and effect of the bankruptcy law through any type of effort to keep assets from being equitably distributed among creditors." Nine (9) separate offenses are identified in § 152. These nine (9) offenses "generally can be divided into three categories: 1. concealment offenses, 2. false oaths, and 3. offenses by creditors." The common thread in all three (3) classifications under section 152 is the criminal intent requirement that a defendant act "knowingly and fraudulently."

Courts have embraced the ordinary meaning of the term "knowingly," requiring that a defendant's conduct be voluntary and intentional. Defining "fraudulent" is somewhat less intuitive. Fraudulent conduct simply means that the debtor had the intent to cheat or deceive creditors. Further, the government need not prove that a defendant's conduct was done with knowledge that it violated existing law.

18 U.S.C. §152 is the core Bankruptcy Crimes statute. It provides:

> §152 Concealment of assets; false oaths and claims; bribery
>
> A person who –

knowingly and fraudulently conceals from a custodian, trustee, marshal or other officer of the court charged with the control or custody or property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;

knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;

knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;

knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney;

knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11;

knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11;

in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;

after the filing of a case under title 11or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor, or
after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court or a United States Trustee entitled to its possession, any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor,

shall be fined under this title, imprisoned not more than 5 years, or both.

In addition to criminal conduct proscribed by 18 U.S.C. §152, §§ 153 and 157 also provide for criminal prosecution for embezzlement against the bankruptcy estate and for bankruptcy fraud, respectively.

18 U.S.C. § 153 EMBEZZLEMENT AGAINST THE ESTATE

§153. Embezzlement against estate:

Offense – A person described in subsection (b) who knowingly and fraudulently appropriates to the person's own use, embezzles, spends, or transfers any property or secretes or destroys any document belonging to the estate of a debtor shall be fined under this title, imprisoned not more than 5 years, or both.

Person to whom section applies – A person described in this subsection is one who has access to property or documents belonging to an estate by virtue of the person's participation in the administration of the estate as a trustee, custodian, marshal, attorney, or other officer of the court or as an agent, employee, or other person engaged by such an officer to perform a service with respect to the estate.

BANKRUTPCY FRAUD, 18 U.S.C. § 157

§ 157. Bankruptcy fraud:

A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so –

files a petition under title 11;

files a document in a proceeding under title 11; or

makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title,

shall be fined under this title, imprisoned not more than 5 years, or both.

THE CRIMINAL REFERRAL

The investigation of most bankruptcy crimes begins pursuant to 18 U.S.C. § 3057. In the course of the administration of a case (particularly with the heightened scrutiny given to cases by the United States Trustee's Civil Enforcement Initiative), the Chapter 7 Trustee, the United States Trustee's Office, and even the bankruptcy judge assigned to the case have the ability to make a criminal referral. In most instances, the "criminal referral" is a letter sent to the United States Attorney outlining the alleged facts supporting the belief that a bankruptcy crime has been committed. In most instances, the fact that a criminal referral has been made is not part of the public record and accordingly, the party being investigated frequently is unaware that the criminal investigation has begun.

As for criminal referrals, the USTP's most recent Annual Report shows that the USTP made 1,721 bankruptcy and bankruptcy-related criminal referrals, a 6.8% increase over the previous fiscal year. The most common allegations in referrals made during that reporting period were false oath/false statement (38.2%), concealment of assets (30.2%), tax fraud (24.2%), bankruptcy fraud scheme (20.7%), identity theft or use of false or multiple Social Security numbers (17.1%), and mortgage fraud or real estate fraud (11.9%). The USTP's Web site at http://www.justice.gov/ust .

United States Trustee Program Annual Report Fiscal Year 2010, at p. 3.

According to the United States Department of Justice of the 1.4 million bankruptcy petitions filed in fiscal year 2009, approximately 10 percent of the petitions contain some elements of fraud.

18 U.S.C. § 3057, BANKRUPTCY INVESTIGATIONS

18 U.S.C. § 3057, Bankruptcy Investigations:

Any judge, receiver, or trustee having reasonable grounds for believing that any violation under chapter 9 of this title or other laws of the United States relating to insolvent debtors, receiverships or reorganization plans has been committed, or that an investigation should be had in connection therewith, shall report to the appropriate United States Attorney all the facts and

circumstances of the case, the name of the witnesses and the offense or offenses believed to have been committed. Where one of such officer has made such report, the others need not do so.

The United States Attorney thereupon shall inquire into the facts and report thereon to the judge, and if it appears probable that any such offense has been committed, shall without delay, present the matter to the grand jury, unless upon inquiry and examination he decides that the ends of the public justice do not require investigation or prosecution, in which case he shall report the facts to the Attorney General for his direction.

As you can see from the above, a report is made to the United States Attorney's Office. From that point forward, it is the United States Attorney's duty to investigate the facts and render a report as to whether or not it appears probable that a crime has been committed. The investigating Assistant Attorney General has the ability to either convene a grand jury to investigate the matter further and render an indictment or to render a report directly to the Attorney General for further direction.

The grand jury process gives the Attorney General significant investigative powers. As a general rule, attorneys who are subpoenaed to testify before the grand jury are not eligible to claim attorney-client privilege for their clients. Further, there are significant issues as to whether or not an individual being investigated by the grand jury has the ability to take the Fifth Amendment privilege against self-incrimination and if so, what the ramifications of asserting the privilege may be. The law on this issue is ever changing and you must confer with a criminal attorney or a bankruptcy attorney specialized in these issues as to the current status of these areas of the law.

NON-DISCLOSURE OR CONCEALMENT OF ASSETS

One of the area's most frequently referred for investigation are alleged bankruptcy crimes concerning the non-disclosure or concealment of a debtor's assets. The concealment of assets by a debtor in a case under the Bankruptcy Code is deemed to be a continuing offense until the debtor is finally discharged or a discharge is denied. The statute of limitations does not begin to run until the final discharge or denial of discharge is entered. There is generally a five (5) year statute of limitations pursuant to 18 U.S.C.S. § 3282. The concealment of a debtor's assets is made a continuing offense pursuant to 18 U.S.C.S. § 3284.

Although bankruptcy judges, the United States Trustee's Office and interim and permanent Chapter 7 Trustees have a duty to report instances of alleged criminal conduct, these matters are not prosecuted by the bankruptcy judge, the United States Trustee's Office or the Chapter 7 Trustee.

Furthermore, although, technically, not a “criminal referral,” there is no prohibition against third-parties (such as creditors) from making a referral to the United States Attorney’s Office regarding alleged bankruptcy crimes.

The purpose and intent of this outline is not to assist in the preparation of a criminal defense. Accordingly, there is no in-depth analysis of the critical elements required to establish the

requisite criminal conduct or the elements for the commission of a bankruptcy crime. Rather, the purpose and intent is to highlight and alert the bankruptcy practitioner to prevalent pitfalls in bankruptcy practice which can lead to a criminal referral.

The non-disclosure or concealment of assets is also one of the more common violations encountered by the average bankruptcy practitioner. What bankruptcy practitioner of any experience has not had a prospective client intimate that they did not want to disclose in their bankruptcy one asset or another? Debtors frequently do not want to part with their non-exempt assets and often believe that "no one will know if they don't list the asset in their bankruptcy." The bankruptcy practitioner needs to implement procedures and safeguards to assist the honest debtor in disclosing all of the debtor's assets and secondarily, to protect the bankruptcy practitioner from the dishonest debtor who, when caught concealing assets, will attempt to lay blame at the attorney's feet.

COLORADO TRUST FUND STATUTE

The crash of the housing market and the construction industry has created a hotbed of litigation in bankruptcy due to the Colorado Mechanic's Lien Statute. The Colorado Mechanic's Lien Statute, CRS § 38-22-127, is commonly referred to as the Mechanic's Lien Trust Fund Statute ("Trust Fund Statute"). The Trust Fund Statute, CRS § 38-22-127, was enacted in 1975 and amended in 2000. Generally, the Trust Fund Statute provides that the funds disbursed under any construction project are to be held in trust for the payment of subcontractors, laborers, or material suppliers who have a lien, or may have a line, against the property.

The Trust Fund Statute also has enunciated several exceptions that give contractors an "out" from its applicability. Colorado Bankruptcy Courts have routinely held claims for violation of the Trust Fund Statute to be non-dischargeable and even awarded treble damages under the statute.

The statute gives rise to personal liability and in addition to the fact that the claim may be non-dischargeable in bankruptcy, it also carries criminal liability. Any person who violates the statute commits a criminal theft and can be prosecuted criminally by the District Attorney for the County in which the violation occurred. If the funds at issue are under $1,000.00, the criminal charges are a misdemeanor. If the funds in question are $1,000.00 or more - the criminal violation is a felony. Fines can range from $2,000.00 to $750,000.00. Incarceration can last up to twelve (12) years.

These cases exemplify the fact that a bankruptcy practioner needs to be aware not only of the non-dischargeability of the claims, but also the criminal implications. *People v. Anderson*, 773 P.2d 542 (Colo.1989); *People v. Mendro*, 731 P.2d 704 (Colo.1987); *People v. Piskula*, 595 (P2d 219 (Colo.1979); *People v. Erickson*, 695 p.2d 804 (Colo.App.1984*);People v. Collie*, 682 P.2d 1208(Colo.App.1983): *People v. Brand,* 608 P.2d 817 (Colo,App.1979). For an excellent summary of the use of the Trust Fund Statute in the criminal forum, *see* Greenwald, "The Mechanics' Lien Trust Fund Statute—Theft or Not Theft," 16 *The Colorado Lawyer* 1968 (1987).

CASES & ISSUES

2011
Non-Disclosure - Options & Leases

In *United States of America v. Moser*, James D. Moser was convicted by a jury of conspiracy to commit bankruptcy fraud in violation of 18 U.S.C. §371 (Count 1) , bankruptcy fraud in violation of U.S.C §§2, 152(1) (Counts 2-8), and bankruptcy fraud in violation of 18 U.S.C §§ 157 (Count 10) . He was sentenced to 121 months' imprisonment.

Mr. Moser, and his wife, Doris Moser, filed a voluntary Chapter 7 bankruptcy petition. Shortly thereafter, on June 24, 2005, Mr. Moser entered into a sub-lease agreement with Mr. Tom Heshion, leasing him horse stalls on a farm that was leased by Mr. Moser's entity Hallmark Arabian Farms LLC ("HAF"). Mr. Moser did not disclose this agreement to his Chapter 7 trustee. Mr. Moser also failed to disclose that he also owned an option to purchase the real property on which HAF was located from the owner (the "Option"). The option to purchase the 16.5 acres, entered into on August 1, 2003, was valued at $1.5 million. Mr. Moser received a Chapter 7 discharge on May 17, 2006. *U.S. v. Moser,* 453 Fed. Appx. 762 (10th Cir. 2011).

2011
Power of Attorney Subjects Debtor to Criminal Liability

In *United States of America v. Spurlin*, Brian and Debra Spurlin were convicted, among other things, of concealment of bankruptcy estate assets, under 18 U.S.C § 152(1), for knowingly and fraudulently withholding their interests in certain properties from their bankruptcy filings. Specifically, the debtor's bankruptcy filings failed to account for certain sale proceeds from a parcel of realty they had sold, three (3) cars titled to a related entity over which they had exclusive use and control, and interests in related entities. Mr. Spurlin didn't appeal his conviction for concealment, but the Spurlins appealed all other convictions. With respect to Mrs. Spurlin's conviction for concealment, the United States Court of Appeals for the Fifth Circuit affirmed.

On appeal, Mrs. Spurlin argued that she could not be convicted of concealment of bankruptcy assets, because the joint bankruptcy petition was filed on her behalf using general power of attorney and because she did not supply any information for the petition.

At the outset, the Fifth Circuit noted that Mrs. Spurlin was not free of criminal liability just because her husband applied for the joint bankruptcy on her behalf using a general power of attorney.

The Fifth Circuit concluded, that a general power of attorney may be used to file for bankruptcy on another's behalf. The court concluded that Mrs. Spurlin's bankruptcy petition was valid, because there was enough evidence for a jury to infer ratification of the petition. Among other things, the court noted that Mrs. Spurlin came to the creditor's meeting, testified before the case

trustee, and never objected to the bankruptcy case going forward. In light of that holding, the court determined that there was sufficient evidence to convict Mrs. Spurlin of concealment of bankruptcy assets, under section 152(1).

U.S. v. Spurline, 664 F.3d 954 (5th Cir. 2011)

December 8, 2010
Bankruptcy Fraud Basis For Judge's Impeachment

The U.S. Senate removed U.S. District Judge G. Thomas Porteus, Jr. (E.D. La.) following an impeachment trial. He was found guilty of four (4) articles of impeachment. He was charged with several bankruptcy criminal charges, including filing for bankruptcy under a false name and by signing false statements under oath in a personal bankruptcy proceeding enabling him to discharge his debts.

January 3, 2009
Pennsylvania Debtors Receive 15 Day Prison Sentence For Failing To Disclose Family Business

Tammy Beecher and Wyatt Beecher, a Pennsylvania couple, were each sentenced to fifteen days in prison by U.S. Magistrate Judge J. Andrew Smyser in the Middle District of Pennsylvania for contempt of court for untruthful conduct in their joint bankruptcy case.

According to a press release issued by the U.S. Attorney's Office, the Beechers filed a Chapter 7 bankruptcy petition in May 2007. The filling stated that the Tammy Beecher had no income and that neither debtor had been involved in the operatio9n of a business within the previous six years. In fact, the Beechers owned a family business, "Fun 4 Kids Entertainment". Only after the Beechers were presented with a coupon for $5 off any party, and reminded by the chapter 7 trustee they signed the bankruptcy petition under penalty of perjury, did the Beecher's admit that the business had been operated on-and-off for the past three years.

January 1, 2009
Funeral Home Operator Indicted On Charges Of Concealing Assets

Eunice Roper-Allen, of the Allen Funeral Home, who was indicted last month in the Central District of Illinois, has entered a non-guilty plea to charges that she concealed assets in her bankruptcy case and defrauded a funeral home client by falsifying a decedent's funeral expenses.

In the three (3) bankruptcy-related counts, the indictment charges Roper-Allen with concealing two bank accounts, a van and real estate located in Michigan. The defendant is also charged with failing to disclose a 2005 judgment against her in the approximate amount of $70,000.00.

December 30, 2008
Florida Mortgage Fraud Scheme Ends In Eight Year Prison Term

Anthony Dehaney, was sentenced in the Southern District of Florida to eight years in prison. Dehaney pleaded guilty to conspiracy, mail fraud, and making a false declaration in a bankruptcy case. He admitted before sentencing that he began investing in real estate in 2002 when advisors instructed him that nobody would review the details of his mortgage applications. He also acknowledged lying on numerous loan applications between 2003 and 2006. When the real estate market turned for the worse, Dehaney filed fraudulent (forged) bankruptcy petitions on behalf of three (3) straw buyers in order to stop pending foreclosure proceedings.

The sentence imposed by U.S. District Judge William Dimitrouleas exceeded prosecutor's recommendations by approximately three years according to published reports.

December 17, 2008
Woman Charged With Filing Fraudulent Bankruptcy Petitions In Alleged Foreclosure Scheme.

Sonia Alburez was charged last week with four (4) counts of bankruptcy fraud for allegedly filing fraudulent bankruptcy petitions in the Northern District of California.

According to the indictment, Alburez solicited homeowners who were delinquent in their mortgage payments and convinced them that her company, Community Home Saver Program, could prevent or delay foreclosure if the homeowners would transfer a fractional interest in their home to one of several fictitious entities and paid Alburez' fees. She is accused of then filing fraudulent bankruptcy petitions listing the properties to trigger the automatic stay while she collected between $1,500.00and $2,500.00 per month from the homeowners.

December 10, 2008
Probation Imposed For Couple Convicted For Concealing Income

According to this news report, Juan Tenorio and Charlene Tenorio each were sentenced to terms of probation after a jury in the District of Guam convicted them of concealing nearly $75,000 in income from their engineering firm during their 2002 bankruptcy case. U.S. District Judge Francis Tydingco-Gatewood sentenced Juan to five years probation, a fine and restitution. Charlene received a two-year term of probation, a fine and will be required to make restitution as well.

December 6, 2008
Italian Fashion Designer Charged With Fraudulent Bankruptcy In Rome

According to this AP story, Italian financial police have said that they have arrested designer Gai Mattiolo on charges of fraudulent bankruptcy in Rome. The charges relate to Mattiolo's siphoning funds from his fashion house before filing bankruptcy.

As described, the charge of fraudulent bankruptcy appears to be the more serious of two potentially applicable charges under Italian bankruptcy law. Fraudulent bankruptcy carries a jail-

sentence of 3-10 years while lesser "bankruptcy offence" provides for a sentence of six months to two years.

December 4, 2008
Plan Proponents Convicted In Hawaiian Airlines bankruptcy Fraud Case

William H. Spencer and Paul Boghosian were convicted on numerous federal charges relating to their fraudulent conduct in proposing a reorganization plan in the 2003 Hawaiian Airlines bankruptcy case. Spencer was convicted following a two-week jury trial in Manhattan. Boghosian pleaded guilty on October 29th.

According to trial evidence, in connection with a bankruptcy court's consideration of two competing reorganization plans, one backed by Hawaiian Investment Partners Group LLC ("HIP Plan") and another jointly backed by the trustee and Hawaiian Holdings Inc., Spencer submitted false affidavits to the bankruptcy court claiming he could provide between $300 and $500 million to fund HIP Plan through a trust that he controlled. He later submitted a supplemental affidavit, with attached purported bank records, in which he held in a Netherlands bank account. Both defendants also gave false deposition testimony and used the false affidavits to solicit interested parties to support the HIP Plan.

As it turned out, the funds did not exist and the documents submitted to the bankruptcy were completely fraudulent.

November 29, 2008
Bankruptcy Fraud Sweep Announced In Southern District of West Virginia

Four defendants in the Southern District of West Virginia have been charged in separate cases with various bankruptcy crimes in a small fraud sweep that the U.S Attorney Charles T. Miller hopes will "serve as a warning to those who would abuse the [bankruptcy] system."

Victoria Caudill was charged with concealing assets (18 U.S.C. 152(3)) and devising a bankruptcy fraud scheme (157(3)) for allegedly transferring a $60,000.00 workers' compensation settlement payment to a bank account not in her name and then failing to disclose the account in multiple filings in her bankruptcy case.

Clinton Smith was indicted and charged with concealing assets (18 U.S.C. 152(1)), making a false declaration (18 U.S.C. 152 (3)) and devising a bankruptcy fraud scheme (157(3)) for allegedly failing to disclose in his bankruptcy case his interest in an income stream from the sale of a 50 acre parcel of property formerly jointly owned with his then wife.

Jennifer Longwell was charged by indictment with two counts of making a false oath (18 U.S.C. 152 (2)) an one count of concealing assets (18 U.S.C. 152(1)) in her bankruptcy case for allegedly not disclosing the proceeds she received from the sale of two parcels of real estate and then giving false testimony at the meeting of creditors concerning the same transactions.

A fourth defendant, Tracy Helms was charged by information with violating 18 U.S.C 152 (2) by allegedly concealing guns and jewelry in her bankruptcy case.

October 31, 2008
New Jersey Man Convicted And Sentenced For Lying In Bankruptcy Case About Closed Bank Accounts

Moty Rosenkrantz a/k/a Michael Rosenkrantz, the owner of B&W Motor Cars, pled guilty to structuring banking transactions to avoid reporting requirements and making a false oath in a bankruptcy case. The defendant admitted in his guilty plea that in July 2003 he filed a bankruptcy petition in which he falsely reported that no financial accounts in his name had been closed in the preceding year when in fact he had closed at least seven bank accounts in March 2003.

Rosenkrantz was sentenced in the District of New Jersey to 48 months I prison, three years of supervised release and a fine of $ 10,000.00.

August 15, 2012
Madison Attorney Pleads Guilty to Bankruptcy Fraud
Southern District of Mississippi

NATCHEZ, MI- Michael E. Earwood, 60 an attorney from Madison, Mississippi, pled guilty in U.S. District Court today to one count of bankruptcy fraud, U.S. Attorney Gregory K. Davis, FBI Special Agent in Charge Daniel Mc Mullen, and Acting Bankruptcy trustee Henry G. Hobbs, Jr. of Region 5 announced.

During the plea hearing, Earwood admitted devising and executing a scheme to obtain money from a business partner by falsely representing that the money would be used to maintain real property owned by the business, Kinwood Captiol Group. He admitted transferring title to the real property assets of the business without the knowledge and consent of his business partner, who held a majority interest in the assets of the business. Earwood admitted that he transferred these assets to his own company named Northlake Development. He then used that property as collateral for bank loans to his company, Northlake Development, but still continued to solicit money from the business partner for a period of time thereafter. Earwood admitted that when the bank attempted to foreclose on the Northlake Development loan, he placed Northlake Development into bankruptcy and continued to conceal the unauthorized transactions from his business partner and the banks from which he had obtained loans.

Earwood will be sentenced on October 25, 2012, at 10:30 a.m. and faces maximum penalty of five years in prison and a $250,000.oo fine.

March 8, 2012
Former Countrywide Loan Officer Sentenced to 15 years In Prison and Ordered to pay a $22 Million in Restitution

District of Arizona

Phoenix- On March 7, 2012. Paige Kinney, aka JamieLee Lawler, 43, of Phoenix, was sentenced to 15 years in prison by U.S. District Judge Neil V. Wake. Kinney had previously pleaded guilty to various charges related to a mortgage fraud scheme and to charges of bankruptcy fraud, wire fraud, and bank fraud in two separate indictments.

Ann Birmingham Scheel, Acting U.S. Attorney for the District of Aarizona, highlighted the significance of this sentence by stating, "Mortgage fraud has deflated property values, harmed lending institutions, and ruined entire neighborhoods in our community. This defendant was undaunted by the mortgage fraud indictment and continued to commit fraud crimes while awaiting trial on those charges. I commend the IRS and the FBI on a tenacious and thorough investigation that led to this significant sentence".

According to court documents related to the first indictment, Kinney played leadership role in a $40 million mortgage fraud scheme that targeted Countrywide Home Loans and other lenders. According to Kinney's plea agreement on those charges, from January 2005 through December 200, Kinney and others conspired to commit mortgage fraud by using unqualified straw buyers to purchase properties, knowing that the straw buyers did not intend to live in the homes or be responsible for the loan payments.

Kinney continued her illicit activities while she was pending trial on the mortgage fraud indictment. According to her plea agreement on the second indictment, Kinney declared bankruptcy and then attempted to hide assets and liabilities from the bankruptcy court by falsifying her name and social security number. Kinney also committed additional financial fraud by arranging for friends to fraudulently obtain a loan to purchase a Mercedes. In addition, she committed insurance fraud by staging a phony burglary of her residence and then collecting $130,000 from Allstate Insurance Company.

Judge Wake noted that the defendant engaged in a "breathtakingly aggressive fraud" when sentencing Kinney to 10 years in prison on the mortgage fraud scheme and to five years in prison on the second indictment, to run consecutively to the mortgage fraud sentence. Judge Wake also ordered Kinney to pay $22,000,000.00 in restitution.

September 27, 2011
Former CEO of Worldwide Financial Resources Sentenced in $11 Million Fraudulent Mortgage Loan Scheme
District of New Jersey

The former CEO of Worldwide Financial Resources, a New Jersey-based mortgage origination firm, was sentenced today to 63 months in prison in connection with and $11 million fraudulent loan scheme, U.S. Attorney Paul J. Fishman announced.

David Findel, 45, of Monmouth County, N.J., was sentenced by U.S. District Judge Peter G. Sheridan in Trenton federal court. He had previously pleaded guilty to an information charging him with fraud.

According to the information to which Findel pleaded guilty and statements made in Trenton federal court:

Findel is the former CEO of Worldwide Financial Resources ('Worldwide"), which was in the business of originating residential home loans. Worldwide worked with borrowers to prepare mortgage applications and qualify the borrowers for home mortgages. Although Worldwide would originate the mortgage loans, after origination, Worldwide would re-sell the loans to another financial institution in the secondary mortgage marketplace.

Findel admitted he prepared and sold fake mortgage loans form 2008 though September 2009. Specifically, after Worldwide had originated a mortgage loan and sold that loan to a third-party lender, Findel would create a second set of fraudulent loan documents for the same property. He would then sell the second set of fraudulent loan documents to another third-party lender, even though the actual mortgage loan for that property already had been sold. AS a result of these fake mortgage loans, Findel received over $11 million in illicit proceeds, which he used, in part, to maintain his lavish lifestyle—including hid multi-million dollar home in Colts Neck, exotic travel, and exclusive seating at a major New Jersey professional sports arena.

In addition to prison term, Findel was sentenced to three years' supervised release and order to pay $11,994,000.00 in restitution. He was immediately remanded into custody.

On September 19, 2011, Findel pleaded guilty to separate Information charging him with bankruptcy fraud for concealing assets from U.S. Trustee, the bankruptcy case trustee and creditors in his bankruptcy case. He is scheduled to be sentenced on that count on November 14, 2011.

U.S. Attorney Fishman credited special agents of the Federal Bureau of Investigation, under the direction of Special agent in Charge Michael B. Ward, in Newark, with the investigation that resulted in today's guilty plea

The government is represented by Assistant U.S. Attorney Christopher J. Kelly of the U.S. Attorney's Office Criminal Division in Newark.

This case was brought in coordination with President Obama's Financial Fraud Enforcement Task Force. President Obama established the interagency Financial Fraud Enforcement Task Force to wage an aggressive, coordinated, proactive effort to investigate and prosecute financial crimes. The task force includes representatives from a broad range of federal agencies, regulatory authorities, inspectors general, and state and local law enforcement who, working together, bring to bear a powerful array of criminal and civil enforcement resources. The task force is working to improve efforts across the federal executive branch, and with state and local partners, to investigate and prosecute significant financial crimes, ensure just and effective

punishment for those who perpetrate financial crimes. Combat discrimination in the lending and financial markets, and recover proceeds for victims of financial crimes.

Shreveport Businessman, Girlfriend Convicted Of Bankruptcy Fraud
September 29, 2012
Western District of Louisiana

United States Attorney Stephanie A. Finley announced today that that Harold L. Rosbottom, Jr., age 55, a Shreveport businessman, along with his girlfriend and co-conspirator, Ashley Kisla, age 44, of Coushatta, La., was convicted late last night by a federal jury for concealing nearly $2 million from Rosbottom's creditors in the course of his bankruptcy proceeding.

Rosbottom and Kisla were found guilty of conspiracy to launder money in order to purchase a 65' Hatteras sport fisherman boat and a half-interest in a private jet.

Rosbottom's bankruptcy case is currently pending in the U.S. Bankruptcy Court in Shreveport, La. These convictions center on the concealment of assets from creditors and the United States Trustee; specifically, a series of 17 cashier's checks totaling about$ 1,820,195.00 all payable to Rosbottom. The federal jury, after hearing five days of testimony and reviewing hundreds of documents, convicted Rosbottom of one count of Conspiracy to Commit Bankruptcy fraud, one count of Giving False Oath and Account, and one count of Conspiracy to Commit Money Laundering.

Rosbottom faces maximum penalty of 20 years in prison and a fine twice the amount of money involved in the transaction for the Conspiracy to Commit Money Laundering. He also faces a maximum penalty of five years in prison and a $250,000.00 fine on the other counts of conviction.

Rosbottom's co-defendant, Ashley Kisla, was convicted of one count of Conspiracy to Commit Bankruptcy Fraud, one count of Giving a False Oath, and one count of Conspiracy to Commit Money Laundering. Kisla also faces maximum penalty of 20 years in prison and a fine of twice the amount of money involved in the transaction for Conspiracy To Commit Money Laundering. She also faces a maximum penalty of five years in prison and a $250,000.00 fine on the other two counts of conviction.

After the jury rendered its verdict, U.S. District Court Judge Donald Walter ordered that both Rosbottom and Kisla be taken into custody and detained pending their sentencing hearings. Sentencing for both defendants is scheduled for January 3, 2013 at 10:00 a.m.

December 5, 2012
Healthcare Fraud & Bankruptcy Crimes

A West Virginia doctor is facing several Felony Charges after federal prosecutors allege he devised a scheme to defraud Medicare and Medicaid, made subscribed false tax returns, falsified

a bankruptcy document and made false statement to a federal agent. He faces 12 counts of bankruptcy fraud as well.

Dr. Allen G. Saoud, 58, served as a doctor of osteopathic medicine and owned the dermatology practice of AGS Inc. in Bridgeport, West Virginia according to a news release from the O.S. Attorney's office.

A December 4 indictment alleged Saoud submitted "false and unsupported medical billing claims" to Medicare and Medicaid between May 1998 and June 2004

However, the U.S. and Saoud reached a settlement regarding these claims in August 2005 where Saoud did not admit liability but agreed to pay $310,800.58 to the U.S., indictment states.

The agreement also listed a provision where Saoud agreed to be excluded from Medicare, Medicaid and other federal health programs for 10 years, indictment states.

Federal Prosecutors assert that Saoud violated that agreement from May 2005 to October 2010. The indictment asserts Saoud devised a scheme to defraud Medicaid and Medicare.

The indictment also asserts he established a new dermatological practice, Central; West Virginia Dermatology Associates Inc., and Transferred ownership to another doctor.

"The purchase price for CWVD's 'shares' was $1.6 million, but Saoud did not receive any payment for CWVD. Moreover, before August, 2005, CWVD was not an operational medical practice," the indictment says.

All of AGS' medical staff and patients were transferred to the new practice, the indictment says.

Federal Prosecutors say Saoud "actively participated in the management and administration of CWVD," which they say is in violation of the agreement. The indictment further asserts Saoud fraudulently filed bankruptcy for AGS in May 2009 to "avoid or delay civil lawsuit from Mountain State Blue Cross/Blue Shield regarding alleged medical overbilling by Saoud."

"To legitimize the bankruptcy filing, Saoud forged the signature of the purported owner of AGS on a document authorizing Saoud to file bankruptcy for AGS," the indictment alleges.

The indictment further asserts he made false statements in sworn testimony in the bankruptcy proceedings about his involvement with AGS and CWVD.

From September 2005-October 2010, the indictment continues to allege, AGS and CWVD received $2 million in Medicare and Medicaid reimbursements.

September 20, 2012
False Identity- False Oath

U.S. v. Marston, Court of Appeals for the First Circuit case No. 11-2100 September 20, 2012. Ramie Marston filed a pro-se Chapter 7 Bankruptcy petition in March 2009. Marston obtained credit cards utilizing the names of two acquaintances—Susan Blake and Kristy Kromer. Enlisting all of the names used by the debtor in the last eight years, Marston failed to list the names of Susan Blake and Kristy Kromer. She also failed to list debts including debt incurred utilizing these false names. After a jury trial she was convicted of two counts of bankruptcy fraud. Marston was ultimately sentenced to concurrent terms of thirty-seven months imprisonment and three years supervised release for each count as well as a statutory $100.00 special assessment imposed separately for each count.

March 24, 2011
Health Care Fraud And Bankruptcy Fraud

A decision from the 7th Circuit Court of Appeals last week illustrates the importance of providing accurate information in the bankruptcy petition. In that case, debtors from Michigan failed to do so and were denied a discharge. (*Stamat v. Neary,* 7th Cir. Mar. 24, 2001).

Dr. and Mrs. Stamat of Illinois filed a high-debt Chapter 7 bankruptcy case in July 2007. Dr. Stamat is a medical doctor who operates a pediatric clinic. The wife owns a medical billing company. They sought out to discharge over $1.5 million in debt.
After being examined, the trustee alleged that the debtors failed to list numerous assets and transactions including past business interests, two limited partnerships, a $10,000.00 law suit settlement payment, and $90,000.00 obtained from a refinance. The trustee also alleged that they misreported their 2006 income.

Accordingly, the trustee sought to deny their discharge by bringing an adversary proceeding under Bankruptcy Code section 727, arguing that the debtors concealed estate assets with intent to defraud their creditors, fraudulently made false statements under oath, and failed to satisfactorily explain the loss of assets—some pretty serious charges.

The bankruptcy court agreed with the trustee, denying the debtors a discharge. The debtors unsuccessfully appealed to both the District Court and The Court of Appeals, who held that the debtors made numerous material omissions which displayed a reckless disregard for the truth.

The debtors indicated in their petition that their 2006 gross income was $53,000.00 However, their 2006 tax return indicated that Dr. Stamat grossed $265,000.00 from his medical practice and his wife grossed $22,000.00 from her billing business. That's quite a disparity.

In addition, the debtors failed to disclose past investment and business interests, as well as ownership interests in various limited partnerships, which information they were required to list in the Statement of Financial Affairs, which is one of the schedules of the bankruptcy petition.

The debtors also refinanced their home twice in the two years before filing the bankruptcy petition, receiving over $90,000.00 in cash, and they failed to report that as well.

The court stated that the debtors knew or should have known that the information they provided was inaccurate and the cumulative effect of their false statements was material. This established a pattern of reckless indifference to the truth.

May 12, 2010
Bankruptcy Fraud and the Hot Dog Vendor

A North Myrtle Beach hot dog vendor pled guilty to bankruptcy fraud. It appears as if the case started because Simmons was behind on mortgage payments. He filed a Chapter 13 bankruptcy and proposed a payment plan which would catch up his mortgage, pay his secured debt, and pay only a nominal amount to unsecured creditors. But there weren't many of those-less than $10,000.00 in unsecured debt is scheduled. It appears to be a very simple case.

Among the assets listed in the bankruptcy was Simmon's hot dog cart and some hot dog inventory. Simmons valued the hot dog cart at $1500.00 He listed his occupation as a hot dog vendor, and showed gross income of about $3,000.00 a month, noting that his income was seasonal. The Chapter 13 bankruptcy plan was confirmed, and the case continued on a very normal track for a while. Then, the trustee moved to dismiss the case because he had discovered that the debtor had sold the hot dog cart and business (without bankruptcy approval) for $95,000. That's the same business that the debtor said had a value of $1,500.00 when he filed his case.

People don't want to "lose" anything, and so they minimize their assets. A debtor doesn't want to lose that hand-made antique hunting rifle, so it's described as a "gun" and valued at $100.00. A debtor doesn't want to lose the Stickley sideboard she inherited, so it becomes "dining room furniture" and is valued at $500.00. Since Simmons pled guilty, he has essentially admitted that he knew that the value of his business was more than the stated value of the hot dog cart and the inventory.

Simons had options. When he got the offer to buy the business for $95,000.00, he could have dismissed his bankruptcy case and used those funds to pay his creditors-remember, he owed less than $10,000.00. Or, he could have modified his Chapter 13 plan proposed to pay only a nominal amount to his unsecured creditors. In fact, that's probably what sealed the case against him. It is certainly possible that, at the time the case was filed, he really didn't know what the business was worth. But, when someone made that big whooping offer, he knew. And did nothing to correct the record and treat creditors fairly.

December 18, 2009

On December 18, 2009, in Mobile, Ala., Sharon Jemison, of Grove Hill, Alabama, was sentenced 24 month in prison for aiding and assisting in the filing of a false tax return and for bankruptcy fraud. Jemison was also sentenced to three years supervised release and ordered to pay $81,078.00 in restitution on the bankruptcy fraud charge as well as sentenced to one year of supervised release and ordered to pay $62,845.00 in restitution on the tax charge.

December 17, 2009

On December 17, 2009, in Billings, Mont., Todd Horob, of Williston, North Dakota, was sentenced to 132 months in prison, five years of supervised release, and ordered to pay restitution of $6,028,731.00. Horob was sentenced after having been found guilty of bank fraud, wire fraud, bankruptcy fraud, money laundering, and aggravated identity theft.

October 1, 2009

On October 1, 2009, in Tallahassee, Fla., Don Reinhard was sentenced to 51 months in prison, five years of supervised release and ordered to pay nearly $680,000.00 in restitution for making a false loan application. Bankruptcy fraud and filing false tax returns.

December 16, 2004
Corporate Officer Guilty of Bankruptcy Crimes

The principal of a former Chapter 11 debtor, Kenneth Babbit, was indicted on December 16, 2004, on four (4) counts of violating 18 U.S.C. §152 for his unauthorized withdrawals of $344,722.51 from the debtor-in-possession account. While Mountain Harvest, Inc. was operating in Chapter 11, its president and thirty-three percent shareholder, made the unauthorized withdrawals within a several week period before he resigned as president.

The Denver Office of the United States Trustee made an immediate criminal referral concerning $300,000.00 of the unauthorized transfers that were disclosed to the United States Trustee within fifteen (15) days of the first transfer. This raiding of the debtor-in-possession account resulted in the debtor not being able to proceed with its plan of reorganization, although $200,000.00 was recovered almost immediately (fortunately, there was a competing plan that provided for new capital to pay all creditors in full.)

The UST Trial Attorney assigned to the case testified before the grand jury and she, along with the bankruptcy analyst, assisted the Assistant United States Attorney in reviewing documents and pleadings to prepare the case for prosecution. What is significant about this case is that the indictment was rendered just prior to the expiration of the five (5) year statute of limitation.

Mountain Harvest, Inc., Chapter 11 Case No. 99-12846 DEC.

June 24, 2004
Police Officer Hid Jeep

A former Breckenridge police officer was convicted of fraud for hiding a $32,000 sport utility vehicle from bankruptcy the court. Corinne M. Purucker, 43, of Maple Valley, Wash., was also convicted after a three-day trial of fraudulently transferring or concealing assets. She faced a total of up to 20 years in prison and up to a $1 million fine on the two counts of fraud and two counts of fraudulent transfer.

Prosecutors said Purucker bought a $32,700 2001 Jeep Cherokee in November 2001 but had her roommate write the check, using Purucker's money, and then put the title in the roommate's name. Purucker filed for bankruptcy the next month in December 2001 but did not list the Jeep as an asset. After filing for bankruptcy, prosecutors said she had her roommate execute a letter "giving" her the Jeep. The case was reopened in November 2003 when a bankruptcy trustee learned of the Jeep. At the time the crime was committed, Purucker was a police officer with the Breckenridge Police Department. Immediately before her conviction, she was working as a police officer in Washington State.

A jury found Purucker guilty on all counts. As of December 2004, Purucker has not yet been sentenced due to the Court granting a Motion for Continuation on sentencing pending a Supreme Court ruling on *Blakely v. Washington*, 2004 WL 1402697 (June 24, 2004).

What is interesting about the *Purucker* case is that at times in the past it was difficult to motivate the United States Attorney's Office to prosecute bankruptcy crimes unless the dollar amounts involved were large. *Purucker* clearly highlights that the bar has been "lowered."

See, *In re Purucker, Case No. 01-28288 MER*. See also the Federal Criminal Case of *USA v. Purucker, 04-CR-00278,* United States District Court, District of Colorado.

OTHER CASES

The following, certainly non-exclusive, laundry-list of cases highlights the breadth of factual circumstances giving rise to violations of 11 U.S.C. §152:

A debtor is required to disclose the receipt of assets even after plan confirmation. See *United States v. Roemessner*, 107 F.3d 1448; 1997 U.S. App. LEXIS 2830; 46 Fed. R. Evid. Serv. (Callaghan) 702; Bankr. L. Rep. (CCH) p77, 282; 14 Colo Bankr. Ct. Rep. 42 (10th Cir. Feb. 19, 1997).

The utilization (embezzlement) by the debtor or the principal of the debtor of assets of the estate; the concealment of assets; and the destruction of books and records of the debtor may give rise to criminal liability. *United States v. Levy*, 992 F.2d 1081; 1993 U.S. App. LEXIS 10289 (10th Cir. May 3, 1993).

The concealment of income received post-petition, but earned pre-petition without disclosure is a crime. *United States v. McIntosh*; 197 B.R. 688; 1996 U.S. Dist. LEXIS 8176 (D.C. Kansas May 17, 1996)

The non-disclosure of contracts or undisclosed agreements. *In re Webster, Clements v. Webster*, 1991 U.S. Dist. LEXIS 21681 (D.C. Colo. November 18, 1991).

The non-disclosure of pre-petition transfers or liabilities of the debtor. *In re Lafferty*, 1986 U.S. Dist. LEXIS 20208 (D.C. Kansas September 18, 1986.)

Bankruptcy attorney discussing advice on denying ownership of a vessel. *United States v. Grundy and Thornburgh*, 7 U.S. 337 (1806).

The *Levine* case is notorious in this District. The case highlights the expansive nature of bankruptcy crimes and the entanglement of the attorneys for the debtors. The allegations of bankruptcy crimes in the underlying bankruptcy case culminated in the convictions of principals in the debtor, three of the debtor's attorneys, and the debtor's accountants. The case included allegations that some of the attorneys for the debtors entered into a conspiracy with the principals of the debtor to assist the debtor's principals: (1) to loot the corporation's pension plan via the establishment of a new corporation for the debtor's principals; (2) to procure and conceal illegal kickbacks from the liquidator of the debtor's business; and (3) to destroy the debtor's business records in an effort to conceal the underlying transactions. See *United Staves v. Levine*, 970 F.2d 681; 1992 U.P.S. App. LEXIS 15019 (10th Cir. July 2, 1992); *United States v. Brown*, 943 F.2d 1246; 1991 U.S. App. LEXIS 20235; 33 Fed.R.Evid. serv. (Callaghan) 1287 (10th Cir. Sept. 3, 1991); *United States v. Schlapman*, 192 U.S. App. LEXIS 16741 (10th Cir. July 2, 1992); *United States v. Zimmerman*, 943 F.2d 1204; 1991 U.S. App. LEXIS 19883; 1992 U.S. App. LEXIS 16741 (10th Cir. July 2, 1992); *United States v. Levine*, 750 F.Supp. 1433; 1990 U.S. Dist. LEXIS 14409 (D.Colo. October 23, 1990).

Although the making of a false oath regarding assets of the estate of a bankrupt corporation is an offense in itself, it may also constitute a concealment within this section prohibiting transfer and concealment of proceeds of corporate property in contemplation of bankruptcy or with intent to defeat bankruptcy law. *Burchinal v. U.S.*, 342 F.2d 982 (10th Cir. 1965).

The utilization of offshore asset protection schemes (Cayman Island bank account). *U.S. v. Knoll*, 16 F.3d 1313 (2d Cir. 1994).

Defendant attempted to secure money from a buyer at a bankruptcy sale in consideration of defendant's agreement to refrain from bidding. *U.S. v. Weiss*, 168 F. Supp. 728 (W.D. PA 1958).

Prosecution of counsel for a creditor who prepared a false proof of claim was convicted of aiding and abetting in the filing of a false bankruptcy claim against the corporate debtor. *U.S. v. Connery*, 867 F.2d 929 (6th Cir. 1989).

Failure of parties to a corporate reorganization proceeding to disclose the existence of a contract to file a plan of reorganization providing for specified payments to creditors and to a nonvoting stockholder violated this section. *Ely v. Donohoo*, 45 F.Supp. 27 (S.D.N.Y. 1942).

In addition to violations of 18 U.S.C. §§ 152, 153, and 157, additional statutes have been utilized for criminal prosecutions in connection with bankruptcy cases, including 18 U.S.C. § 1961, *et seq*. (Federal Racketeering Influenced and Corrupt Organizations Act ("RICO")); and 18 U.S.C. §§ 1956 and 1957 (Money Laundering).

In addition to criminal repercussions, including bankruptcy crimes, the non-disclosure of assets may lead to civil repercussions, including the judicial estoppel of claims. See *Eubanks v. CBSK*

Financial Group, Inc., 2004 U.S. App. LEXIS 20678, 6th Cir. April 23, 2004. See also, *In re Coastal Plains, Inc*., 179 F.3d at 197 at 208 (5th Cir. 1999); *Peltz v. Shidler,* 952 P.2d 793 (Colo. App. 1997).

PARALELL PROSECUTIONS

Practitioners should be aware of the fact that bankruptcy is probably one of the most common areas of law where parallel civil and criminal proceedings take place. A debtor may be subjected to an 11 U.S.C. §523 action or an 11 U.S.C. §727 action for conduct which also constitutes a bankruptcy crime. The unaware debtor and practitioner in defending the §523 or §727 action may also be facilitating the client's criminal conviction by "making" the U.S. Trustee's case or the U.S. Attorney's case for a bankruptcy crime.

In addition to the ethical mine fields for the practitioner, the attorney must also meet the standard of care by advising his or her client as to the risks and pitfalls of bankruptcy crimes and prosecutions. Bankruptcy practice is also one of those areas where a client being "squeezed" by civil and/or criminal prosecutions is very likely to attempt to lay blame on the attorney. The suggestions contained herein are designed to assist the attorney in helping the client meet their duties, including duties of disclosure, while, at the same time, helping the attorney to avoid, at a minimum, a malpractice claim or, at a maximum, involvement in a criminal referral.

The *Purucker* case *supra* is a perfect example of the practical problem of parallel prosecutions for civil and criminal issues. The United States Trustee's Office filed a Motion to reopen the bankruptcy. The Bankruptcy Court entered an Order reopening the case and appointed a Chapter 7 Trustee to administer the case. The Chapter 7 Trustee then filed a Motion for Turnover of the nondisclosed asset (the Jeep). The debtor naively filed a Response to the Motion to Compel Turnover. Apparently, neither the debtor, nor her counsel, recognized the criminal implications surrounding the civil bankruptcy proceeding for the turnover. As part of the proceeding to compel the turnover of the Jeep, the Chapter 7 Trustee served combined discovery requests upon the debtor attempting to prove that the Jeep was property of the bankruptcy estate pursuant to 11 U.S.C. §541. Again, the debtor and debtor's counsel naively responded to these discovery requests without recognition of the potential parallel criminal proceeding for bankruptcy crimes.

Approximately one (1) month before the hearing in the Bankruptcy Court on the Trustee's Motion for Turnover, the FBI seized the debtor's Jeep. Approximately two (2) weeks before the hearing on the Trustee's Motion for Turnover, a Grand Jury indicted the debtor on four (4) counts of bankruptcy crimes. At that point in time, the debtor sought to continue the civil hearing in the Bankruptcy Court on the Trustee's Motion to Compel Turnover recognizing, albeit late, that any testimony provided by the debtor in the civil proceeding could and would be used against her in the criminal proceeding. At that point in time, the damage had already been done due to the Debtor's Response to the Motion to Compel Turnover and the debtor's responses to Chapter 7 Trustee's discovery requests.

Although the debtor sought, at that time, to raise her Fifth Amendment privilege against self-incrimination, it can be argued that the "horse was out of the barn." The United States

Attorney's Office had already obtained sufficient incriminating statements from the debtor to facilitate the criminal prosecution. Had the debtor or her counsel suspected that a criminal investigation was pending or underway, it might have been better to forfeit the Jeep; taking the Fifth Amendment in the bankruptcy proceeding; and preparing for the real battle in the criminal case.

THE FIFTH AMENDMENT PRIVILEGE

Even though the bankruptcy practitioner establishes procedures and safeguards to attempt to prevent a debtor from committing a bankruptcy crime, these attempts may be unsuccessful. Upon spotting a potential bankruptcy crime issue, it is important to advise the debtor as to the potential consequences of the debtor's conduct and its relationship to bankruptcy crimes. Furthermore, it is critical that the debtor be referred to either a bankruptcy attorney specializing in bankruptcy crimes, or a criminal attorney.

To avoid the problems of parallel prosecutions highlighted by the *Purucker* case, the bankruptcy practitioner should also advise the debtor of the debtor's Fifth Amendment privilege against self-incrimination. The debtor may be denied a discharge in the bankruptcy based upon the exercise of his or her Fifth Amendment privilege, but this may be preferable to establishing and proving the commission of the bankruptcy crime through the debtor's own words. Self-incriminating testimony voluntarily given without the assertion of the Fifth Amendment privilege is admissible in a criminal proceeding against the debtor.

The Fifth Amendment provides, in pertinent part, that "No person…shall be compelled in any criminal case to be a witness against himself…" The Fifth Amendment privilege protects a person against being legally compelled to provide testimonial information that might tend to incriminate that person. *Fisher v. United States*, 425 U.S. 391, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976); *McCarthy v. Arndstein,* 266 U.S. 34, 40, 45 S. Ct. 16, 17, 69 L. Ed. 158, 160 (1924).

The privileges available do not require an admission of guilt or the establishment of the elements of the bankruptcy crime. The fact that the debtor's testimony might provide a "link in a chain of evidence" establishing guilt is sufficient. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S. Ct. 814, 818, 95 L. Ed. 1118, 1124 (1951).

The common assumption that the Fifth Amendment privilege is only available in criminal cases is erroneous. Litigants, debtors, and even witnesses in civil and bankruptcy proceedings may exercise the privilege where their answers to questions might incriminate them in pending parallel criminal proceedings or potential future criminal proceedings. *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S. Ct. 316, 322, 38 L. Ed. 2d 274, 281 (1973).

The common statement of "use it or lose it" applies to the privilege. The privilege is not waived by the mere filing of a voluntary petition in bankruptcy. *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); cf. *Arndstein v. McCarthy*, 254 U.S. 71, 72, 41 S. Ct. 26, 65 L. Ed. 138 (1920). To the extent, however, that the debtor testifies and answers given by the debtor amount to an admission or showing of guilt, the debtor may be deemed to have waived his Fifth Amendment privilege.

McCarthy v. Ardnstein, 262 U.S. 355, 43 S. Ct. 562, 67 L. Ed. 1023 (1923), reaff'd on rehearing, 266 U.S. 34, 40, 45 S. Ct. 16, 17, 69 L. Ed. 158, 160 (1924).

Although a complex area of the law, in general, the Fifth Amendment privilege may not be applied to non-testimonial acts, such as the production of the debtor's books and records. *Butcher v. Bailey*, 753 F.2d 465, 468-69, 11 C.B.C.2d 1229 (6th Cir.), cert dismissed, 473 U.S. 925, 106 S. Ct. 17, 87 L. Ed. 2d 696 (1985). The seminal bankruptcy case in Colorado on invoking the Fifth Amendment privilege against self-incrimination is *In re Foster*, 217 B.R. 631, 643 (Bankr. D. Colo. 1997). *Foster v. Hill* (*In re Foster*) 188, F.3d 1259; 1999 U.S. App. Lexis 21490; 16 Colo. Bankr. Ct. rep 274; 1999 Colo. J.C.A.R. 5429 U.S. Ct. App. (10th Cir. Sept. 8, 1999).

Although there is a conflict among the districts, some courts have concluded that a debtor's assertion of the Fifth Amendment privilege against self-incrimination and consequential refusal to testify constituted cause for dismissal of the bankruptcy pursuant to 11 U.S.C. § 707(a). *In re Foster*, 217 B.R. 631 (Bankr. D. Colo. 1997) citing *In re Peklo*, 201 B.R. 331 (333-334)(Bankr.D.Conn. 1996).

Similarly, the assertion of the Fifth Amendment privilege may also result in the denial of a discharge based upon the debtor's failure to adequately maintain books and records under 11 U.S.C. § 727(a)(3) and 11 U.S.C. § 727(a)(5). *In re Foster*, 217 B.R. 631 (Bankr. D. Colo. 1997) citing *In re Wazeter*, 209 B.R. 222, 231 (W.D.Mich. 1997); *In re Horridge*, 127 B.R. 798, 799 (S.D. Tex 1991).

WHEN IS A TAX RETURN A TAX RETURN?

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I. OVERVIEW

The appendix covers the basic rules regarding discharging taxes in Bankruptcy. The primary material discusses recent developments regarding whether a tax return is a tax return for the purposes of bankruptcy. As mentioned in the appendix, one of the rules that must be met to discharge a tax in bankruptcy is that the tax return must be filed at least two years prior to the filing of the bankruptcy. This issue involves the interplay of amendments to the Bankruptcy Code[1] made by BAPCPA,[2] pre-BAPCPA case law and the tax code.[3]

II. FACTUAL SETTING WHICH CREATES THE PROBLEM

To meet the two year filing requirement one must first file a tax return. When is a tax return a tax return? This is an issue that has seen a lot of litigation in recent years. The fact patterns start with an individual failing to timely file a tax return and then the IRS filing a Substitute for Return ("SFR"). If an individual does not file a tax return, 26 U.S.C. 6020(b) gives the IRS authority to file a SFR. This process ends with an assessment, without a return being filed, that allows the IRS to proceed with collection efforts. There are five basic fact patterns that flow from this factual setting.

A. The taxpayer does nothing

In this case, Courts have consistently ruled that the taxpayer has not filed a tax return. Therefore, the two year rule has not been met.

B. The taxpayer files a return during the SFR process

If the taxpayer files a return during the SFR process and the assessment from the tax return occurs before the creation of a SFR assessment, the IRS considers this a filed return and will discharge the tax.

C. The taxpayer signs the SFR

Revenue Ruling 74-203 indicated that signing a document during the SFR process, consenting to the assessment, constituted filing a return. Prior to BAPCPA, the majority of Courts ruled a signed document in this situation does constitute the filing of a return. In Revenue Ruling 2005-59, the IRS revoked its position that signing a document in the SFR process constituted a return. The ruling applies to such documents signed after September 12, 2005. I am not

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[1]Title 11 of the United States Code.

[2]Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 119 Stat. 23 (April 20, 2005).

[3]Title 26 of the United States Code, also known as the Internal Revenue Code.

aware of any cases that have addressed this issue since Revenue Ruling 2005-59 was issued.

D. The taxpayer responds to the Notice of Deficiency and files a Tax Court petition

The final step, prior to assessment, of the SFR process is the issuance of a Notice of Deficiency. This notice provides a 90 day window in which the taxpayer may dispute the proposed assessment, by filing a Tax Court petition. Most Tax Court matters are resolved with a stipulated Decision Document. As part of BAPCPA, the definition of return indicates that "a written stipulation to a judgement or a final order entered by a nonbankruptcy tribunal" is a return. The IRS is not disputing discharge of taxes when this is the case.

E. The taxpayer files a return subsequent to the filing of the SFR

This is the area that is currently seeing a great deal of litigation. The IRS takes the position that once a SFR has been prepared it is not possible for a taxpayer to meet the two year filing requirement. In essence, that any document filed after a SFR is not a return. This position is tempered in two important ways. First, to the extent the taxpayer filed return increased the tax liability, the return is considered a tax return for the increased liability. Second, for joint filers, the return is considered a return for the spouse that did not have a previous SFR.

The official IRS position is set out in a Chief Counsel Notice.[4] This Notice takes the position that there are potentially two pieces to the assessment when a taxpayer files a return after the SFR process has been completed. The first piece is the amount of the assessment that existed before the taxpayer filed the return, or what is left of it. The second piece is the additional assessment, if any, after the filing of the return.

The IRS takes the position that the amount assessed through the SFR process is not dischargeable at any time. The IRS takes this position despite the fact there is no statutory language that suggests such a result. Further, this position is put forth despite the fact the current assessment matches the tax reported on the return.

The Chief Counsel Notice rejects a line of thinking put forth in the 5th Circuit case of *In re McCoy*, 666 F.3d 924 (5th Cir. 2012).[5] This case has ruled that the only way to file a tax return after an SFR assessment is to use the process in 26 U.S.C.

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[4]IRS Office of Chief Counsel Notice CC-2010-016, dated September 2, 2010 (position reiterated in IRS Memorandum of September 28, 2011 Control Number SBSE-05-0911-078).

[5]The Chief Counsel Notice is issued prior to *McCoy*. However, *McCoy* uses the same logic as the case cited in the Notice, *In re Creekmore*, 401 B.R. 748 (Bankr. N.D. Miss. 2008).

§ 6020(a). This result is arrived at after a tortured and illogical analysis of the statute. The Chief Counsel Notice specifically rejects this interpretation as a misreading of the statute.

III. PRE-BAPCPA HISTORY

To understand the current situation, it is helpful to look at the status of this issue prior to BAPCPA. Then, we can take a look at BAPCPA and determine the effect, if any, of the added provisions on this particular question. First, case law had made it clear that an SFR assessment created without a filing by the taxpayer was not a return.[6]

The next question is the question that creates the litigation. Is a tax return filed by the taxpayer(s) after an SFR assessment a tax return? The plain language of the question would suggest the answer is yes. However, there was a split of authority on this issue. There were four Circuit Courts[7] that dealt with the issue of whether a tax return filed after an SFR was a tax return. In addition, there were two Bankruptcy Appellate Panels[8] (hereinafter "BAP") that dealt with the issue.

Savage was the first case to be decided. The *Savage* Court held that the returns filed by the taxpayers, after SFR assessments, were returns.[9] Further, the Court noted that the fact the return was filed after the SFR assessment was irrelevant.[10] The Court went on to note that the two year filing rule and the 240 day assessment rule are completely separate rules, "Congress specifically excluded any reference to assessment in § 523(a)(1)(B) . . . The Court has to assume that was Congress' intent" at 132. The Court indicated that whether the return met the elements of a tax return might have been a relevant issue, but the IRS

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[6] *In re Bergstrom*, 949 F.2d 341 (10th Cir. 1991).

[7] *In re Moroney*, 352 F.3d 902 (4th Cir. 2003), *In re Hindenlang*, 164 F.3d 1029 (6th Cir. 1999), *In re Payne*, 431 F.3d 1055 (7th Cir. 2005), and *In re Colsen,* 446 F.3d 836 (8th Cir. 2006).

[8] *In re Nunez*, 232 B.R. 778 (9th Cir. B.A.P. 1999) and *In re Savage*, 218 B.R. 126 (10th Cir. B.A.P. 1998). At times, *In re Hatton*, 220 F.3d 1057 (9th Cir. 2000) is cited as overruling *Nunez*. The *Colsen* (BAP) Court, at 124, points out that this case is distinguishable. The issue in *Hatton* was whether an SFR or an agreement to an Installment Agreement constituted a tax return. The Court looked to the *Beard* test. The Court did not need to arrive at a subjective or objective analysis of the third prong because there was no signed return.

[9] *Savage* at 131.

[10] *Id* at 132.

failed to raise the issue.[11] All of the Appellate Courts that followed, found this to be a relevant issue.

Prior to BAPCPA, the term "return" was not defined in the Bankruptcy Code. Nor was the term defined in the Internal Revenue Code, which is still true today. Rather, the definition of "return" has been defined by case law. The case most commonly cited is *Beard v Commissioner*, 82 T.C. 766 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986)(per curiam). This case creates a four prong test to determine what is a tax return. The four prongs are:

1) there must be sufficient data to calculate tax liability;
2) the document must purport to be a return;
3) there must be an honest and reasonable attempt to satisfy the requirements of the tax law; and
4) the taxpayer must execute the return under penalties of perjury.[12]

These factors come from two Supreme Court cases.[13]

Each of the Appellate Courts that follows *Savage* cites these elements as the elements to determine whether a tax return is a return.[14] Despite the fact the elements are the same, Courts reached vastly different conclusions. The final case decided was *Colsen*. *Colsen* affirmed the decision of the 8th Circuit BAP.[15] That BAP opinion is the most thorough and rigorous analysis of this issue. As the *Colsen* Court indicated, the difference between the two approaches is whether a subjective or objective analysis of the third element is used.[16] The subjective approach was used by the *Hindenlang*, *Moroney* and *Payne* Courts. *Nunez* and *Colsen* used the objective approach. The subjective approach uses factors outside the tax return document to determine whether the third element has been met. The objective approach looks merely at the tax return. As *Colsen* pointed out, the Supreme Court[17] has ruled that even a fraudulently filed tax return can qualify as a tax return filing. Therefore, *Colsen*, at 840, concluded that the objective approach was the

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[11] *Id* at 132.

[12] *Beard* at 777.

[13] *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 55 S. Ct. 127, 79 L. Ed. 264 (1934) and *Germantown Trust Co. v. Commissioner*, 309 U.S. 304, 60 S. Ct. 566, 84 L. Ed. 770 (1940).

[14] *Nunez* at 782-3, *Hindenlang* at 1033, *Moroney* at 905, *Payne* at 1057, *Colsen* at 840.

[15] 322 B.R. 118 (8th Cir. B.A.P. 2005).

[16] *Id* at 126.

[17] *Badaracco v. Commissioner*, 464 U.S. 386, 104 S. Ct. 756, 78 L. Ed.2d 549 (1984).

approach used in tax law and found no reason to deviate from the tax law usage of the test.[18]

The *Hindenlang*, *Moroney*, and *Payne* Courts all used a subjective approach. In this approach, the subjective intent of the filer was deemed relevant to whether the return was an honest and reasonable attempt to satisfy the requirements of the tax law. Each Court used the fact the return had been filed late, and/or the possibility the return was filed solely for the potential purpose of eventually discharging the debt in Bankruptcy, to find there was no honest and reasonable attempt to satisfy the tax law. The *Payne* Court indicates the term "return" is being used in a bankruptcy specific context.[19]

Colsen and *Nunez* used the objective approach. *Colsen* stated "to be a return, a form is required to 'evince' an honest and genuine attempt to satisfy the tax laws. . . . . We therefore hold that the honesty and genuineness of the filer's attempt to satisfy the tax laws should be determined from the face of the form itself, not from the filer's delinquency or the reasons for it. The filer's subjective intent is irrelevant." at 840.

It should also be noted that in each of these cases the IRS was attempting to create a per se rule (the current IRS position) that if an SFR assessment occurred prior to a taxpayer filing, that it is was not possible for the taxpayer to meet the two year filing requirement. *Savage* indicated this was an absurd result.[20] *Colsen* and *Nunez* also flatly rejected this position. Even the Courts that used the subjective approach, rejected the IRS' position.[21] By definition, the subjective approach requires factual findings regarding the intent of the taxpayer in analyzing the third prong of the test.

To summarize, all Courts used the elements set out in *Beard*, using non-Bankruptcy law. However, some Courts used the third element in a subjective manner that was not consistent with tax law, while other Courts used the objective approach that was consistent with tax law. None of these Courts used the rationale used in the Chief

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[18]The IRS still recognizes that *Colsen* is good law in the 8th Circuit and has instructed the various insolvency units not to pursue the theories set out in the Chief Counsel Notice in the 8th Circuit. *See* the memorandum cited in footnote 4.

[19]*Id* at 1059.

[20]*Savage* at 132.

[21]*Hindenlang* is sometimes cited as setting out a per se rule. However, a careful reading of this opinion finds this is not the case. The 6th Circuit "merely" laid out a very difficult test for any taxpayer to meet in the fact pattern at hand, at 1035. *Moroney* states "this simply goes to far" at 907. *Payne* states "we need not go that far" at 1059. The hypothetical on page 1058 of *Payne* contains an error. The problem with the return sent to the cemetery is that it has not been filed, not that it fails to be a return.

Counsel Notice, regarding separating the assessment into multiple pieces. As the *Savage* Court noted, at 132, this would insert assessment language into the two year rule.

IV. POST-BAPCPA

A. THE LEGISLATIVE CHANGES AND ANALYSIS

BAPCPA altered § 523(a)(1) in two ways. First, with italics indicating the added language, § 523(a)(1)(b) now reads as follows:

with respect to which a return, *or equivalent report or notice,* if required -
i) was not filed *or given*; or
ii) was filed *or given* after the date on which such return, *report, or notice* was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or.

In addition, a hanging paragraph was added to the end of § 523(a). The hanging paragraph states:

> For purposes of this subsection, the term 'return' means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

The hanging paragraph is creating a definition of "return." The definition has been placed inside § 523(a), rather than in § 101. This suggests there is a need to create a definition unique to this subsection.

The hanging paragraph has two sentences. The first sentence creates a definition for 'return' for this subsection. The definition indicates that nonbankruptcy law is used to determine what is a tax return. As mentioned previously, the term 'return' is not defined in the tax code. Rather, it has been defined by case law. Therefore, this section is codifying prior case law to the extent it points to the *Beard* elements to determine what is a tax return. This leads to the question of which approach is the correct approach, the subjective approach or the objective approach? As set out above, *Colsen* and *Badaracco* indicate the objective test is used in nonbankruptcy law.

The second sentence has two parts. The first portion of the sentence provides a list of items that are *included* in the set of items considered a return. The second portion of the sentence clearly indicates that an assessment created by 26 U.S.C. §

6020(b) is not a return. The second portion of the sentence is codification of previous case law. This first part of the second sentence is designed to expand the definition of a tax return. A written stipulation in a nonbankruptcy tribunal would not meet the *Beard* definition of a tax return. In addition, a return prepared under 26 U.S.C. § 6020(a) might not meet the *Beard* definition of a tax return. Congress inserted this language to make clear these items were tax returns for this subsection, despite the fact they might not meet the *Beard* test.

Further, the word 'includes' is not meant to be a word used for an exhaustive list.[22] There are other items that may be a tax return that do not meet the *Beard* test.[23] 26 U.S.C. § 6014 allows certain taxpayers to complete most of a tax return but submit the document without computing the tax. Failing to compute the tax may be grounds for finding the third prong of the *Beard* test has not been met. Although a 6014 return is not in the list enumerated in the statute, such a return is closer to being a tax return than providing the information to have a 6020(a)[24] return prepared. To the extent one tries to interpret the language in the hanging paragraph to exclude a 6014 return, one arrives at a nonsensical result.

Moving one step further, recognizing other items that are less than a tax return as a tax return, but interpreting the statute to suggest a 1040 that meets requirements of a tax return, but for the fact an SFR assessment was previously made, as not being a return defies common sense.

The first sentence also contains a parenthetical (applicable filing requirements) at the end of the sentence. This parenthetical needs to be read in conjunction with

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[22]It is interesting to note that taxpayer protestors look at 26 U.S.C. § 3401(c) as "proof" that they do not have to pay taxes. This section states "for purposes of this chapter, the term "employee" includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term "employee" also includes an officer of a corporation." Most individuals in the country are not part of this list. However, the list uses the word includes. The section is written in a manner to make sure it is understood these individuals are also part of the group of individuals who are employees. To interpret the first part of the second sentence to omit everything outside of the list, would be to make the same statutory construction mistake that taxpayer protestors make.

[23]There are a number of complications in regard to State law requirements and this provision. Many States use different terminology than the Federal system. This language, in part, is designed to deal with these problems. These problems are outside the scope of the current discussion.

[24]This is where the taxpayer provides information to the IRS and the IRS prepares the return. This occurs very rarely.

the language added to § 523(a)(1)(B).[25] On the Federal level, §§26 U.S.C. 6011 and 6012[26] define the filing requirements. These sections do not contain any reference to due dates. The due dates for Federal income tax returns are set out in § 6072, which makes no reference to filing requirements. In the tax world, a filing requirement and a due date are separate concepts.[27] The language inserted into the Bankruptcy code makes clear that the tax(nonbankruptcy) context is to be used.

Recognizing the definition of return has been expanded, one can see Congress needed to limit the application to this subsection. If the definition was also used in § 507, there would have been an expansion of what constitutes a priority tax debt.

The reality is that the bankruptcy code follows the tax code. The three year rule deals with when a return is due. The return must have been due at least three years prior to the filing of the bankruptcy. The two year rule addresses the fulfillment of a filing requirement. The filing requirement must be fulfilled at least two years prior to the filing of the bankruptcy, regardless of the due date of the return.

There is nothing in the statute that suggests there cannot be both an SFR assessment and a tax return filed by the taxpayer. To suggest otherwise, inter alia, is not to follow the statutory canon that exceptions to discharge are to be narrowly construed.

To summarize, BAPCPA has changed § 523(a) in the following ways:

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[25]This provision has more relevance in State law matters. Many states have a requirement to file an amended return, report or some other document (with the State taxing authority) after the completion of an IRS audit. The Colorado statute is C.R.S. § 39-22-601(6). There was a split of authority regarding whether requirements of this nature were filing requirements for the two year rule. This language, along with the addition of "equivalent report or notice" and the fact a document may be "given" instead of filed, is designed to indicate such a requirement is a filing requirement. The difficulty with terminology being different at the State level was also the impetus for changing the word "assessment" to "incurred" in § 507(a)(8)(B).

[26]These sections are found in Subtitle F, Chapter 61, Subchapter A, Part II, Subparts A and B of Title 26. § 6072 regarding filing requirements is in Part V.

[27]This concept is also seen in IRS Publication 17. Pages 5 - 7 discuss filing requirements. There are three tables (the first table is on page 4) that assist one in determining whether one has a filing requirement. There is a discussion of due dates on pages 11 and 12. The filing requirement sections never discuss due dates, and the due date section makes no reference to filing requirements, just like the statute.

1. The case law indicating an SFR is not a tax return has been codified;
2. The clear reference to using nonbankruptcy law has codified the usage of the *Beard* test to define a tax return (and that the *Colsen* and *Badarracco* use of an objective analysis (nonbankruptcy) of the third prong of the test is to be used);
3. In circumstances beyond the scope of this discussion, there is an expanded definition of return to deal with various State law requirements to file documents that are not considered tax returns. In addition, stipulations to Tax Court decisions, 6020(a) returns and other items are included in the concept of a tax return.

B. THE *MCCOY* APPROACH - THE TWO YEAR RULE DOES NOT EXIST

The 5th circuit decision in *McCoy* is a very scary and flabbergasting case. In essence, it writes the two year rule out of the code. It holds that a late filed return is not a return, unless one uses the "safe harbor" of filing a return pursuant to 26 U.S.C. 6020(a). I have never heard of using 26 U.S.C. 6020(a) after the filing of a SFR. For that matter, I am not aware of tax professionals ever making use of the process. I believe that restricting the "safe harbor" to a 6020(a) return ignores that the definition uses the term "includes." In statutory construction, the term "includes" normally refers to a non exhaustive list.

Judge Campbell notes this case makes a mess of statutory interpretation.[28] First, "interpret[ing] 'applicable filing requirements' . . . to encompass the time for filing a return" renders the language in § 523(a)(1)(B)(ii) superfluous.[29] Effectively, such an interpretation redefines "return" as "timely filed return." "This contravenes the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning."[30]

McCoy indicates its holding is not a major change from pre-BAPCPA use of this provision. This conclusion is incredulous. Judge Campbell points out that the legislative history makes no mention of any major change to the statute.

The argument in the McCoy case should have been what is a tax return as defined by Mississippi state law. Federal law should only have been used to the extent Mississippi relies on Federal law for its definitions.

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[28] *In re Martin*, -- B.R. –, 2012 WL 5554611 (Bkrtcy. D. Colo. 2012). The Adversary Proceeding Case No. is 11-1536.

[29] *Id* at page 4.

[30] *Id* at page 5.

Unfortunately, there are more cases using this approach than any other approach.[31] Fortunately, the official IRS position is that *McCoy* misinterprets the statute. Earlier, I indicated that the IRS is discharging taxes when the taxpayer files a return during the SFR process, but before a SFR assessment has been made. If *McCoy* were the law of the land, this would no longer be the case.

C. THE *WOGOMAN* OR IRS APPROACH

Judge Brooks decision in *In re Wogoman*[32] is the first case, pre or post BAPCPA, that follows the official IRS position.[33] Judge Brooks made it clear he was not happy with how the case was presented.[34] The ruling has been affirmed by the BAP.[35] No further appeals were made. The BAP opinion does not provide clear guidance. The opinion states there are three approaches to the situation. The first approach is to look to pre-BAPCPA case law. The Court noted that three Circuits had ruled for the IRS and only one for the taxpayer. The Courts analysis is that the IRS won three out of four Circuits, and that the reasoning in the subjective approach is more persuasive. However, the subjective approach does not follow nonbankruptcy law, tax law. The second approach is the *McCoy* case. The Court questions the *McCoy* approach, but indicates the IRS would win if that approach was correct. The third approach is the *Wogoman*, or IRS, approach. The Court points out that no Court accepted this position pre-BAPCPA, but indicates the IRS would win if this approach was correct. Without specifically saying so, the Court appears to adopt the thinking of the *Hindenlang, Moroney* and *Payne* line of cases. But, the Court points out that the *McCoy* or *Wogoman* approaches would arrive at the same result. Judge Brooks ruling is affirmed without providing a specific rationale, as noted by Judge Campbell.

Judge Brooks opinion, which matches the official IRS position and has been followed by *Smythe* and *Casano*, is one possible line of thinking than can come from *Wogoman*. The other approach the could come from *Wogoman* is the revival of the *Hindenlang*, *Moroney* and *Payne* line of thinking. This approach does leave open the possibility of the taxpayer demonstrating a return has been filed,

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[31]The previously mentioned *Creekmore* case, *In re Links*, 2009 WL 2966162 (Bkrtcy. N.D. Ohio 2009, *In re Canon*, 451 B.R. 204 (Bkrtcy. N.D. Ga.), *In re Shinn*, 2012 WL 986756 (Bkrtcy. C.D. Ill. 2012), and *In re Perry*, 2012 WL 4762020 (Bkrtcy. M.D. Ala. 2012).

[32]*In re Wogoman*, 2011 WL 3652281 (Bankr. D. Colo. 2011).

[33]*In re Smythe*, 2012 WL 843435 (Bkrtcy. W.D. Wash. 2012) and *In re Casano*, (Bkrtcy. E.D. N.Y. 2012) have now followed the *Wogoman* rationale.

[34]See footnote 2 on page 1 and section V on page 3 of the opinion.

[35]*In re Wogoman*, 475 B.R. 239 (10th Cir. BAP 2012).

but under the more difficult subjective approach. I think the latter is unlikely. The BAP opinion is the only post-BAPCPA case that uses this approach. As mentioned before, this line of cases does not properly use the *Beard* test, in its nonbankruptcy context.

D. THE *MARTIN* APPROACH

Judge Campbell recently ruled for the taxpayer on this issue.[36] The IRS has filed a notice of appeal to the 10th Circuit BAP. It is an excellent opinion. If you want to understand this issue, I would read this opinion, one of my summary judgement motions[37] and the *Colsen* BAP opinion.

Martin correctly points out that whether a 6020(a) or 6020(b) return has been filed is not relevant to the resolution of this issue. The question is whether the taxpayer filed return "satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)."[38] *Martin* points out the statutory construction flaws in the other approaches. *Martin* follows the plain language of the statute. The two year filing requirement stands by itself. The determination of whether a return has been filed is not intermingled with the 240 day assessment rule or the fraud rule. The Court recognizes that what is to be filed and when it is to be filed are two completely separate matters. The statute clearly indicates nonbankruptcy law is to be used. *Martin* recognizes that the *Colsen* case is the one Circuit Court opinion prior to BAPCPA that used the *Beard* test in a tax context. This approach makes sense in that it effectively creates an objective test, consistent with tax (nonbankruptcy) law, defining what is a tax return.

V. SUMMARY

This area is currently fraught with peril for the taxpayer/debtor. With the exception of the *Martin* decision, the taxing authorities have won every battle. This area will continue to see litigation. If the *McCoy* approach takes hold, the ability to discharge taxes in bankruptcy will be greatly curtailed, making any late filed return nondischargeable. If the *Wogoman* or IRS approach takes hold, with the exceptions previously mentioned, the ability to discharge a return filed after a SFR assessment will be gone. If the *Martin* approach prevails, the ability to discharge taxes will return to the practice that was in place in this part of the country prior to BAPCPA.

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[36]The Adversary Proceeding Case No. is 11-1536.

[37]I currently have four other adversary proceedings on this issue. *In re Chaj Ajtun* is in front of Judge Brown. *In re Reneau* and *In re Urban* are in front of Judge Tallman. *In re Mallo* is in front of Judge Romero. The Adversary Proceeding Case No. are 11-1538, 11-1539, 11-1540 and 11-1624, respectively. *Urban* and *Mallo* are joint cases.

[38]*Martin* at page 4.

APPENDIX - DISCHARGE RULES

I. Basic rules for dischargeability of income taxes(all rules must be met)

A. Three year rule

This rule relates to the original due date of the return, including extensions. The date the return was actually filed is not relevant. The date of the assessment is not relevant. No tax is dischargeable unless three years have passed since the original due date of the return, including extensions. See 11 U.S.C. 523(a)(1)(A) and 11 U.S.C. 507(a)(8)(A)(I).

1. Therefore, between January 1st and April 15th of each year, the last four years are never dischargeable periods. After April 15th of each year, the last three years are never dischargeable periods.

2. Be wary of April 15th falling on a weekend. April 15th falling on a weekend alters the due date of a tax return to the 16th or 17th. This is complicated by the fact the IRS has recognized Patriots Day as a holiday in several northeastern states. In these states, the deadline can be extended by another day. I am unaware of any cases ruling on this issue. However, I would not want to be the test case. Normally, I do not file cases before April 19th to avoid dealing with these issues.

3. Tax returns are normally due on April 15th. In the past, a taxpayer could file an extension to August 15th and a second extension to October 15th. If these extensions were requested, the three year rule was counted from the August 15th or October 15th date. Starting with the 2005 tax year, the IRS eliminated the first extension, now all extensions are to October 15th.

B. 240 day rule

This rule relates to the date the tax was actually assessed. The date the return was due is not relevant. The date the return was actually filed is not relevant. No tax is dischargeable if it was assessed within the 240 days preceding the Bankruptcy. See 11 U.S.C. 523(a)(1)(A) and 11 U.S.C. 507(a)(8)(A)(ii). By statute, Colorado income taxes are deemed assessed on the date of filing.

C. Two year rule

This rule relates to the date the return was actually filed. The date the return was due is not relevant. The date the tax was assessed is not relevant. No tax is dischargeable if the return was filed in the two years preceding the filing of the Bankruptcy or not filed at all. See 11 U.S.C. 523(a)(1)(B). If a return is filed late, the received date is the filing date, not the postmark date.

D. Fraud

A tax is not dischargeable if the debt was incurred due to fraud. See 11 U.S.C. 523(a)(1)(c).

E. Assessable but not assessed

Any amount that could be assessed, but is not yet assessed, and for which the return was filed at least two years prior to the Bankruptcy and for which there is no fraud, is not discharged. See 11 U.S.C. 523(a)(1)(A) and 11 U.S.C. 507(a)(8)(A)(iii).

1. The essence of this rule is: it is foolish not to have full disclosure on any return that one hopes to discharge. If the audit statute is still open, any amount that could be assessed is not discharged.

2. The introductory clause relating to the two year filing requirement and the no fraud rule no longer effect dischargeability. The reference to 523 simply limits the scope of priority debt. Without this clause, all unfiled and fraudulent returns would be priority debts.

II. Tolling

A. A prior Bankruptcy tolls the three year rule and the 240 day rule for the time in Bankruptcy, plus 90 days. If there are multiple Bankruptcy filings, 90 days is added for each filing.

B. A collection appeal request tolls the three year rule and the 240 day rule for the time in Bankruptcy, plus 90 days. If there are multiple requests, 90 days is added for each request.

C. An Offer in Compromise tolls the 240 day rule for the time in an Offer in Compromise, plus 30 days.

D. The tolling provisions discussed above are in the hanging paragraph inside 11 U.S.C. 507(a)(8).

Prior to BAPCPA, there was a great deal of litigation regarding whether tolling applied to the discharge rules. This ended when the Supreme Court held that the principle of equitable tolling applied to the 3-year rule.[39] *Young* held that the time in a prior bankruptcy tolls the running of the 3-year rule. By analogy, the IRS assumed the ruling would also apply to the two year filing rule and the 240 day assessment rule. In *Young*, the Court held the discharge rules to be a form of

[39] *In re Young*, 535 U.S. 43 (2002)

statute of limitations. The Court then applied the statutory construction of equitable tolling. Equitable tolling assumes Congress did not express tolling provisions because they are implied as part of a statute of limitation. Congress has now expressly stated tolling provisions. As mentioned before, the 2-year filing requirement referenced above is in 11 U.S.C. 523(a)(1)(B). I do not see how these tolling provisions can apply to the 2-year rule. The 2-year rule has nothing to do with the priority section of the Code. So, does tolling apply to the 2-year rule?

There are three logical possibilities. Those possibilities are:

1. Tolling is the duration of the event plus 90 days;
2. Tolling is the duration of the event; or
3. There is no tolling.

As mentioned above, I do not see how the first possibility is possible. The *Young* case did not specifically deal with the 2-year rule. However, a court might find that by analogy the reasoning in the *Young* case must apply to the 2-year rule. In this case, the second possibility would be the answer. A court might also find that Congress has now specifically stated when tolling does and does not apply. That, tolling applies to the 3-year rule and the 240-day rule and not the 2-year rule. In this case, the third possibility would be the answer. I am not aware of any cases that have addressed this issue.

In many cases, this is a minor or meaningless issue. The fact pattern that is most likely to generate a problem is when a Chapter 13 is filed, non-priority returns are filed shortly after the filing, the case is dismissed, and now one is evaluating the dischargeability of taxes in a new bankruptcy. The effect in this situation could be dramatic.

Does tolling apply to the two year filing rule or the three year penalty rule? Litigation will have to answer this question.

III. What constitutes the filing of a tax return? - See the primary materials.

IV. Penalties

Generally, penalties are dischargeable if the three year rule is met.[40] The discussion regarding tolling of the two year rule applies to this penalty provision also.

[40] 11 U.S.C. 523(a)(7) and *In re Roberts*, 906 F.2d 1440 (10th Cir. 1990).

A recent case held that the frivolous filing penalty occurs as the return is filed.[41] Therefore, for the frivolous filing penalty, the three years runs from the filing of the return, not the due date. I believe the same logic would apply to the accuracy-related[42] or fraud penalties.[43] The event occurs when the fraud occurs. 11 U.S.C. 523(a)(7) indicates the event creating the penalty must have occurred at least three years prior to filing the petition. The most common penalties are: failure to pay,[44] failure to file[45] and failure to pay estimated taxes.[46] Each of these penalties is an act of omission where the event occurs before or immediately after the tax return was due.

The State of Colorado is taking the position that the recurring distraint warrant penalty and the new collection fees[47] are similar to the frivolously filing penalty. The position is that the event does not occur until the notice that creates the penalty is issued. This issue may be litigated in the future.

V. Tax debts are not consumer debts

When analyzing any Chapter 7 case, there is a critical question that is often overlooked. Is the case a consumer case or a non-consumer case?[48] Non-consumer debts alter Bankruptcy in several respects. If business and other non-consumer debts are a majority of the debt(a non-consumer case), 11 U.S.C. 707(b) does not come into play and there is no requirement to complete the means test form. The threshold to recover a preference is also higher in non-consumer cases.[49] In addition, the co-debtor stay in 11 U.S.C. 1301 and the redemption rights in 11 U.S.C. 722 do not apply to non-consumer debts.

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[41] *In re Wilson*, 407 B.R. 405 (10th Cir. BAP 2009).

[42] 26 U.S.C. 6662A

[43] 26 U.S.C. 6663

[44] 26 U.S.C. 6651(a)(2)

[45] 26 U.S.C. 6651(a)(1)

[46] 26 U.S.C. 6654

[47] C.R.S. 39-21-114(7) and (8) and 39-22-621(2)

[48] 11 U.S.C. 101(8) defines "consumer debt" as "a debt incurred by an individual primarily for a personal, family or household purpose."

[49] Preferences of $600 or more can be recovered in a consumer case. In a non-consumer case, only preferences greater than $5,850 can be recovered. See 11 USC 547(c)(8) and (9).

Taxes are not consumer debts.[50] The *Stewart* Court does not discuss the issue. However, the Court tallied various consumer and non-consumer debts and put the tax debt on the non-consumer side of the ledger.

The critical distinction is not whether the debt is consumer debt or business debt. The critical distinction is whether the debt is consumer debt or something else. The two boxes presented as a choice on the front page of the petition suggest the wrong distinction. Check the business box when you have mostly non-consumer debt, even if the debt is not business debt. Check the "other" box for type of business. The *Westberry* case provides an analysis of this issue.

VI. Codification of majority rule on state amendments after IRS audit

Many state tax codes require a taxpayer to file a return, report or amended tax return within a certain period after the end of an IRS audit.[51] One premise in our tax code is that there is only one tax return for any given period. Despite this tax concept, most Bankruptcy Courts had ruled that state law provisions requiring the filing of a document after an IRS audit created a new filing requirement for purposes of the two year filing rule. The fact a return had previously been filed was not relevant. The BAPCPA changes to 11 U.S.C. 523(a)(1)(B) codified the majority position. An audit assessment, for a State tax debt, cannot be discharged unless an amended return is filed at least two years prior to the filing of the Bankruptcy petition.

[50] *In re Westberry*, 215 F.3d 589 (6th Cir. 2000), *In re Harrison*, 82 B.R. 557 (Bankr.D.Colo. 1987) and *In re Stewart*, 175 F.3d 796 (10th Cir. 1999).

[51] In Colorado, this requirement is in C.R.S. 39-22-601(6)(a).

Ethical Issues: Balancing Business and Practice, and the Multiple Roles of Consumer Debtor's Counsel

Materials are substantially from Hon. Keith M. Lundin and Hon. William H. Brown, Chapter 13 Bankruptcy 4th ed
Available at www.ch13online.com

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

In re Lehtinen, 564 F.3d 1052 (9th Cir. 2009). Bankruptcy court has inherent authority to discipline Chapter 13 attorney for failing to properly represent debtor; counsel was appropriately suspended from practice in bankruptcy court for failing to appear at meeting of creditors, for failing to appear at confirmation hearing and for representing a conflicting interest by pressuring debtor to use counsel as a real estate broker.), *aff'g* 332 B.R. 404 (B.A.P. 9th Cir. Oct. 11, 2005) (Discipline of debtor's counsel, for conflict of interest in acting as both bankruptcy attorney and real estate broker and for failure to advise debtor of conflict, is within bankruptcy court's core jurisdiction. Attorney was suspended for three months and required to disgorge fees, but remand ordered for court to consider mitigating and aggravating factors concerning suspension.

In re Withrow, 405 B.R. 505 (BAP 1st Cir. 2009). Bankruptcy court appropriately imposed $3,585 sanction debtor's attorney for violations of § 707(b)(4) and Bankruptcy Rule 9011 for failure to conduct reasonable investigation into accuracy of schedules. Attorney "had an affirmative duty to conduct a reasonable inquiry into the facts set forth in the Debtor's schedules, statement of financial affairs and [other pleadings] before filing them. There is evidence in the record, however, that Attorney . . . violated that obligation. It is undisputed that there were numerous errors and discrepancies in the documents filed by Attorney . . . on the Debtor's behalf."

In re Pagaduan, 447 B.R. 614 (D. Nev. 2011). Debtors' attorney was appropriately sanctioned for impersonating debtors online to obtain prepetition briefing certificates; monetary sanction was within court's discretion, but bankruptcy court did not have authority to extend sanctions imposed on same attorney in earlier case that required attorney to provide copy of sanction order to each client.), *aff'g in part, vacating in part,* 429 B.R. 752, 759, 760 (Bankr. D. Nev. Apr. 12, 2010) (Markell) (Debtors' attorney violated Bankruptcy Rules 9010 and 9011 and Nevada Rules of Professional Conduct by filing Chapter 13 case with credit counseling certificates that debtors did not sign. Crediting debtors' testimony, attorney "or someone in his office, impersonated the Debtors online to complete the [credit counseling] class. This is forgery." Attorney was not authorized to complete credit counseling form without debtors' participation. Bankruptcy Rule 9010 authorizes actions by attorney-in-fact, but debtors' attorney acted as attorney-at-law. "All Rule 9010 does is distinguish between an attorney-at-law, permitted to practice law, and an attorney-in-fact—essentially an agent—who is not permitted to practice law." Referral appropriate to U.S. Attorney to determine whether crime had been committed and whether violation of Nevada Rules of Professional Conduct required sanction. Attorney's testimony revealed commingling of client funds with funds earned from other clients—another violation of ethical rules. Nevada has adopted Model Rule 1.15(c), providing that advance payments for fees and expenses cannot be commingled with lawyer's own funds but must be held in trust and withdrawn only as fees are earned or expenses are incurred. Attorney violated clients' wishes by scheduling home to be surrendered, when they wished to retain home and attorney refused to work on loan modification requested by debtors. Sanctions, in addition to referral to U.S. Attorney, included requiring attorney to return $1,000 to debtors and to pay court $4,920, the expected fee from debtors. For commingling client funds, attorney must bring his practice into compliance with Nevada Rules of Professional Conduct within 60 days and report to court steps taken to remedy violation. As further sanction, opinion will be published, and for five years following publication, attorney shall be required to give copy of opinion to every client in all cases where professional fees exceed $5,000, excluding costs.

In re Plumeri, 434 B.R. 315 (S.D. N.Y. 2010). Attorney's failure to disclose prepetition judgment for possession as required by § 362(*l*)(5) was reckless conduct that violated attorney's duties as an officer of the court and was sanctionable; attorney was ordered to pay landlord $2,500 for attorney fees.

In re Brent, 458 B.R. 444 (Bankr. N.D. Ill. 2011). Debtor's attorney, filing 8,000 cases from mid-1996 to present, violated Rule 9011(b) when fee applications in 317 pending cases contained false representations by alteration of model retention agreements ("MRA"), which provided for $3,500 fixed fees, with undisclosed addendum for additional fees; numerous false applications made attorney "culpably careless," citing *Young v. City of Providence,* 404 F.3d 33, 39 (1st Cir. Apr. 11, 2005) (Boudin, Lynch, Lipez). "No reasonable attorney would have believed he was telling the truth in representing to the court he had entered into the MRA when the attorney had modified the MRA—which permits a single flat fee for the entire bankruptcy case—with an addendum requiring the debtor to pay additional fees. The addendum produces a

different agreement with different terms, terms different in a critical way. The point of the flat fee arrangement is to set a 'presumptively reasonable fee' that obviates the need for elaborate fee applications in routine cases. . . . Modifying the MRA to authorize fees beyond the presumptively reasonable fee defeats the purpose of the arrangement." As sanction, attorney was ordered to pay $10,000 fine to clerk of court, to attend and successfully complete legal ethics course at accredited law school, and censured for misconduct, with opinion forwarded to district court and disciplinary agency.

In re Lichtenberg, 457 B.R. 908 (Bankr. N.D. Ga. 2011). Attorney was ordered to appear and show cause why fees should not be reduced or disallowed, why attorney should not be suspended from practice for six months, and why court should not refer matter to state bar for disciplinary action. Attorney did not appear at confirmation hearing, instead sending attorney who had no opportunity to prepare. "[A]bsent some emergency, the attorney who is counsel of record—the lawyer the client actually hired—has no business putting another lawyer in a situation where the attorney who appears cannot represent the client. Clearly, this does not provide proper representation to the client." Show cause was required because of prior concerns with attorney's practice.

In re Small, 2011 WL 5508825 (Bankr. D. Alaska June 2, 2011). Debtor and his attorney made false statements in motion to convert from Chapter 7, representing debtor was "making more money and intends to keep his real estate and pay arrearage through Chapter 13 payment plan;" debtor was not making additional income, and Schedules I and J were similarly false. Although court declined to dismiss case as overly harsh sanction, court would welcome motion by trustee or U.S. trustee for order to show cause why debtor and his attorney should not be required to pay substantial monetary sanctions.

In re Monroe, 2011 WL 6010280 (Bankr. E.D. N.C. 2011). Attorney was sanctioned for incompetent management of stay relief order and plan modifications. Attorney failed to properly communicate with debtor regarding stay relief consent order, failed to competently negotiate consent order, and negligently failed to timely modify confirmed plan. Attorney ordered to pay sanction in amount of vehicle repossession charge and creditor's attorney fees. "While negotiating the consent order, [debtor's attorney] was aware that the Debtor's plan would need to be modified to account for the Debtor's residence no longer being included in the Chapter 13 plan. However, [attorney] failed to competently handle these matters to the detriment of his client." If plan had been timely amended to reduce plan payments, and if all information had been properly communicated by attorney, debtor would have been current and would not have triggered drop-dead provision in consent order, leading to repossession.

In re Bowen, 2010 WL 7768240 (Bankr. N.D. Ga. 2010). Debtors' lawyer was sanctioned $1,025 for repeated failures to comply with local rule requiring counsel to timely submit orders granting motions; "'Debtors' counsel's failure to submit proposed orders subjected their clients to denial of the motions or objections for want of prosecution. Pursuant to 11 U.S.C. § 329, the bankruptcy court may review and

determine whether compensation paid or to be paid to a debtor's attorney exceeds the reasonable value of the services provided.'"

In re MacFarland, 2011 WL 5527355 (Bankr. S.D. Fla. 2011). In multiple cases, debtors' counsel were sanctioned for Rule 9011 violations in objecting to claims that had been scheduled in same amounts as proof of claims. "The cases addressed by this sanctions order present essentially baseless claims objections which appear to be shotgun attempts to object to everything and 'see what sticks.' Requiring creditors to attach documentation in response to frivolous claims objections increases abuse in litigation. . . . If there is not *substantive* objection to the claim, the creditor should not be required to provide further documentation because it serves no purpose other than to decrease the likelihood that a valid claim against the estate will be disallowed on specious grounds. . . . The instant cases present objections to claims for debts which were scheduled in amounts substantially identical to (or greater than) the claimed amounts. All of the relevant debts were scheduled as neither contingent, no unliquidated, nor disputed." Sanction was 31 days' suspension from practice, with some attorneys receiving consecutive suspensions for repeat violations. "Debtors' attorneys must carefully consider their ethical obligations under Fed. R. Bankr.P. 9011(b) when objecting to a claim." Section 502(b) provides exclusive grounds for disallowing claims, with failure to attach writing not grounds; failure to attach sufficient documentation may deprive claim of prima facie validity, but "[t]he burden of proof is on the objecting party to provide evidence surpassing the evidence set forth in the claim."

In re Menton, 2011 WL 2038976 (Bankr. N.D. N.Y. 2011). Debtors' attorney was sanctioned $2,000 with referral to district court for disciplinary consideration. Errors included Rule 2016(b) statement of no fee when plan provided for $2,000 fee, which had been paid. Attorney failed to complete filings or timely request adjournment of confirmation hearing, and improperly filed motion to dismiss without clients' knowledge. New York Rules of Professional Conduct were violated and attorney had been sanctioned previously for similar actions.

In re Smith-Canfield, 2011 WL 1883833 (Bankr. D. Or. 2011). Bankruptcy court had core jurisdiction in action against attorney who represented debtor and acted as real estate broker for debtor. Attorney recommended purchase of real estate prior to bankruptcy filing in order to obtain Oregon homestead exemption and reduce income available to creditors in Chapter 13. Attorney was negligent, as both attorney and broker, for failure to advise debtor of risk involved in purchasing property that had defective retaining wall. Attorney knew that seller was in financial distress and might be unable to repair defect. Breaches of duty caused $5,266.30 in damages for engineering costs related to repair of retaining wall, and attorney was ordered to disgorge $4,000 of attorney fees.

In re Torres-Jimenez, 2011 WL 1758640 (Bankr. D. P.R. 2011). Attorney's practice of depositing monies received from debtors into "sort of trust account" did not comply with Model Rule 1.15(a) requirement to hold client property separately. Attorney admitted that commingling of funds was wrong but that account had been used to deposit

payments from debtors for disbursement to trustee when debtors did not have bank accounts. Attorney was enjoined from using trust account "as a vehicle to channel payments from chapter 13 debtors to the chapter 13 trustee."

In re Burnett, 450 B.R. 116 (Bankr. E.D. Ark. 2011). Attorney neglected responsibility to debtors by failing to provide legal advice or explore options outside of bankruptcy, failing to timely file petition to prevent foreclosure, and permitting paralegals to practice law. Debtors filed bankruptcy two weeks after foreclosure sale when debtors had $6,000 tax refund that would have cured mortgage arrearage. "As a direct result of [attorney's] failure to provide legal services: the debtors lost their home; got behind on car payments; used their $6,000 tax refund for purposes other than paying their mortgage arrearage; filed a bankruptcy; and ultimately, ended up living in a borrowed camper in an RV park. [Attorney] failed to meet with his clients prior to filing the bankruptcy case, failed to provide them with legal advice, and ignored them in spite of his first-hand knowledge of the harm he had inflicted on them. [Attorney] acted purposefully to conceal his errors and shield himself from liability by removing documents from the Debtors' file, and by making misleading statements in his letters to the Debtors and in his sworn testimony before this Court." $526 fee was excessive in light of services provided and must be disgorged, and attorney was suspended from appearing before bankruptcy court until review by Arkansas Supreme Court Committee on Professional Conduct.

In re Lott, 2011 WL 1398995 (Bankr. S.D. Fla. 2011). Attorney who had not satisfied prior $500 sanction was in contempt; to purge contempt, attorney must pay prior $500 sanction and additional $1,000 sanction within seven days to clerk of court, disgorge $3,500 fee to client, reimburse client for $274 filing fee, and pay $500 to client for "troubling Ms. Lott to come to the courthouse more often than she should have." Attorney was also prohibited from practicing in bankruptcy court in district until petitioning "*within this bankruptcy case* for reauthorization."

In re Jackson, 2011 WL 768098 (Bankr. D.D.C. 2011). Debtor's attorney violated Bankruptcy Rule 9011 by filing third case while second case was pending, and schedules contained gross inaccuracies. Third case was unnecessary when debtor scheduled only Capital One, which had foreclosed prepetition. Attorney had primary blame for filing schedules and statement of financial affairs that falsely stated debtor owned real property. Petition stated that estimated liabilities were between $500,001 and $1,000,000, which attorney knew could not be true, in violation of Bankruptcy Rule 9011(b)(3). Reasonable inquiry would have led attorney to conclude that filing was for improper purpose—to circumvent triggering of § 362(c)(4) had second case been dismissed prior to third filing.

In re Seidel, 443 B.R. 411 (Bankr. S.D. Ohio 2011). Stay pending appeal is denied based on public interest and unlikelihood of success after debtor's attorney was sanctioned for violations of § 526 and Ohio Rules of Professional Conduct. Attorney had been ordered to disgorge fees and costs received through credit card charge. No-look

fee for Chapter 13 cases filed by attorney had been suspended, and attorney was required to complete six hours of bankruptcy ethics instruction.

In re Carpenter, 2011 WL 250746 (Bankr. S.D. Cal. 2011). Since debtor's spouse's case had been dismissed based on statutory debt limits, any potential conflict for debtor's firm in representing both spouses evaporated; law firm was not disqualified in instant case.

In re Harmon, 2010 WL 3788052 (Bankr. E.D. N.Y. 2010). Electronic filing privileges and access were revoked for 90 days as sanction for attorney who filed numerous cases without paying filing fees through Pay.gov as required by local procedures for electronic filing. Further hearing was required concerning disgorgement of fees paid by debtor. Attorney had been filing incomplete petitions and then failing to meaningfully prosecute the cases.

In re Kim, 2010 WL 2816213 (Bankr. N.D. Cal. 2010). Newly admitted attorney who heavily advertised bankruptcy and "foreclosure defense" was ordered to return $4,000 charged for worthless Chapter 13 services. Attorney charged debtor $15,000, of which $4,000 was allocated to bankruptcy services under Rule 2016 disclosure. Services were of no value for foreclosure prevention, and Chapter 13 filing was "an exercise in futility," since attorney did not schedule $1.9 million secured debt that rendered debtor ineligible. "There is no sin in being a new lawyer; everyone has to start some time, and there is a shortage of good bankruptcy attorneys these days. However, some of [attorney]'s conduct is of serious concern to the court. . . . [Attorney]'s Chapter 13 services were worthless due to a fundamental mistake of law. The court will accordingly order [attorney] to return to Kim the sum of $4,000.00, which Kim paid for Chapter 13 services." Allegations referred to State Bar of California included that attorney began to practice law before admission to bar, that she misled debtor and public as to experience level, and that she may have taken advance fee for loan modification services in violation of California Business and Professions Code.

In re Ross, 2010 WL 2509939 (Bankr. N.D. Cal. 2010). Law firm that did not appear as counsel of record for pro se debtor, but did prepare skeletal Chapter 13 petition, provided bankruptcy services and was obligated to disclose bankruptcy-related fees. Firm admitted that it accepted fees and advised debtors of availability of bankruptcy. That firm claimed to be performing foreclosure avoidance services did not change bankruptcy content.

In re Harmon, 435 B.R. 758 (Bankr. N.D. Ga. 2010). Attorneys and firm violated Bankruptcy Rule 9011 and local bankruptcy rules by failing to obtain new client signatures on documents that changed between the time of review by the client and electronic filing. Electronic filing of changed documents with electronic indication of client signatures was violation of attorneys' responsibilities to court. Attorneys' and managing partner's misconduct was imputed to law firm. "As this Court relies heavily on electronic filings, the adherence of attorneys to the local rules regarding electronic signatures is imperative." $5,000 sanction was imposed, and firm was ordered to

provide action plan addressing its practices. Attorneys were required to attend five hours of continuing legal education in ethics and professionalism.

In re Glenn, 422 B.R. 469 (Bankr. S.D. N.Y. 2010). Debtor's attorney sanctioned $250, payable to clerk of court, and ordered to pay $4,503 to debtor's landlord when attorney failed to disclose in petition that landlord had obtained prebankruptcy judgment for possession, thereby removing leasehold from automatic stay.

Pre-Bankruptcy Planning - Conversion of Non-Exempt Assets into Exempt Assets

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We are all familiar with the avoiding powers set forth in Sections 544 and 548 of the Bankruptcy Code which enable the Trustee to recover pre-petition transfers made by the debtor with the intent to hinder, delay or defraud creditors as well as transfers for which the debtor did not receive reasonably equivalent value. We are also familiar with the provisions of Section 727 which set forth the circumstances under which such transfers can result in the denial of a debtor's discharge. The subject of these materials is more narrowly focused. The majority of consumer debtors do not reach out for counsel until they have been sued, the pressure accompanying constant dunning letters becomes too great to bear, or a creditor's collection efforts have resulted in the seizure of assets or the garnishment of the client's earnings. In situations where the client has non-exempt assets, the time period available to counsel to devise a strategy to convert those non-exempt assets into exempt assets and thereby insulate them from the bankruptcy process is limited, and it is not uncommon to see such activity immediately prior to the filing of the bankruptcy case. The question remains as to how successful counsel's efforts will be once the transactions are scrutinized by stakeholders in the bankruptcy process. It is one thing to engage in the pre-bankruptcy conversion of non-exempt assets into exempt assets. It is another for the exemption to be allowed.

In reviewing whether a debtor's pre-petition conversion of non-exempt assets to exempt assets is permissible, the Tenth Circuit began with the premise that "the conversion of non-exempt to exempt property for the purpose of placing the property out of the reach of creditors, without more, will not deprive the debtor of the exemption to which he

otherwise would be entitled." *In re Carey,* 938 F.2d 1073, 1076 (10th Cir. 1991) (quoting *Norwest Bank Neb., N.A. v. Tveten*, 848 F.2d 871, 873-74 (8th Cir. 1988).

The question remains as to what constitutes "more"? Stated another way, when does a "debtor's pre-filing conduct [stray] into that murky realm where overly aggressive asset protection only serves to hinder, delay or defraud creditors, fresh starts become head starts, and pigs are safe but hogs are slaughtered[?]" *In re Bronk*, 444 B.R. 902, 908 (Bankr. W.D. Wis. 2011). This issue was discussed by the Tenth Circuit in *In re Warren*, 512 F.3d 1241 (10th Cir. 2008). In that case, the Court addressed whether intent to defraud creditors can be shown by a debtor's conversion of nonexempt assets to exempt assets so as to establish the requisite grounds for denial of the debtor's discharge under 11 U.S.C. §727. In addressing this issue, the Court stated:

> One of the more difficult issues in bankruptcy law is deciding when, if ever, an intent to defraud creditors can be shown by the debtor's conversion of nonexempt assets to exempt assets. Any such conversion is highly likely to harm creditors because it removes their access to some of the debtors's wealth. But the very purpose of having exemptions is to permit a debtor to retain certain necessities (although one could dispute whether exemptions are limited to necessities) without the fear of creditors taking them. Thus, as Judge Richard Arnold wrote in an oft-noted dissent, "A debtor's right to make full use of statutory exemptions is fundamental to bankruptcy law." *Norwest Bank Neb. v. Tveten*, 848 F.2d 871, 877 (8th Cir. 1988) (Arnold, J., dissenting) .... But Judge Arnold's view has not universally prevailed. Accordingly, bankruptcy lawyers can face a dilemma in advising clients whether to acquire exempt assets. As one commentator observed, "[T]he same conduct can be malpractice not to advise in one jurisdiction, but voidable and grounds for denial of discharge and possibly for disbarment in another ... " John D. Ayer, *How to Think About Bankruptcy Ethics,* 60 Am. Bankr.L.J. 355, 374 (1986).
>
> This circuit has not joined Judge Arnold's camp. To be sure, our opinion in [*Marine Midland Business Loans v. Carey (In re Carey)*, 938 F.2d 1073, 1077 (10th Cir. 1991)] "started with the premise that 'the conversion of non-exempt

> to exempt property for the purpose of placing the property out of the reach of creditors, without more, will not deprive the debtor of the exemption to which he otherwise would be entitled,'" 938 F.2d at 1076 (quoting *Tveten*, 848 F.2d at 873-74). But our quoting the majority opinion in *Tveten*, rather than Judge Arnold's dissent, suggests that the "more" that would permit denial of the exemption (or even discharge) may be no more than evidence regarding the acquisition of exempt property, because the basis for finding fraudulent intent in *Tveten* was merely that "the debtor liquidated almost his entire net worth of $700,000 and converted it to [exempt] property ... on the eve of bankruptcy," 848 F.2d at 876. Moreover, we said in *Carey* that "[a]ctions from which fraudulent intent may be inferred include situations in which a debtor ... converts assets immediately before the filing of the bankruptcy petition," 938 F.2d at 1077 (citations omitted); and we noted that "[o]ther indicia of fraud include: (1) that the debtor obtained credit in order to purchase exempt property; (2) that the conversion occurred after entry of a large judgment against the debtor ... and (4) that the conversion rendered the debtor insolvent," *Id*. at n. 4 (brackets and internal quotation marks omitted). Emphasizing the scope of the trial court's fact-finding discretion, we added: "The cases ... are peculiarly fact specific, and the activity in each situation must be viewed individually." *Id*. at 1077.

Warren, 512 F.3d at 1249-1250.

The "more" that is needed is fraud. The Court in Warren noted that *Carey* is of limited value in determining what is necessary to establish fraud, because *Carey* affirmed the bankruptcy court's ruling that the debtor was entitled to the claimed exemptions. Rather, in discussing what is necessary to establish fraud, the Court referred to its earlier opinion in *Mueller v. Redmond (In re Mueller)*, 867 F.2d 568, 570 (10th Cir. 1989). In *Mueller*, the Court affirmed the bankruptcy court's determination that a life insurance policy claimed to be exempt had been acquired with fraudulent intent based on the presence of the following "badges of fraud": (1) the debtor was insolvent when he purchased the policy; (2) the debtor purchased the policy one week before filing his bankruptcy petition; (3) the debtor used his sole remaining nonexempt assets to purchase the policy; (4) the debtor had two other

unencumbered policies; (5) although the debtor stated he purchased the policy to provide for his daughter's education, the named beneficiaries were the then living children of the debtor. *Mueller*, 867 F.2d at 570.

In situations where the debtor has converted a non-exempt asset into an exempt asset for the intended purpose of defrauding creditors, the exemption is subject to disallowance. However, as recognized by the Court in *In re Channon,* 424 B.R. 895 (Bankr. D. N.M. 2010), "[p]roof that a debtor was motivated in part by an intent to shield an asset from creditors does not by itself establish intent to defraud creditors; otherwise, the exemption would be disallowed whenever the debtor converted to a non-exempt asset into an exempt asset for the purpose of taking advantage of the exemption statutes."

In determining whether a debtor has crossed the line from permissible pre-bankruptcy planning to fraudulent conduct, courts utilize many of the same "badges of fraud" that have been developed in connection with fraudulent transfer law. *In re Beaudin*, 2010 WL 3748735 (Bankr. D. Colo. 2010). Several of the relevant badges of fraud are codified in the Uniform Fraudulent Transfer Act ("UFTA"). These include:

- whether the conversion was disclosed or concealed;
- whether the debtor was being sued or threatened with suit when the conversion was made;
- whether the conversion was of substantially all of the debtor's assets;
- whether the debtor absconded;
- whether the debtor removed or concealed assets;
- whether the debtor was insolvent or became insolvent shortly after the conversion;

- whether the conversion occurred shortly before or shortly after a substantial debt was incurred; and

- whether the debtor retained control of the property transmuted.

See C.R.S. §38-8-105(2) (enumerating factors adopted from the UFTA).

In addition to the badges of fraud set forth in the UFTA, other badges have been recognized by courts. These include:

- the value of the asset claimed as exempt;

- the proportion of the debtor's non-exempt assets converted into exempt form;

- whether the exemption is limited or unlimited;

- whether the debtor already owned the exempt asset and used non-exempt assets to increase its value;

- whether the debtor borrowed funds to acquire the exempt asset;

- whether the debtor intended to use the exempt asset for the legislative purpose behind the claimed exemption;

- whether the conversion of the non-exempt assets into exempt form was made in contemplation of a bankruptcy filing and the proximity of the conversion to the bankruptcy filing;

- whether the debtor's acquisition of the exempt asset or enhancement of its value deviated from the debtor's historical conduct, and if so to what extent;

- whether the debtor misrepresented any aspect of the transactions by which exempt assets were acquired or the values of the assets in question; and

- whether the debtor sought legal advice prior to purchasing the exempt asset.

In re Beaudin, supra. *See also Channon,* 424 B.R. 895, 902.

The question of whether a debtor has crossed the line from permissible pre-bankruptcy planning to fraudulent conduct is fact specific, " ... with a judge's determination often hinging on whether, in the judge's view of the debtor's attempt to maximize exemptions, 'a pig becomes a hog'." *In re Wadley,* 263 B.R. 857, 860 (Bankr. S.D. Ohio 2001).

As recognized by the Court in *Warren*, lawyers face a dilemma in advising their clients with regard to pre-bankruptcy planning. What may be acceptable in one jurisdiction may be grounds for disallowance of an exemption (and for that matter, denial of discharge) in another jurisdiction. The same may be true as between different divisions of the Bankruptcy Court in the same district. Perhaps more importantly, a lawyer who advises a client with regard to pre-bankruptcy planning which is later found to have crossed the line from permissible pre-bankruptcy planning to fraudulent conduct may have exposure. In situations where the client believes that they were not fully informed of the risks of the planning that was undertaken, the lawyer may be at risk for a malpractice action. In addition, Rule 1.2(d) of the Colorado Rules of Professional Conduct provides that a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.

Bankruptcy Eligibility and Problems Facing Repeat Filers

The Honorable William T. Thurman
United States Bankruptcy Court for the District of Utah
Salt Lake City, Utah

I. INTRODUCTION

Before filing a bankruptcy petition, a debtor and debtor's counsel must consider numerous factors. The threshold issue to consider is whether the debtor is eligible to be a debtor under the Bankruptcy Code. If the debtor is a repeat filer, meaning that he or she has filed a bankruptcy petition previously, there are certain restrictions based upon when the later petition was filed in comparison with the prior case(s), whether the previous filing was dismissed, or whether the debtor received a discharge in the previous filing.

II. CODE SECTIONS TO CONSIDER

A. Eligibility: Sections 109(e) and 109(g)[1]

B. Applicability of the Automatic Stay: Section 362

C. Limitations on Discharge: Sections 727 and 1328(f)

III. 180 DAY ELIGIBILITY LIMITATION

A. Section 109(g)(1)-(2)

Section 109(g) provides that an individual may not be a debtor under the Bankruptcy Code if the individual had a case pending in the preceding 180 days that was dismissed for one of three reasons: (1) failure to abide by orders of the court, (2) failure to appear before the court in proper prosecution of the case, or (3) the debtor requested and obtained voluntary dismissal of the case after a motion for relief from stay was filed.

IV. CHAPTER 13 BANKRUPTCY ELIGIBILITY

A. Section 109(e)

Section 109(e) provides the eligibility requirements under the Bankruptcy Code for

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[1] All subsequent chapter and section references herein are contained in title 11 of the United States Code unless otherwise specified.

chapter 13 debtors. Section 109(e) provides:

> Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $360,475 and noncontingent, liquidated, secured debts of less than $1,081,400, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $360,475 and noncontingent, liquidated, secured debts of less than $1,081,400 may be a debtor under chapter 13 of this title. § 109(e).

Pursuant to § 104, the dollar amounts in § 109(e) are adjusted every three years by the Judicial Conference of the United States. The amounts above went into effect on April 1, 2012.

B. Interpreting the Amount of Debt for Purposes of Section 109(e)

1. In re Thompson, No. 11-20138-13, 2011 WL 5520963, at *3 (Bankr. D. Kan. 2011): The Court held that debtors were not eligible for chapter 13 and that as held in the Sixth, Seventh, and Ninth Circuits, the "§ 109(e) eligibility question is similar to the amount in controversy question in federal diversity jurisdiction cases." The Court followed the "rule that the debtor's schedules control the determination unless the party questioning eligibility shows they are not completed in good faith."

2. In re Rottiers, 450 B.R. 208 (Bankr. D. N.M. 2011): The Court found that in a §109(e) eligibility proceeding, "the Court should not conduct a full blown trial that authenticates each and every debt listed on a debtor's schedules and the proofs of claim filed."

3. In re Adams, 373 B.R. 116, 121 (10th Cir. B.A.P. 2007) (citing In re Barcal, 213 B.R. 1008, 1015 (8th Cir. B.A.P. 1997)): The Court held that "at a hearing on eligibility, the court should 'canvass and review the debtor's schedules and proofs of claim, as well as other evidence offered by a debtor or the creditor to decide only whether the good faith, facial amount of the debtor's liquidated and non-contingent debts exceed statutory limits."

C. Definition of an "Individual with Regular Income"

1. Section 101(30) provides the definition for an "individual with regular income" referred to in § 109(e).

> The term "individual with regular income" means individual whose income is sufficiently stable and regular to enable such

individual to make payments under a plan under chapter 13 of this title, other than a stockbroker or a commodity broker. § 101(30).

2. The "Regular Income" Test

   a. In re Sigfrid, 161 B.R. 220 (Bankr. D. Minn. 1993): Court held that the "test for regular income is not the type or source of income, but rather its regularity and stability." The Court denied confirmation of an unemployed debtor's chapter 13 plan when she failed to provide evidence, in the form of an affidavit or otherwise, that her non-debtor spouse would provide debtor with funds to make the plan payments.

3. Congress' "Liberal Interpretation"

   a. There are multiple cases holding that Congress intended a "liberal interpretation" of the phrase "regular income"

      (1) In re Ellenburg, 89 BR. 258 (Bankr. N. D. Ga. 1988); In re Cohen, 13 B.R. 350, 356 (Bankr. E.D. NY. 1981)

4. Good faith is always an issue in chapter 13.

   a. In re Cranmer, 697 F.3d 1314 (10th Cir. 2012) (citing Educ. Assistance Corp. v. Zellner, 827 F.2d 1222, 1227 (8th Cir. 1987)): The Tenth Circuit Court of Appeals held since § 1325(b) was added to the Bankruptcy Code, "the good faith inquiry now 'has a more narrow focus'" and "a bankruptcy court must consider 'factors such as whether the debtor has stated his debts and expenses accurately; whether he has made any fraudulent misrepresentation to mislead the bankruptcy court; or whether he has unfairly manipulated the Bankruptcy Code.'"

   b. Marrama v. Citizens Bank of Massachusetts 549 U.S. 365, 375 n.11 (2007): The Supreme Court held that "lack of good faith in proposing a Chapter 13 plan is an express statutory ground for denying plan confirmation" under § 1325(a)(3).

D. Questions:

1. Must drill down as to the Debtor's status.

2. What if debtor shows counsel a list of creditors with amounts in excess. What should counsel do then?

3. What about the nature of the debt? Just because the prospective debtor thinks the debt is disputed, is that enough to make it "contingent" and thus not considered in the debt limit?

V. PROBLEMS FACING REPEAT FILERS PREVIOUSLY DISMISSED

A. Applicability of the Automatic Stay

1. Section 362(c)(3) – Single Case Pending in the Previous Year

Section 362(c)(3) places restrictions on the applicability of the automatic stay for chapter 7, 11, or 13 debtors who had a case pending within the preceding 1-year period but was dismissed (other than a dismissal under section 707(b)). If the debtor falls within § 362(c)(3)'s parameters, the automatic stay terminates on the 30th day after filing the later case. Under § 362(c)(3)(B), a party in interest can file a motion before the 30th day after filing the later case to extend the stay if the moving party shows that the filing of the later case is in good faith. Section 362(c)(3)(C) carves out certain cases that are presumptively filed in bad faith. However, the presumption may be rebutted by clear and convincing evidence that the case was filed in good faith.

2. 362(c)(4) – 2 or More Cases Pending in the Previous Year

Section 362(c)(4) applies to debtors who have had two or more cases pending but dismissed in the preceding 1-year period. If the debtor is in this situation, the automatic stay does not go into effect upon the filing of the third bankruptcy petition. Under § 362(c)(4)(A)(ii), the court "shall promptly enter an order confirming that no stay is in effect" on the request of a party in interest to the case. However, a party in interest may request within 30 days that the stay take effect in the later case as to any or all creditors if the party in interest can show that the later cause "is in good faith as to the creditors to be stayed." § 362(c)(4)(B). Section 362(c)(4)(D) provides the requirements for a finding that the later case was "presumptively filed not in good

faith." The "not in good faith" presumption may be rebutted by showing clear and convincing evidence to the contrary. § 362(c)(4)(D).

B. Cases

1. In re Benefield, 438 B.R. 709, 713 (Bankr. D. N.M. 2010): The Court held that to rebut the not in good faith presumption, the debtor under § 362(c)(4)(D) must meet the "objective futility test" by "'explain[ing] away' or justify[ing] the debtor's role in those circumstances, and further explain why the Court should be confident that the current case will be successful when the previous cases were not."

2. In re Underhill, 425 B.R. 614, 619-620 (Bankr. D. Utah 2010): The secured creditor failed to seek an order from the Court confirming that the stay was not in effect. The Court ruled "that the presumption found in § 362(c)(4)(D) does not apply to § 1325 and does not per se render the Debtor's Plan unconfirmable, the Court [did] not find that the Debtor's petition and Plan were filed in good faith."

C. What do these code sections tell us when advising parties contemplating bankruptcy?

1. Consider property of the estate vs. property of the debtor.

a. In re Jupiter, 344 B.R. 754 (Bankr. D. S.C. 2006): The Court held that the termination of the automatic stay under § 362(c)(3) 30 days after filing the later petition terminates the stay with respect to the debtor, the property of the debtor, and the property of the estate.

b. In re Bell, No. 06-11115 EEB, 2006 WL 1132907 (Bankr. D. Colo. April 27, 2006): The Court held that the termination of the automatic stay under § 362(c)(3) was "limited to actions taken against the Debtors, not property of the estate."

2. Consider good faith.

a. In re Galanis, 334 B.R. 685 (Bankr. D. Utah 2005): The Court held that "the following factors are relevant to the analysis of good faith under § 362(c)(3)(B): 1) the timing of the petition; 2) how the debt(s) arose; 3) the debtor's motive in filing the petition; 4) how the debtor's actions affected creditors; 5) why the debtor's prior case was dismissed; 6) the likelihood that the debtor will have a steady income throughout the bankruptcy case, and will be able to properly fund a plan; and 7) whether the Trustee or creditors object

to the debtor's motion."

3. What is the creditors remedy if there is a repeat filing?

a. See § 362(c)(4)(A)(ii) and seek an order confirming that no stay went into effect upon the filing of the later case.

VI. PROBLEMS FACING REPEAT FILERS WITH PREVIOUS DISCHARGES

A. Chapter 7: Section 727(a)(8)-(9)

Section 727(a) governs when the court shall grant the debtor a discharge. Under § 727(a)(8), a debtor may not receive a chapter 7 discharge if the debtor has been granted a discharge in a chapter 11 or chapter 7 case within 8 years before the filing of the later petition. Under § 727(a)(9), a debtor may not receive a chapter 7 discharge if the debtor has been granted a discharge in a chapter 12 or chapter 13 case within the 6 years prior to filing of the petition, unless payments under the plan totaled at least 100 percent of the allowed unsecured claims or 70 percent of allowed unsecured claims and the plan was proposed in good faith and is the debtor's best effort.

B. Chapter 13: Section 1328(f)

Section 1328(f) provides a limitation on when a chapter 13 debtor may receive a discharge if the debtor has had previous discharges. Under § 1328(f), a debtor will not be granted a discharge if the debtor received a discharge in a chapter 7, 11, or 12 case within the previous 4 years or if the debtor received a discharge in a chapter 13 case within the previous 2 years.

C. Time Limits for Discharge Summary Chart

PREVIOUS CASE	NEW CHAPTER 7 – Time Limit	NEW CHAPTER 13 – Time Limit
Chapter 7	8 years	4 years
Chapter 11	8 years	4 years
Chapter 12	6 years (unless previous plan paid 100% or 70% on unsecured allowed claims and the debtor filed in good faith and with best effort; then no time limit)	4 years
Chapter 13	6 years (unless previous plan paid 100% or 70% on unsecured allowed claims and the debtor filed in good faith and with best effort; then no time limit)	2 years

See Harry Boul, Repeat Filings under BAPCPA: Stays, Multiple Discharges and Chapter 20, 4 ABI BANKR. CONSUMER COMM. NEWSLETTER 6 (Dec. 2006), http://www.abiworld.org/committees/newsletters/consumer/vol4num6/RepeatFilings.html.

D. Chapter 20

1. The term "Chapter 20" refers to a chapter 13 case filed after the completion of a chapter 7 case. Through this method, the debtor can eliminate most unsecured debt through discharge in a chapter 7 and then immediately file a chapter 13 case for debts that a nondischargeable, such as student loans.

2. Lien Avoidance in Chapter 20 Cases

a. In re Woolsey, 438 B.R. 432, 438 (Bankr. D. Utah 2010): The Court discussed lien avoidance in chapter 13 cases in which debtors were not eligible for discharge and held that permitting permanent lien avoidance "without a discharge or full payment . . . would essentially invalidate § 1328(f) and permit the debtors to get a second discharge."

b. In re Picht, 428 B.R. 885 (10th Cir. B.A.P. 2010): A lien may be avoided only if the underlying debt is discharged

c. In re Fisette, 455 B.R. 177, 185 (8th Cir. B.A.P. 2011): The 8th Circuit BAP held that "the strip off of a wholly unsecured lien on a debtor's principal residence is effective upon completion of the debtor's obligations under his plan, and it is not contingent on his receipt of a Chapter 13 discharge."

ISSUES RELATING TO THE "MEANS TEST"
11 U.S.C. § 707(b) and 1325(b)

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Chapter 7 Means Test

1. 707 - Dismissal of a case or conversion to a case under Chapter 11 or 13
   a. 707(b)(1) After notice and a hearing, **the court, on its own motion or on a motion by the United States Trustee, trustee, or any party in interest**, may dismiss a case filed by an individual debtor under this chapter **whose debts are primarily consumer debts**, or with the debtor's consent, convert such case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an **abuse** of the provisions of this chapter. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions.....
   b. 707(b)(2)(A)(i) .....the Court shall presume abuse exists if the debtor's **current monthly income** reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of - (I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $7,025, whichever is greater; or (II) $11,725.
   c. Amounts to be reduced under 707(B)(2)(a)(ii), (iii) and (iv):
      i. 707(b)(2)(A)(ii) Applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses (copy of IRS Other Necessary Expenses attached) issued by the IRS for the area in which the debtor resides.....Such expenses shall include reasonable necessary health insurance, disability insurance and hsa (and shall not include payments for debts). Also includes expenses pursuant to section 309 of the Family Violence Prevention & Services Act; may also include 5% additional allowance for food/clothing; actual expenses paid for care & support of elderly, chronically ill, or disabled HH member or member of debtor's immediate family; actual expenses not to exceed $1,650 per year per child to attend elementary or secondary school (private or public); excess housing & utility costs in excess of standards, if reasonable & necessary.
      ii. 707(b)(2)(A)(iii) Curing of defaults of secured debts necessary for the support of debtor/debtor's dependents - why curing defaults on the boat/RV probably won't work here, absent some showing of need.
      iii. 707(b)(2)(A)(iv) Curing/payment of all priority claims.
   d. 707(b)(2)(B) Presumption of abuse may be rebutted by demonstrating **special**

circumstances, SUCH AS serious medical condition or call to active duty in the armed forces.

e. 707(b)(2)(D) No means test if: debtor is a disabled vet & indebtedness occurred primarily while debtor was on active duty, or performing a homeland defense activity.

Means Test & Chapter 13

1. 1325 - Confirmation of a plan
   a. 1325(b)(1) **If the trustee or the holder of an allowed unsecured claim** objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan-
   b. 1325(b)(1)(B) the plan provides that all of the debtor's **projected disposable income** to be received in the **applicable commitment period** beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.
   c. 1325(b)(2) **Disposable income** (not "projected disposable income," as is mentioned in the previous paragraph) **means current monthly income received by the debtor** (other than child support payments, foster care payments, or disability payments for a dependent child), **less amounts reasonably necessary to be expended-**
   d. 1325(b)(2)(A)(i) for the maintenance or support of the debtor/debtor's dependents, or for a domestic support obligation, that first becomes payable after the date the petition is filed and (ii) for charitable contributions not to exceed 15 percent of gross income and
   e. 1325(b)(2)(B) for necessary business expenses.
   f. 1325(b)(3) Amounts reasonably necessary under paragraph (2) (other than charitable contributions referred to in 1325(b)(2)(A)(ii), shall be determined in accordance with 707(b)(2)(A) & (B) where debtor is an above-median debtor.

***Note that there is no means test exclusion under Chapter 13 for debtor whose debts were incurred during a period in which the debtor was on active duty, nor for debtors whose debts are primarily business debts.

   g. 1325(b)(4) **Applicable commitment period is 3 years, or not less than 5 years if the current monthly income is over the median income**, unless the plan provides for payment in full of all allowed unsecured claims over a shorter period.

What's "income" & what's not???

1. Discussion of statute - what's defined as income in statute.
   a. Section 101 does not define "income," but the term "**current monthly income**" is defined at 101(10)(A): "..the average monthly income *from all sources* that the debtor receives .....*without regard to whether such income is taxable income,* derived during the 6-month period ending on....."(emphasis added). Then, in 101(10)(B) - "Current monthly income includes any amount paid by any entity other than the debtor, on a regular basis for the household expenses of the debtor

or the debtor's dependents, but excludes benefits *received under the Social Security Act*....."(emphasis added again).

b. Black's Law Dictionary definition referenced below by Bankruptcy Court for District of Nebraska.

c. § 707(b)(2)(A)(I) - Court may dismiss a case filed under Chapter 7 under abuse provision if debtor's current monthly income..... - leads us to the question - what is "income?"

d. Recall that § 1325(b)(1)(B) says - If trustee or holder of an unsecured claim objects to plan, the Court may not approve the plan unless the plan provides that all of the debtor's projected disposable income (another undefined term) to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

   i. See § 1325(b)(2) - Defines the term "disposable income" - means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent necessary to be expended for such child) less amounts reasonably necessary to be expended....

e. Conclusion - Life would have been much easier if the Code had a definition for income.

2. Form 22A & Form 22C - Both call for income derived from all sources.

   a. Form 22A (Calculation of Monthly Income) & Form 22C (Chapter 13 Statement of Currently Monthly Income and Calculation of Commitment Period and Disposable Income) have identical language as to income - All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriates line.

      i. What does derived mean? Does it mean that income/wages earned prior to that six month period don't belong in the Form 22, even if received during that six month period (see *In re Bernard*, 397 B.R. 605 (Bankr.D.Mass. 2008) - I've never seen this issue, but this certainly is not how our office handles the calculation of income, nor does it seem to jive with either of the Chapter 13 Trustee Offices' practices.

   b. Form 22A & Form 22C both now ask about unemployment compensation - allow Debtor to claim the compensation as a benefit derived under the Social Security Act, though that issue appears to have been put to rest (see below).

3. Impact of median income - Chapter 7 vs. Chapter 13.

   a. Chapter 7 - Of course, could be the difference between losing under 707(b)(2) and being granted a discharge. However, even if unemployment is excluded from Form 22A income, still may have to survive 707(a) or 707(b)(3) challenge if

Schedule I & J numbers show Debtor has ability to make meaningful repayment to creditors (though see recent 10th Circuit *Cranmer* decision (697 F.3d 1314 (2012) concerning social security income).

b. Chapter 13 - Difference between 3 and 5 year plan. Also, being subject to Form 22C alone can result in a much higher monthly plan payment than under a Schedule I/J analysis, where we have much more control over the budget.

4. Caselaw review - hot topic around our neck of the woods was unemployment (and it didn't help that the official forms were amended where debtors were given the option to "claim" their unemployment income as a benefit under the Social Security Act), but what about other one-time income types of things?

a. Unemployment/Means Test Exclusion - the **overwhelming majority** and clear trend right now is that it is income that must be included in Form 22 - courts say unemployment is not a benefit received under the social security act, but rather arises in one way, shape or form under a state program.

i. Cases that say no, the income does not have to be included - *In re Sorrel*, 359 B.R. 167 (Bankr.S.D. Ohio 2007), *In re Munger*, 370 B.R. 21 (Bankr.D.Mass 2007) - plain language of the statute interpretation (benefits received under the Social Security Act, unemployment benefits arose under the Act).

ii. Cases that say yes, the unemployment must be included as income - *In re Baden*, 396 B.R. 617 (M.D. Pa 2008), *In re Kucharz*, 418 B.R. 635 (Bankr.C.D.Ill. 2009), *In re Washington*, 438 B.R. 348 (Bankr.M.D. Al. 2010), *In re Winkles*, 2010 WL2680895 (Bankr.S.D.Ill. 2010) - these cases dive further into the intent of the Act, and how unemployment benefits were treated under a substantial abuse analysis prior to the 2005 law changes, and make a distinction between unemployment (replacement of wages) with social security (old-age income). Judge Brown from our district recently ruled that it is income. *In re Gentry*, 463 B.R. 526 (Bankr.D.Colo.2011).

b. Other types of income "derived" from Social Security Act? How about adoption subsidies and the like? Hard to tell from Chapter 7 - but §1325(b)(2) seems to call into question whether this is income. There's an unpublished Nebraska opinion that a *Skvorecz* approach - the subsidy is income that's included in Form 22A, but since it's not disposable income in Chapter 13, won't force debtor into Chapter 13 (trying to dig that unpublished opinion up).

c. How about personal injury proceeds? Voluntary withdrawals from retirement savings. See *In re Marti*, 393 B.R. 697 (Bankr.D.Neb.2008) - again, income is not separately defined in the Code, but is defined in Black's Law Dictionary as the return in money from one's business, labor, or capital invested; gains, profits salary, wages, etc. Thus, from a pure vocabulary interpretive standpoint, a debtor's voluntary withdrawals from retirement savings are simply not income.

d. Reimbursement for moving expenses? See *In re Jones*, Case No. 07-81646 (Bankr.D.Neb.2007) - Reimbursement of moving expenses should not count as income where it is a direct reimbursement of out-of-pocket costs, even though it

may be taxable on the debtors federal income tax return.

5. Wrapup

   a. Best conclusion to me seems to be to include the "income" in the Form 22A/Form 22C, and simply back it out as a special circumstance - you will never get in trouble for disclosing.

How big is your household size???

1. Discussion of statute/definitions

   a § 707(b)(6) - Judge or UST may file a motion to dismiss under 707(b) if the current monthly income of the debtor(s) is equal to or less than the median family income of the applicable state for the debtor(s) household.

   b. Under 1325, if the trustee or a holder of an unsecured claim objects to a plan, the plan may not be confirmed unless provides for the creditor's claim in full or the debtor provides all of his projected disposable income in the applicable commitment period.

   c. Section 101 does not define "household" or "household size." And as previously mentioned, it also does not define "projected dispoable income." However, the definition of "current monthly income" in Section 101(10)(B) includes any amount paid by any entity other than the debtor(s) for the household expenses of the debtor or the debtor's dependents ("dependent" is also undefined). This clearly muddies the waters a bit on the income side as well - if the boyfriend covers half the rent, does that half constitute "income" for the debtor, but in a one person household? Or is the boyfriend a member of the household too? (See In re Epperson, 409 B.R. 503 (Bankr.D.AZ. 2009)

   d. Black's Law Dictionary: A family living together. Those who dwell under the same roof and compose a family. Term is generally synonymous with "family" for insurance purposes, and includes those who dwell together as a family under the same roof. Generally, the term as used in automobile policies is synonymous with "home" and "family."

2. Back to Form 22A & Form 22C.

   a. Form 22A (Calculation of Monthly Income) & Form 22C (Chapter 13 Statement of Currently Monthly Income and Calculation of Commitment Period and Disposable Income) have the same language: Enter the median family income for the applicable state and household size.

      i. Form 22A: Line 14. Household size often times determines the difference between a Chapter 7 and Chapter 13. If a 3 person household, your client is over the median income, but if we can claim that 22 year old college student that goes to school full-time in Ft. Collins, we have a 4 person household & we're in a Chapter 7.

ii. Form 22C: Line 16. Here, a smaller household size may cost your client thousands of dollars in monthly payments due to the amount of deductions that your client may have in the Form 22C. Everything from food to medical care is on the table.

A. Issue of 36 v. 60 month plans seems to me to have been put to rest. If your debtor is over median income, you have to go 60 months in your plan, whether or not you can zero out your Form 22C (unless, of course, you are paying 100% on timely filed claims over less than 60 months).

3. Caselaw review - 3 different approaches taken by courts

a. In re *Wendy Marie Morrision*, 443 B.R. 378 (Bankr.M.D.N.C. 2011) provides a wonderful analysis of the three approaches that courts have recently been using. Whether or not our Courts will follow the reasoning used, it's a good overview.

a. **Heads on Beds** - Household as defined by the census - all people, related and unrelated, living under the same roof.

i. *In re Bostwick*, 406 B.R. 487 (Bankr.D.Minn.2009) (roommates, shared some expenses, but house had shared living space), *In re Epperson* (mentioned above).

A. *Epperson*: "Congress did not state that two unrelated roommates or a co-habitating couple should not be counted as part of the same household. In the absence of Congressional guidance, it is unreasonable to conclude that two persons living in the same home are not part of the same household.

b. **IRS Dependency Approach** - household includes all of those that could be, or are, included as dependents on the debtor(s) tax returns

i. *In re Duncan*, 201 B.R. 889 (Bankr.W.D. PA.1996), *In re Napier*, 2006 WL 4128358 (Bankr.D.S.C. 2006).

A. *Napier* - "to the extent that official Form B22C indicates that Debtors may include [non-dependents] in the means test calculation, it must yield to the plain language of 707(b)(2), which only allows Debtors to include dependents."

c. **Economic Unit Approach** - Are the individuals in the household acting as a single economic unit?

i. *In re Jewel*, 365 B.R. 796 (Bankr.S.D.Ohio 2007), *In re Morrison* (above)

A. "Thus, a household will include individuals who are financially dependent on a debtor, individuals who financially support a debtor, and individuals whose income or expenses are inter-mingled or interdependent with a

debtor."

B. *In re Robinson* (Bankr.E.D.Va. 2011) - court approves economic unit approach - then uses a mathematical formula to determine HH size of divorced debtor based on the amount of time his children spent with him versus the other parent.

C. *In re Justice*, 404 B.R. 506 (Bankr.W.D.Ark. 2009) - allowed an adult 23 year old daughter living in the home, and her child as members of debtor's household.

d. Fourth approach? **Dependency Test** as outlined by a bankruptcy court in Wyoming (Judge McNiff) - *In re Kraft* and *In re Heinze* (neither has a citation) - looks at the issue on a case-by-case basis.

i. Says the Court adopts the approach based on the rationale of *In re Dunbar*, 99 B.R. 320 (Bankr.M.D.LA. 1989).

ii. The debtor must have reasons to provide support for a dependent and the claimed dependent must have a reason to rely on the debtor. Factors the court will consider: 1) length of time the claimed dependent is in the HH; 2) reason claimed dependent is in the HH; 3) age of the alleged dependent; 4) how much income or support the dependent receives from a third party; 5) whether the dependent is in school; 6) whether the dependent could be claimed as an IRS deduction or qualify in another legal way, i.e., for purposes of medical insurance.

A. Leo Weiss argued the *Kraft* case - Chapter 13 converted to Chapter 7. This is the instance of the deadbeat grown offspring. The Chapter 13 trustee handled Heinze, which involved grown kids & their offspring, but all had a decent reason for being in the HH. Judge granted the Motion to Dismiss in *Kraft* & denied the Chapter 13 Plan in *Heinze* b/c all projected disposable income contributed to the plan (based on HH size, deductions too much).

4. Wrapup

a. I haven't found any Colorado or 10th Circuit cases that have analyzed the issue, and I have not had any contested cases yet. Since it's still unsettled law here, I have taken whatever approach (of the three above) that best works for my clients, in both a Chapter 7 and a Chapter 13 context. I don't know that either of our Chapter 13 Trustees have taken a position on this (and in spite of all the Lanning type stuff out there, I've still found both offices to look at what's fair).

b. The most recent trend seems to be the economic unit approach, and if I had to guess, that's the way our courts would go. The Wyoming cases make me wonder if our UST would be inclined to go with an IRS dependency approach, but the

facts of the case may have also dictated their approach there - any feedback from the group?

b. It's clearly best to discuss these issues with clients before filing - I always refer to the household size issue as a grey area. While the issue with roommates does come up, I find that it's in split households/divorces (how many kids do you claim?) and grown kids/college students that the issue is most prevalent (see Justice, above).

c. Query - do you need to be consistent here? i.e., can you have your cake and eat it too. If you are claiming the expenses of someone you want to be a household member, are you claiming all of their income? Do you just need to include the income that they contribute to household, and not all of that person's income? (See *Epperson*, again - and note in *Epperson* that the UST did not necessarily take a position here, they simply argued that the Debtor was either a 1 person HH, or if he was a 2 person HH, all income of the 2nd HH member needed to be included in the Means Test - court disagreed.).

What constitutes special circumstances???

1. Discussion of statute/definitions

a § 707(b)(1) - Provides that the Court, after notice and a hearing, may dismiss (or convert to Chapter 13 w/Debtor's consent) a case filed by an individual debtor with primarily consumer debts, if the Court finds that granting of relief would be an abuse (*note substantial abuse no longer required*) of Chapter 7.

i. §707(b)(2)(A)(i) - In considering whether abuse exists, the Court shall presume abuse exists if Debtor's CMI, reduced by the expenses provided for in subparts (ii), (iii) & (iv) X 60 is not less than the lesser of 1) 25% of Debtor's non-priority unsecured claims or $6,575, whichever is greater or 2) $10,950.

ii. §707(b)(2)(B) - Debtor can rebut the presumption of abuse upon a showing special circumstances. ****What is this?????

A. Statute says - by demonstrating special circumstances, such as a serious medical condition, or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or *adjustments of current monthly income for which there is no reasonable alternative.* (b)(2)(B)(ii) & (iii) say Debtor must itemize the expenses, provide documentation & a detailed explanation of the circumstances that make the expenses necessary, and attest under oath to the accuracy of that information provided.

b. §1325(b)(1) - if the trustee or a holder of an unsecured claim objects to a plan, the plan may not be confirmed unless:

i. §1325(b)(1)(B) the plan provides for the creditor's claim in full or the

debtor provides all of his projected disposable income in the applicable commitment period.

ii. §1325(b)(2) - Disposable income is CMI (minus some types of income specifically excluded in only Chapter 13) less amounts "reasonably necessary to be expended....."

iii. §1325(b)(3) - amounts reasonably necessary to be expended are determined in accordance with §707(b)(2)(A) & (B) (B being our special circumstances).

c. Surprise surprise, Section 101 does not define "special circumstances."

d. Black's Law Dictionary: also does not define "special circumstances."

2. Form 22A & Form 22C.

a. Form 22A (Calculation of Monthly Income) & Form 22C (Chapter 13 Statement of Currently Monthly Income and Calculation of Commitment Period and Disposable Income) are substantially different:

i. Form 22A: Line 56. Curiously, the Chapter 7 Means Test form does not include a deduction for special circumstances. It appears that the best place to put a deduction is under line 56 (that is what the Debtor did in *Hammock*, listed below), which is entitled "Other Expenses." This section calls for any monthly expenses required for the health & welfare of the Debtor & family, but refers the drafter of the document to §707(b)(2)(A)(ii)(I), not §702(b)(2)(B)

ii. Form 22C: Line 57. Specifically calls for special circumstances (without statutory reference) which call for additional expenses for which there is no reasonable alternative, and calls for documentation & details. Again, curiously, the Form 22C also has a line item (Line 60) entitled "Other Expenses."

3. Caselaw review

a. *In re Delbecq*, 368 B.R. 754 (Bankr.S.D.In. 2007): "the term "special circumstances" requires a fact-specific, case-by-case inquiry into whether the debtor has a "meaningful ability" to pay his or her debts in light of an additional expense or adjustment to income not otherwise reflected in the means test calculation.

b. *In re Knight*, 370 B.R. 429 (Bankr.N.D.Ga. 2007): "A special circumstance is one that, if the debtor is not permitted to adjust her income or expenses accordingly, results in a demonstrable economic unfairness prejudicial to the debtor." Seems to be a pretty fair definition, where the Court has at least expressed a willingness to hear out the debtor.

c. *In re Hammock*, 436 B.R. 343 (Bankr.E.D.N.C. 2010) - Mentions two different

approaches taken by courts in evaluating whether an expenses is a special circumstance.

i. One group determined that "special circumstances" should be narrowly construed and based upon the plain meaning of special. Clearly, this is a high bar to meet.

ii. Second group says "special circumstances" does not necessarily mean that the situation has to be extraordinary, outside of the control of a debtor, or always unanticipated.

d. *In re Martellaro*, 404 B.R. 548 (Bankr.D.Mt. 2008) - Judge Tallman refers to this case in his opinion in *In re Moore*, 10-20045 HRT (Bankr.D.Colo. 2011).

e. Lots and lots of these cases have focused on student loans.

i. Majority view - not allowed as a special circumstance: *In re Lightsey*, 374 B.R. 377 (Bankr.D.Ga.2007), *In re Vaccariello*, 375 B.R. 809 (Bankr.N.D.Ohio 2007), *In re Pageau*, 383 B.R. 221 (Bankr.D.N.H.2008), *In re Champagne*, 389 B.R. 191 (Bankr.D.Kan.2008) and *In re Campbell*, Case 11-51573, ED Kentucky 2012, In *re Martellaro* (above).

ii. Minority view allowing: *In re Haman*, 366 B.R. 307 (Bankr.D.Del.2007), *In re Templeton*, 365 B.R. 213 (Bankr.W.D.Okla.2007).

f Separate households allowed as a special circumstance: *In re Graham*, 363 B.R. 844 (Bankr.S.D.Ohio 2007), *In re Crego*, 387 B.R. 225 (Bankr.E.D.Wis.2008).

g. Liberal case allowing special circumstances - *In re Barbutes*, 436 B.R. 518 (Bankr.M.D.Tenn.2010) - allowed pool cleaning, home maintenance & funding a non-employer maintained retirement account.

h. Special circumstances does not include retirement contributions or repayment to retirement contributions - *In re Egebjerg*, 574 F.3d 1045 (9th Cir.2009), *In re Taunter*, 402 B.R. 903 (Bankr.M.D.Fla.2009) - recall this is a Chapter 7 issue, as Form 22C provides for this deduction, not a special circumstance, but as a reduction from PDI. However, there may be occasions where the reasons for obtaining a 401k loan constitutes a special circumstance (see *In re Turner*, 376 B.R. 370 (Bankr.D.N.H.2007).

i. Terrible case that seems to fly in the face of Lanning - *In re Cotto*, 425 B.R. 72 (Bankr.E.D.N.Y.2010) - Debtors not allowed to deduct non-recurring, one time only payment from CMI.

j. Chapter 13 ineligibility not special circumstance allowing Ch 7 - *In re Burggraf*, 436 B.R. 466 (Bankr.N.D.Ohio 2010), quoting old 6th Circuit BAPCPA case of *In re Krohn*, 886 F.2d (6th Cir.1989), nor is the potential payback of zero percent to unsecured creditors, *In re Johns*, 342 B.R. 262 (Bankr.E.D.Ok. 2006), *In re Smith* 388 B.R. 885 (Bankr.D.Ill. 2008), though see contra, *In re Skvorecz*, 369 B.R. 638 (Bankr. D.Colo. 2007), wherein Judge Campbell found pointless to deny a Chapter 7 discharge would result in a zero payout to unsecured creditors (extend to *Cranmer*?).

4. Wrapup

   a. There is very little out there in terms of what's allowed, and what is out there isn't encouraging. However, a literal reading of the statute seems to indicate that was the intent.

   b. I find this to be one of the toughest issues to talk about with over-median income clients. The freedom of the Schedule J harkens back to the pre-BAPCPA days. If your client's daughter has gymnastics at $300/mo, that's the expense you claimed. Where does that go on a Form 22A or Form 22C? Is there no reasonable alternative to that expense? How about cell phones? Why on earth aren't those allowed as a regular deduction (the telecommunications line specifically excludes that expense)? It's as though the forms were designed in 1996. When the forms were created in 2004-2005, I would bet that over 85% of the adult population had a cell phone.

   c. War stories? Anybody had success using different types of expenses as a special circumstance? Had any pushback from UST & what was response?

Other Issues:

1. I have seen the argument that debtors should be able to use the life insurance deduction for whole life insurance - reasoning that the IRS standards (which the bankruptcy law says the means test should use) do not limit the deduction to just term life insurance. This is exactly what SCOTUS did in Ransom - the IRS manuals do not allow a vehicle ownership expense for a car where there is no loan or lease payment. However, I think the IRS manual only allows payments for a term policy on the taxpayer (IRS "Other Necessary Expenses" affixed to materials). However - another argument - a portion of the premium for a whole life insurance policy is for the cost of the insurance only, as opposed to the portion that's for the investment that goes with whole life.

2. Taxes "incurred" versus taxes withheld (lines 25 & 30 of Forms 22A & 22C, respectively). The case law here is also pretty one-sided: you over withhold on taxes, it can be challenged. In Chapter 7, if the over withholding is how you "beat" the Means Test, you're probably going to lose a 707(b)(2) contest. In Chapter 13, your plan is not going to get confirmed unless you have the correct withholding amounts in the Form 22C. See, *In re Michaud*, 399 BR 365 (Bankr. D. N.H. 2008), *In re Balcerowski*, 353 BR 581 (Bankr. E.D. Wis. 2006), *In re Lawson*, 361 BR 215 (Bankr.D.Utah 2007)

3. Pretty well-settled/known - No deduction on vehicle ownership expense for vehicle paid in full (*Ransom*) - though option may still be available for an additional $200 operating expense for an older vehicle. At the very least, it appears that there is not an automatic $200 deduction for older cars on Means Test - *In re Hargis*, 154 B.R. 174 (Bankr.D.Ut.2011) (says have to prove it), *In re Baker*, 2011 WL 576851 (Bankr.D.Mont.2011) (this case said ownership expense for 2 cars, plus the additional operating expense), *In re Byrn*, 410 B.R. 642 (Bankr.D.Mont.2008), *In re Johnson*, 454

B.R. 882 (Bankr.M.D.Fla. 2011). Beware of the following cases that don't allow - *In re Sisler*, 464 B.R. 706 (Bankr.W.D.Va. 2012), *In re VanDyke*, 450 B.R. 836 (Bankr.C.D.Ill. 2011). Post-*Ransom* Judge Brown denied confirmation on a Chapter 13 plan wherein Debtors took a deduction for an unsecured junior deed of trust that was being stripped off - fact that the Debtors might have to pay at some point (say if the plan failed) not good enough. *In re Gonzales*, 10-11433 EEB (Bankr.D.Colo.2011). Also no deduction on secured debt for surrendered items - *In re Liehr*, 439 B.R. 179 (BAP 10th Cir. 2010). And of course, for now concrete principle that Means Test is not a rigid formula incapable of looking forward, you have *Lanning*. Following the 10th Circuit's ruling in *Lanning* (but prior to SCOTUS hearing the case), Judge Campbell denied confirmation of the debtors' plan wherein debtors used their CMI to fund the Chapter 13 plan, while the projected income was higher. *In re Odom*, 406 B.R. 911 (Bankr.D.Colo. 2009).

4. College tuition/expenses from Means Test - general answer, does not look good. *In re Baker*, 400 B.R. 594 (Bankr. N.D. 2009), *In re Saffrin*, 380 B.R. 191 (Bankr. N.D. Ill 2007), *In re Boyd*, 378 B.R. 81 (Bankr. M.D. Pa. 2007), *In re Hess, No. 07-31689*, 2007 Bankr. LEXIS 3553 (Bankr. N.D. Ohio Oct. 15, 2007). *In re Featherston*, No. 07-60296, 2007 Bankr. LEXIS 4578 (Bankr. D. Mont. Sept. 28, 2007), *In re Goins*, 372 B.R. 824 (Bankr. D. S.C. 2007), *In re Hicks*, 370 B.R. 919 (Bankr. E.D. Mo. 2007), *In re Walker*, 383 B.R. 830 (Bankr. N.D. Ga. 2008). Whether or not it's allowable on the Means Test, Judge Tallman sustained a 707(b)(3) objection from the UST for, among other things, the expense of college tuition on debtors Schedule J, in *In re Ziegler*, 08-18017 HRT (Bankr.D.Colo. 2009).

5. Unborn children - special circumstance? Pretty well settled the unborn child is not a household member. *In re Pampas*, 369 B.R. 290 (Bankr.M.D.La. 2007). But with *Lanning*, may now have an argument that looking forward the budget will change. Does that require the actual birth of the child & plan modification?

6. Means Test exclusion for primarily business debtors - no definition for "primarily" in code. And what is business debt? Most courts say if the debt was incurred with an eye of profit, it's business. One case found that tax debts are not consumer debts - *In re Westberry*, 215 F.3d 589 (6th Cir. 2000). However - even if you don't have to do the Means Test, are you free to file a Chapter 7 even though you don't face 707(b) scrutiny? 707(a) still allows dismissal for cause - some courts have found bad faith to be for cause - see *In re Rahim*, 449 B.R. 527 (D.Court E.D.Mich. 2011), which quotes several other courts that have found "for cause" to mean failure to belt-tighten, ability to fund a Chapter 13 plan, etc. Good Debtor cases, post-*Rahim* are *In re Walterhouse*, (Bankr.E.D.Mich. 2012) and *In re Blok*, (Bankr.S.D.Ind. 2011). It appears that 8th & 9th Circuits don't allow for bad faith as "cause" under 707(a), but 3rd & 6th Circuits have held that bad faith can be "cause" under 707(a).

7. Student loans - headache that has been around for years. It hasn't worked as a special circumstance, but several local attorneys have suggested that student loan payments should be allowed as a deduction on the Means Test, as the IRS manual allows for such a deduction as Other Expenses. *Martellaro* (above) says no.

8. Marital Deduction - good cases to review, pretty hot topic. *In re Shahan*, 367 B.R. 732 (Bankr.D.Ks. 2007), *In re Trimarchi*, 421 B.R. 914 (Bankr.N.D. Ill. 2010), *In re Travis*, 353 B.R. 520 (Bankr.E.D.Mich. 2006), *In re Vollen*, 426 B.R. 359 (Bankr.D.Ks. 2010), and hot off the press, Judge Romero's decision in *In re Toxvard*, 11-17876 MER.

STATEMENT OF THE U.S. TRUSTEE PROGRAM'S POSITION ON LEGAL ISSUES ARISING UNDER THE CHAPTER 7 MEANS TEST

Following is a line-by-line summary of Form 22A and various recurring disposable income issues likely to arise in chapter 7 under the BAPCPA provisions of 11 U.S.C. § 707(b). The summary gives the position of the United States Trustee Program (USTP) on these issues. For ease of reference, the USTP positions are listed in summary fashion without citation to legal authority. The referenced lines are those on the Form 22A. Unless a circuit court has decided an issue to the contrary, United States Trustees should, absent unusual circumstances, maintain these positions when interpreting section 707(b).

Line 1A, Declaration of Disabled Veterans

- Must have at least 30% disability from service or released/discharged due to disability.
- Debt primarily incurred during period of active duty/homeland defense activity.
- Only if BOTH conditions apply is debtor exempt from further completing Form 22A.

Line 1B, Declaration of Non-Consumer Debts

- Less than 50% of total scheduled debt was incurred for personal, household or family purposes.
- Purpose of debt is judged at the time the debt was incurred.
- Home mortgages are typically consumer debt.
- Most tax debts are not typically consumer debt.

Line 1C, Declaration of Reservists and National Guard Exclusion

- Must be either a member of a reserve component or National Guard; AND
- Must have been on active duty or performing a homeland defense activity for at least 90 days.
- Exclusion applies after the minimum 90 day period of service, and for 540 days after the service ends.
- Exclusion applies only to cases filed between December 19, 2008 and December 18, 2011, unless extended by Congress.

Line 2, Filing Status

- The only four options permitted are those listed on the Form 22A.
- No option for legally separated but filing joint case; joint cases generally should be treated as a single household for means test purposes.
    - May be asserted as special circumstances to rebut the presumption of abuse under section 707(b)(2)(B).
    - May be considered by the UST when stating the reasons under section 704(b)(2) that a motion to dismiss is not appropriate.

- Information should be consistent with household size on Schedule I.

Line 3, Gross wages, salary, tips, bonuses, overtime, commissions.

- Includes pay/shift differentials.
- Includes income, whether or not taxable.
- Figures are gross amounts, before any deductions.

Lines 4 & 5, Business and real property income and expenses.

- Must be "ordinary and necessary," i.e., a reasonable operating expense.
- Depreciation is not included.
- Line "c" cannot be a negative number.

Line 6, Interest, dividends, and royalties.

- Includes automatic dividend reinvestment program.

Line 7, Pension and retirement income.

- Does not include Social Security payments.
- Includes all other retirement, including government, 401(k), and IRA.

Line 8, Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child or spousal support.

- Includes payments made monthly, quarterly, or annually.
- Includes payments regardless of written agreement with contributor.
- Includes payments from roommate, partner, parent, or relative, regardless of whether living with debtor.
- Includes payments made directly to creditors on behalf of debtor, e.g., rent, car, or insurance.
- Does not include payments from non-filing spouse (which are already included as income in Column B).

Line 9, Unemployment compensation.

- Unemployment compensation is not a "benefit under SSA" and should be included; USTP opposes any entry in the boxes to the left of Columns A and B.

Line 10, Income from all other sources.

- Includes net gambling, cash gifts, litigation proceeds, and trust income.
- Includes private disability income.
- Does not include SSA benefits.
- Does not include tax refunds.
- Does not include loan proceeds.
- Whether it meets IRS test for income could be relevant, but whether it is taxable income or non-taxable income is not a factor.

Line 14, Applicable median family income.

- "Applicable state" is state of residence at filing.
- If married and two different households, residence is where most family members reside.
- If no plurality of family members are in any one state, use state of spouse with highest income.
- "Household size" is the debtor, debtor's spouse, and any dependents that the debtor could claim under IRS dependency tests. The USTP uses the same IRS test for the definition of both "household" and "family." IRS Publication 501 explains the IRS tests for "dependent."
- The USTP departs from the IRS dependent test (as does the IRS when it determines family size for collection purposes) in cases justifying "reasonable exceptions" (e.g. a long standing economic unit of unmarried individuals and their children). However, if an individual is counted as a family member for median income purposes, that individual's income should be included as income on Part II of Form 22A .

Line 17, Marital adjustment.

- All income of the non-debtor spouse should be included, except the following expenses of the non-debtor spouse may be excluded:
  - withholding taxes;
  - student loan payments;
  - prior support obligations;
  - debt payments on which only the non-filing spouse is legally liable and where the consideration for the loan exclusively benefits the non-filing spouse. (Credit cards used to pay for household expenses may not be deducted on Line 17).

Line 19A, National Standards: food, apparel and services, housekeeping supplies, personal care, and miscellaneous.

- The following expenses are covered by the National Standards and may not be counted separately elsewhere:
  - apparel and services (includes shoes and clothing, laundry and dry cleaning, and shoe repair);
  - meals at home or away (unless unreimbursed business expenses);
  - housekeeping supplies (includes laundry and cleaning supplies; other household products such as cleaning and toilet tissue, paper towels and napkins; lawn and garden supplies; postage and stationary; and other miscellaneous household supplies);
  - personal care products and services (includes hair care products, haircuts and beautician services, oral hygiene products and articles, shaving needs, cosmetics, perfume, bath preparations, deodorants, feminine hygiene products, electric personal care appliances, personal care services, and repair of personal care appliances)
  - miscellaneous personal expenses.
- National Standard amount that may be claimed is based on the debtor, the debtor's dependents, and the debtor's spouse in a joint case if the spouse is not otherwise a dependent.

Line 19B, National Standards: health care.

- National Standard amounts may be claimed based on debtor, debtor's dependents, debtor's spouse, and the age of household members.
- Actual mounts expended by the debtor exceeding the National Standards that are required for the health and welfare of the debtor, debtor's dependents, and debtor's spouse, which are not reimbursed by insurance or paid by a health savings account, may be claimed on line 31.

Line 20A, Local Standards: housing and utilities; non-mortgage expenses.

- Based on county of residence; see line 14 for resolving multiple residences.
- The following expenses are covered by the Local Standards and may not be counted elsewhere:
  - maintenance and repair;
  - homeowner association dues;
  - condominium fees;
  - gas, electricity, water, heating oil, bottled gas, trash and garbage collection, wood and other fuels, septic cleaning;
  - basic telephone and cell phone service.

Line 20B, Local Standards: housing and utilities, mortgage/rent expense.

- Based on county of residence; see line 14 for resolving multiple residences.
- The following are included in the Local Standard and may not be counted elsewhere, except as provided on lines 42 and 43:
  - principal and interest on mortgage loan;
  - rent;
  - homeowners/renters insurance;
  - local property taxes.
- Line 20B(b) is the same figure as line 42 for house payments.
- Debtor may not "double dip," that is take the full amount of the Local Standard for mortgage/rent on line 20B(a) and then fail to deduct the monthly mortgage payment on line 20B(b). The overall effect of disallowing double-dipping is to allow the debtor to take only the higher of the actual mortgage payment or the Local Standard.
- If the home is being surrendered, the debtor may not include the mortgage payment on lines 42 and 43, and may not deduct the mortgage payment on line 20B(b). The debtor may, however, claim the full amount of the Local Standard for housing on line 20A.
- Debtors and joint debtors are entitled to only one Local Standard mortgage/rent payment, even if maintaining two separate households.
- Vacation homes do not entitle a debtor to the Local Standard on line 20B.
- Debtor may not claim a Local Standard on line 20B when the debtor:
  - is and has been living with a friend or relative for an extended period of time at no cost;
  - is and has been living in military or other employer-paid housing.

Line 21, Local Standards: housing and utilities; adjustment.

- This line is often used improperly by debtors to claim housing expenses in excess of the IRS standards; USTP policy is to object to that use of line 21.
- This line is occasionally used by debtors who claim that Form 22A incorrectly captures the separation of the IRS housing Local Standard into two components, a mortgage component and a non-mortgage component; the USTP will object to that use of line 21.

Line 22A, Local Standards: transportation, vehicle operation/public transportation expense.

- Based on metro area or region.
- See line 14 to resolve multiple residences.
- The Local Standard for vehicle operation may be taken when the debtor owns, leases, or pays the operating expenses on a vehicle.
- The Local Standard for vehicle operation for zero vehicles may be taken if the debtor does not own, operate, or pay operating expenses on any vehicle.
- A vehicle must be "street ready" and licensable.
- A vehicle designed without an engine does not qualify, e.g., camper or trailer.
- Debtors located outside of the Fifth, Seventh, and Eighth Circuits who operate

vehicles not subject to a loan or lease may deduct an additional $200 if the vehicle is owned by the debtor, and is older than six (6) model years or has more than 75,000 miles.

Line 22B, Local Standards: transportation, additional public transportation expense.

- If debtor claims vehicle operating expense for one or more vehicles on Line 22A, debtor may only claim additional public transportation expense if reasonable and necessary for the health and welfare of the debtor, debtor's dependents, and debtor's spouse, or for the production of income.
- If additional public transportation expense is applicable, it is capped by Local Standard amount for public transportation.

Lines 23 & 24, Local Standards: transportation ownership/lease expenses.

- Outside the Fifth, Seventh, and Eighth circuits, debtor cannot claim the vehicle ownership expense if the debtor does not have a secured loan or a lease on the vehicle.
- In the Fifth, Seventh, and Eighth circuits debtor may claim this expense if the debtor owns a vehicle regardless of whether the debtor has a loan or lease payment. However, if the debtor owns a vehicle free and clear the USTP position is that the lack of any actual ownership expense may be considered in determining whether the case constitutes an abuse under the totality of the debtor's financial circumstances pursuant to section 707(b)(3)(B).
- If the vehicle is being surrendered without replacement, the debtor may not claim the expense. *But see* discussion regarding line 42.
- If the vehicle is borrowed, the debtor may not claim the expense.
- Debtor may not "double dip," that is take the full amount of the vehicle ownership expense on line 23(a) and then fail to deduct the monthly lien payment on line 23(b). The overall effect is to allow the debtor to take the higher of the actual loan or lease payment and vehicle ownership expense.
- A debtor whose household contains a single driver is generally entitled to an ownership expense for only one vehicle.

Line 25, Other Necessary Expenses: taxes.

- Based on monthly amount of actual taxes owed, not taxes withheld.
- Includes FICA, Social Security, Medicare, state and local taxes.
- Non-debtor spouse's taxes is not included if "backed out" on line 17.

Line 26, Other Necessary Expenses: involuntary deductions for employment.

- Includes retirement, union dues, uniform costs, work shoes.
- Does not include voluntary 401(k) contributions, voluntary 401(k) loan repayments,

or other voluntary retirement or profit sharing deductions.
- Does not include United Way or charitable contributions.
- Does not include elective insurance.

Line 27, Other Necessary Expenses: life insurance.

- Includes only amounts for term insurance on the debtor's life.
- If the policy is whole life, debtor must determine what portion of the premium is attributable to term coverage.
- Does not include premiums on policies for non-debtor spouse or children.

Line 28, Other Necessary Expenses: court-ordered payments.

- Includes the current monthly amount of support and alimony, not any past due amounts, which are entered on line 44.
- Does not include purely voluntary amounts for which there is no legal obligation.

Line 29, Other Necessary Expenses: education for employment or for a physically or mentally challenged child.

- Employment education must be as a condition of employment.
- Expenses for challenged children must be for "health or welfare."
- Expenses for challenged children cannot be otherwise provided by public school system.
- Expenses for challenged children cannot be already included on line 30 or 38.

Line 30, Other Necessary Expenses: childcare.

- These are actual expenses only.
- Includes babysitting, nursery school, daycare, preschool.
- Premium daycare may be permitted, depending on the justification.
- May not be permitted if one parent is "stay at home;" depends on the circumstances.

Line 31, Other Necessary Expenses: health care.

- Includes only unreimbursed, out-of-pocket expenses, exceeding the National Standard amounts provided for at line 19B, including items traditionally reimbursable through a flexible spending or "cafeteria" medical saving plan. For example:
  - deductibles
  - medications
  - therapy
  - co-pays
- Does not include payments for health insurance or health savings account; those are

covered by line 34.

- Does not include elective or cosmetic surgery.
- May not duplicate items on line 34.

Line 32, Other Necessary Expenses: telecommunication services.

- Does not include basic phone or cell service, which is included in the Local Standards on line 20A.
- Pagers, call waiting, long distance, caller ID, and internet may be included, depending on amount and circumstance; test is whether "necessary for health and welfare or production of income."
- Does not include business expenses already deducted on line 4b or 5b.

Line 34, Health Insurance, Disability Insurance, and Health Savings Account Expenses.

- Includes actual expense for debtor, spouse, and dependents.
- Does not include flexible spending account or “cafeteria” medical saving plan contributions, which should be deducted as excess costs on line 31 to the extend they exceed to line 19B IRS standard amounts.

Line 35, Continued contributions to the care of household or family members.

- Includes only actual, not anticipated expenses.
- Family member must live with the debtor or be a member of the debtor’s immediate family, i.e., parent, grandparent, sibling, child, grandchild.
- Elderly, chronically ill, or disabled person must be unable to pay the expense.

Line 36, Protection against family violence.

- Include only ongoing expenses related to a real threat.
- Legal costs related to a restraining order may qualify.
- Home security system costs will not qualify in all cases.
- Nature of expense, but not the amount, must be kept confidential by the court.

Line 37, Home energy costs.

- Insert the amount by which the twelve-month average home energy costs exceed line 20A.
- Amount claimed is unlimited, but must be documented.

Line 38, Education expenses for dependent children under 18.

- Includes public or private elementary or secondary education.
- Does not include college or preschool education.

- Child must be under 18 at filing.
- Amount may not exceed $147.92 per child.
- Expenses must be documented.
- Cannot duplicate expenses claimed on line 30.
- Does not include school lunches, which are included in National Standards on line 19A.
- Can include home schooling expenses.

Line 39, Additional food and clothing expense.

- The USTP Web site breaks out the food/clothing standard for application of the 5 percent limit.
- Expenses must be actual, not merely anticipated.
- Special dietary and allergy restrictions can be covered.
- Documentation is required.

Line 40, Continued charitable contributions.

- Contribution is limited to 15 percent of gross income.
- The USTP position is that charitable contributions under section 707(b) are available to both below median and above median debtors. The Religious Liberty and Charitable Donation Clarification Act of 2006, Pub. L. 109-439 clarifies the Bankruptcy Code to ensure that above-median debtors may make continued charitable contributions.

Line 42, Future payments on secured claims.

- Total all payments coming due in the 60 months following filing and divide by 60.
- In the case of a variable rate loan, use the loan rate in effect on the petition date to calculate the payments.
- In the case of a "balloon" payment within 60 months, use the full amount of the balloon to calculate the average payment.
- Does not include property subject to a lease rather than a loan.
- Includes all secured debt, even "toys" and luxury items. Although the USTP position is to allow secured payments for luxury items on this line, the Program believes that luxury expenses may demonstrate that a petition was filed in bad faith warranting dismissal of the case under section 707(b)(3)(A), and may be considered in determining the totality of the debtors financial circumstances under section 707(b)(3)(B).
- Includes a secured loan payment, even when the value of the collateral is less than the amount of the loan.
- Outside the First Circuit, does not include payments when the debtor intends to surrender the collateral securing the loan.
- In the First Circuit, debtor may include payments on line 42 when the debtor intends

to surrender the collateral securing the loan. However, the USTP position is that the failure of the debtor to continue to make the payments post-petition in surrendering the property may be considered in determining the totality of the debtor's financial circumstances under section 707(b)(3)(B).

Line 43, Other payments on secured claims.

- Does not include arrearage on luxury items; the item must be "necessary for the support of the debtor or dependents."
- See line 42 for a discussion of when the collateral is surrendered.

Line 44, Payments on prepetition priority claims.

- The total of priority debt includes only amounts due as of filing.
- Does not include figures already listed on line 28.

Line 45, Chapter 13 administrative expenses.

- Debtor must project a hypothetical chapter 13 plan payment to calculate the figure on line 45a. The USTP does not insist on mathematical exactitude and allows a reasonable estimation of the hypothetical chapter 13 plan payment.
- Generally the plan payment should be calculated based on the amount of monthly disposable income suggested by the completion of the means test, or shown on Schedules I and J.
- The multiplier for line 45b is found on the USTP Web site by state.

Line 56, Other Expenses.

- Generally this line should be used to assert special circumstances to rebut the presumption of abuse under section 707(b)(2)(B).
- Also may provide information for the UST to consider under section 704(b)(2) when determining whether a motion to dismiss is appropriate.
- Should not be included by debtor in calculating disposable income on line 51, or in determining whether the presumption of abuse arises on lines 52-55.

STATEMENT OF THE U.S. TRUSTEE PROGRAM'S POSITION ON LEGAL ISSUES ARISING UNDER THE CHAPTER 13 DISPOSABLE INCOME TEST

Following is a line-by-line summary of Form 22C and various recurring disposable income issues likely to arise in chapter 13 under the BAPCPA provisions of 11 U.S.C. § 1325(b). The summary gives the position of the United States Trustee Program (USTP) on these issues. For ease of reference, the USTP positions are listed in summary fashion without citation to legal authority. The referenced lines are those on the Form 22C. Unless a circuit court has decided an issue to the contrary, United States Trustees should maintain these positions when interpreting section1325(b).

Many of the issues listed below are identical to issues arising in the chapter 7 means test under 11 U.S.C. § 707(b). However, several of the issues below are unique to the chapter 13 disposable income test. The USTP positions listed below reflect an intent to harmonize the chapter 7 means test with the chapter 13 disposable income test for above-median debtors.

Line 2, Gross wages, salary, tips, bonuses, overtime, commissions.

- Includes pay/shift differentials.
- Includes income, whether or not taxable.
- Figures are gross amounts, before any deductions.

Lines 3 & 4, Business and real property income and expenses.

- Must be "ordinary and necessary," i.e., a reasonable operating expense.
- Depreciation is not included.
- Line "c" cannot be a negative number.

Line 5, Interest, dividends, and royalties.

- Includes automatic dividend reinvestment program.

Line 6, Pension and retirement income.

- Does not include Social Security payments.
- Include all other retirement, including government, 401(k), and IRA.

Line 7, Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child or spousal support.

- Includes payments made monthly, quarterly, or annually.
- Includes payments regardless of written agreement with contributor.
- Includes payments from roommate, partner, parent, or relative, regardless of whether living with debtor.
- Includes payments made directly to creditors on behalf of debtor, e.g., rent, car,

insurance, or tuition.

- Does not include payments from non-filing spouse (which are already included as income in Column B).

Line 8, Unemployment compensation.

- Unemployment compensation is not a "benefit under SSA" and should be included; USTP opposes any entry in the boxes to the left of Columns A and B.

Line 9, Income from all other sources.

- Includes net gambling, cash gifts, litigation proceeds, and trust income.
- Includes private disability income.
- Does not include SSA benefits.
- Does not include tax refunds.
- Does not include loan proceeds.
- Whether it meets IRS test for income could be relevant, but whether it is taxable income or non-taxable income is not a factor.

Line 13, Marital adjustment.

- For purposes of determining the "applicable commitment period," section 1325(b)(4) refers to the income of "the debtor and debtor's spouse combined." By using line 13, a debtor contends that the income of a spouse should not be included as chapter 13 income in a non-joint case for purposes of determining the applicable commitment period. The USTP position is to oppose any amount listed on line 13.

Line 16, Applicable median family income.

- "Applicable state" is state of residence at filing.
- If married and two different households, residence is where most family members reside.
- If no plurality of family members are in any one state, use state of spouse with highest income.
- "Household size" is the debtor, debtor's spouse, and any dependents that the debtor could claim under IRS dependency tests. The USTP uses the same IRS test for the definition of both "household" and "family." IRS Publication 501 explains the IRS tests for "dependent."
- The USTP departs from the IRS dependent test (as does the IRS when it determines family size for collection purposes) in cases justifying "reasonable exceptions" (e.g. a long standing economic unit of unmarried individuals and their children). However, if an individual is counted as a family member for median income purposes, that individual's income should be included as income on Part I of Form 22C .

Line 17, Application of § 1325(b)(4).

- The USTP has not adopted a position on whether the "applicable commitment period" is a "length of time" or "multiplier."

Line 19, Marital adjustment.

- All income of the non-debtor spouse should be included, except the following expenses of the non-debtor spouse may be excluded:
  - withholding taxes;
  - student loan payments;
  - prior support obligations;
  - debt payments on which only the non-filing spouse is legally liable and where the consideration for the loan exclusively benefit the non-filing spouse.
- A car payment on the non-debtor spouse's car cannot be excluded if the car is counted as a family car for the purpose of lines 28 and 29.

Line 24A, National Standards: food, apparel and services, housekeeping supplies, personal care, and miscellaneous.

- The following expenses are covered by the National Standards and may not be counted separately elsewhere:
  - apparel and services (includes shoes and clothing, laundry and dry cleaning, and shoe repair);
  - meals at home or away (unless unreimbursed business expenses);
  - housekeeping supplies (includes laundry and cleaning supplies; other household products such as cleaning and toilet tissue, paper towels and napkins; lawn and garden supplies; postage and stationary; and other miscellaneous household supplies);
  - personal care products and services (includes hair care products, haircuts and beautician services, oral hygiene products and articles, shaving needs, cosmetics, perfume, bath preparations, deodorants, feminine hygiene products, electric personal care appliances, personal care services, and repair of personal care appliances)
  - miscellaneous personal expenses.
- National Standard amount that may be claimed is based on the debtor, the debtor's dependents, and the debtor's spouse in a joint case if the spouse is not otherwise a dependent.

Line 24B, National Standards: health care.

- National Standard amounts may be claimed based on debtor, debtor's dependents, debtor's spouse, and the age of household members.
- Actual mounts expended by the debtor exceeding the National Standards that are

required for the health and welfare of the debtor, debtor's dependents, and debtor's spouse, which are not reimbursed by insurance or paid by a health savings account, may be claimed on line 36.

Line 25A, Local Standards: housing and utilities; non-mortgage expenses.

- Based on county of residence; see line 16 for resolving multiple residences.
- The following expenses are covered by the Local Standards and may not be counted elsewhere:
  - maintenance and repair;
  - homeowner association dues;
  - condominium fees;
  - gas, electricity, water, heating oil, bottled gas, trash and garbage collection, wood and other fuels, septic cleaning;
  - basic telephone and cell phone service.

Line 25B, Local Standards: housing and utilities, mortgage/rent expense.

- Based on county of residence; see line 16 for resolving multiple residences.
- The following are included in the Local Standard and may not be counted elsewhere, except as provided on lines 47 and 48:
  - principal and interest on mortgage loan;
  - rent;
  - homeowners/renters insurance;
  - local property taxes.
- Line 25B(b) is the same figure as line 47 for house payments.
- Debtor may not "double dip," that is take the full amount of the Local Standard for mortgage/rent on line 25B(a) and then fail to deduct the monthly mortgage payment on line 25B(b). The overall effect of disallowing double-dipping is to allow the debtor to take only the higher of the actual mortgage payment or the Local Standard.
- If the home is being surrendered, the debtor may not include the mortgage payment on lines 47 and 48, and may not deduct the mortgage payment on line 25B(b). The debtor may, however, claim the full amount of the Local Standard for housing on line 25A.
- Debtors and joint debtors are entitled to only one Local Standard mortgage/rent payment, even if maintaining two separate households.
- Vacation homes do not entitle a debtor to the Local Standard on line 25B.
- Debtor may not claim a Local Standard on line 25B when the debtor:
  - is and has been living with a friend or relative for an extended period of time at no cost;
  - is and has been living in military or other employer-paid housing.

Line 26, Local Standards: housing and utilities; adjustment.

- This line is often used improperly by debtors to claim housing expenses in excess of the IRS standards; USTP policy is to object to that use of line 26.

- This line is occasionally used by debtors who claim that the form incorrectly captures the separation of the IRS housing Local Standard into two components, a mortgage component and a non-mortgage component; the USTP will object to that use of line 26.

Line 27A, Local Standards: transportation, vehicle operation/public transportation expense.

- Based on metro area or region.
- See line 16 to resolve multiple residences.
- The Local Standard for vehicle operation may be taken when the debtor owns, leases, or pays the operating expenses on a vehicle.
- The Local Standard for vehicle operation for zero vehicles may be taken if the debtor does not own, operate, or pay operating expenses on any vehicle.
- A vehicle must be "street ready" and licensable.
- A vehicle designed without an engine does not qualify, e.g., camper or trailer.
- Debtors located outside of the Fifth, Seventh, and Eighth Circuits who operate vehicles not subject to a loan or lease may deduct an additional $200 if the vehicle is owned by the debtor, and is older than six (6) model years or has more than 75,000 miles.

Line 27B, Local Standards: transportation, additional public transportation expense.

- If debtor claims vehicle operating expense for one or more vehicles on Line 27A, debtor may only claim additional public transportation expense if reasonable and necessary for the health and welfare of the debtor, debtor's dependents, and debtor's spouse, or for the production of income.
- If additional public transportation expense is applicable, it is capped by Local Standard amount for public transportation.

Lines 28 & 29, Local Standards: transportation ownership/lease expenses.

- Outside the Fifth, Seventh, and Eighth circuits, debtor cannot claim the vehicle ownership expense if the debtor does not have a secured loan or a lease on the vehicle.
- In the Fifth, Seventh, and Eighth circuits debtor may claim this expense if the debtor owns a vehicle regardless of whether the debtor has a loan or lease payment. However, if the debtor owns a vehicle free and clear the USTP position is that the lack of any actual ownership expense may be considered in calculating projected disposable income under section 1325(b)(1)(B).
- If the vehicle is being surrendered without replacement, the debtor may not claim the expense. *But see* discussion regarding line 47.
- If the vehicle is borrowed, the debtor may not claim the expense.
- Debtor may not "double dip," that is take the full amount of the vehicle ownership expense on line 28(a) and then fail to deduct the monthly lien payment on line 28(b). The overall effect is to allow the debtor to take the higher of the actual loan or lease payment and vehicle ownership expense.

- A debtor whose household contains a single driver is generally entitled to an ownership expense for only one vehicle.

Line 30, Other Necessary Expenses: taxes.

- Based on monthly amount of actual taxes owed, not taxes withheld.
- Includes FICA, Social Security, Medicare, state and local taxes.
- Non-debtor spouse's taxes not included if "backed out" on line 19.

Line 31, Other Necessary Expenses: involuntary deductions for employment.

- Includes retirement, union dues, uniform costs, work shoes.
- Does not include voluntary 401(k) contributions, voluntary 401(k) loan repayments, or other voluntary retirement or profit sharing deductions.
- Does not include United Way or charitable contributions.
- Does not include elective insurance.
- But see line 55 for exclusion of retirement payments and loan repayments in chapter 13.

Line 32, Other Necessary Expenses: life insurance.

- Includes only amounts for term insurance on the debtor's life.
- If the policy is whole life, debtor must determine what portion of the premium is attributable to term coverage.
- Does not include premiums on policies for non-debtor spouse or children.

Line 33, Other Necessary Expenses: court-ordered payments.

- Includes the current monthly amount of support and alimony, not the past due amounts, which are entered on line 49.
- Does not include purely voluntary amounts for which there is no legal obligation.

Line 34, Other Necessary Expenses: education for employment or for a physically or mentally challenged child.

- Employment education must be as a condition of employment.
- Expenses for challenged children must be for "health or welfare."
- Expenses for challenged children cannot be otherwise provided by public school system.
- Expenses for challenged children cannot be already included on line 35 or 43.

Line 35, Other Necessary Expenses: childcare.

- These are actual expenses only.
- Includes babysitting, nursery school, daycare, preschool.
- Premium daycare may be permitted, depending on the justification.
- May not be permitted if one parent is "stay at home;" depends on the circumstances.

Line 36, Other Necessary Expenses: health care.

- Includes only unreimbursed, out-of-pocket expenses, exceeding the National Standard amounts provided for at line 24B, including items traditionally reimbursable through a flexible spending or "cafeteria" medical saving plan. For example:
  - deductibles
  - medications
  - therapy
  - co-pays
- Does not include payments for health insurance or health savings account; those are covered by line 39.
- Does not include elective or cosmetic surgery.
- May not duplicate items on line 39.

Line 37, Other Necessary Expenses: telecommunication services.

- Does not include basic phone or cell service, which is included in the Local Standards on line 25A.
- Pagers, call waiting, long distance, caller ID, and internet may be included, depending on amount and circumstance; test is whether "necessary for health and welfare or production of income."
- Does not include business expenses already deducted on line 3b or 4b.

Line 39, Health Insurance, Disability Insurance, and Health Savings Account Expenses.

- Includes actual expense for debtor, spouse, and dependents.
- Does not include flexible spending account or "cafeteria" medical saving plan contributions, which should be deducted as excess costs on line 31 to the extend they exceed to line 19B IRS standard amounts.

Line 40, Continued contributions to the care of household or family members.

- Includes only actual, not anticipated expenses.
- Family member must live with the debtor or be a member of the debtor's immediate family, i.e., parent, grandparent, sibling, child, grandchild.
- Elderly, chronically ill, or disabled person must be unable to pay the expense.

Line 41, Protection against family violence.

- Include only ongoing expenses related to a real threat.
- Legal costs related to a restraining order may qualify.
- Home security system costs will not qualify in all cases.
- Nature of expense, but not the amount, must be kept confidential by the court.

Line 42, Home energy costs.

- Insert the amount by which the twelve-month average home energy costs exceed line 25A.
- Amount claimed is unlimited, but must be documented.

Line 43, Education expenses for dependent children under 18.

- Includes public or private elementary or secondary education.
- Does not include college or preschool education.
- Child must be under 18 at filing.
- Amount may not exceed $147.92 per child.
- Expenses must be documented.
- Cannot duplicate expenses claimed on line 35.
- Does not include school lunches, which are included in National Standards on line 24.
- Can include home schooling expenses.

Line 44, Additional food and clothing expense.

- The USTP Web site breaks out the food/clothing standard for application of the 5 percent limit.
- Expenses must be actual, not merely anticipated.
- Special dietary and allergy restrictions can be covered.
- Documentation is required.

Line 45, Continued charitable contributions.

- Contribution is limited to 15 percent of gross income.
- The USTP position is that charitable contributions under section 1325(b)(2)(A)(ii) are available to both below median and above median debtors. The Religious Liberty and Charitable Donation Clarification Act of 2006, Pub. L. 109-439 clarifies the Bankruptcy Code to ensure that above-median debtors may make continued charitable contributions.

Line 47, Future payments on secured claims.

- Total all payments coming due in the 60 months following filing and divide by 60.
- In the case of a variable rate loan, use the loan rate in effect on the petition date to

calculate the payments.

- In the case of a "balloon" payment within 60 months, use the full amount of the balloon to calculate the average payment.
- Does not include property subject to a lease rather than a loan.
- Includes all secured debt, even "toys" and luxury items. Although the USTP position is to allow secured payments for luxury items on this line, the Program believes that luxury expenses may demonstrate a lack of good faith that could prevent confirmation or support dismissal of the case.
- Includes a secured loan payment, even when the value of the collateral is less than the amount of the loan.
- Outside the First Circuit, does not include payments when the debtor intends to surrender the collateral securing the loan either in the plan or independent of the plan.
- In the First Circuit, debtor may include payments on line 47 when the debtor intends to surrender the collateral securing the loan either in the plan or independent of the plan. However, the USTP position is that the lack of a monthly car payment may be considered in calculating projected disposable income under section 1325(b)(1)(B).
- It is the Program's position that the secured payment under the plan is the figure to be included on line 47. This includes "crammed down" plan payments, as well as zero for payments on property on which a lien is to be avoided.

Line 48, Other payments on secured claims.

- Does not include arrearage on luxury items; the item must be "necessary for the support of the debtor or dependents."
- See line 47 for a discussion of liens which are crammed down or avoided, or where the collateral is surrendered.

Line 49, Payments on prepetition priority claims.

- The total of priority debt includes only amounts due as of filing.
- Does not include figures already listed on line 33.

Line 50, Chapter 13 administrative expenses.

- Debtor must project a hypothetical chapter 13 plan payment to calculate the figure on line 50a. The USTP does not insist on mathematical exactitude and allows a reasonable estimation of the hypothetical chapter 13 plan payment.
- The multiplier for line 50b is found on the USTP Web site by state.

Line 54, Support income.

- Support income may be deducted here, but must be included on line 7.

Line 57, Deduction for Special Circumstances.

- Governed by section 707(b)(2)(B).

Line 58, Monthly Disposable Income Under § 1325(b)(2).

- The disposable income determined on line 58 is not the same as the "projected disposal income" of section 1325(b)(2)(B). Historical income is not conclusive; rather, the disposable income projected over the life of the plan should be used.
- The disposable income and the calculations shown on Form 22C are a "starting point" or framework for the calculation of "projected disposable income."
  - The term "projected disposable income" is forward-looking and reality-based, and is not grounded in any artificial or mechanical formulation.
  - Known or reasonably foreseeable changes in financial circumstances as established by any party should be considered.
  - The object is to reach a determination based on the reality of a debtor's capability to repay creditors.
- The type of income allowed under the definition of Current Monthly Income, rather than the income shown on Schedule I, is the framework for projecting the debtor's income over the life of plan.
- The type and amount of expenses allowed under section 707(b)(2), rather than the expenses shown on Schedule J, are the framework for projecting the debtor's expenses over the life of the plan.
- Using chapter 13 to preserve luxury items at the expense of unsecured creditors and acquiring payments on luxury items on the eve of bankruptcy may be evidence that the plan has not been proposed or filed in good faith.
- A chapter 13 trustee need not object to confirmation when "special circumstances" of section 707(b)(2)(B) justify additional expenses or adjustments to current monthly income for which there is no reasonable alternative.

Rev'd April 20, 2010

Allowable Living Expense National Standards - effective 04/02/2012

Expense	One Person	Two Persons	Three Persons	Four Persons
Food	$301	$537	$639	$765
Housekeeping supplies	$30	$66	$65	$74
Apparel & services	$86	$162	$209	$244
Personal care products & services	$32	$55	$63	$67
Miscellaneous	$116	$209	$251	$300
Total	**$565**	**$1,029**	**$1,227**	**$1,450**

More than four persons	Additional Persons Amount
For each additional person, add to four-person total allowance:	**$281**

Please note that the standards change.
We recommend you check the irs.gov website periodically to assure you have the latest version.