

Problems, Problems, Problems Workshops

CONSUMER

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TAXING ISSUES

Chapter 13 case was filed on February 10, 2013. The meeting of creditors was scheduled and held on March 20. At the meeting of creditors, the trustee asked the debtor for her 2012 federal income tax return. Debtor stated that she was missing a 1099 and hadn't filed a tax return yet for 2012. Debtor promised to send a copy of the return to the trustee when it was filed.

Debtor filed 2012 tax return on June 15, 2013. Return showed that debtor owed \$3,000. The claims bar date for governmental creditors is August 9, 2013. Debtor also owes real property taxes for 2012 and for 2013.

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- What are the § 1308 issues here?
 - Did the trustee “hold open” the meeting of creditors?
 - Is there a § 1307(e) issue here?
 - Is the 2012 income tax claim a prepetition or postpetition claim?
 - Are the 2012 income taxes entitled to priority?
 - Are the 2012 income taxes administrative expenses?
 - How does § 502(i) figure in this problem?
 - Can the debtor file a proof of claim for the 2012 income taxes?
 - Can/must the IRS file a proof of claim for the 2012 income taxes?
 - How does § 503(b)(1)(D) affect this problem?
 - Are property taxes different from income taxes for purposes of § 1305? For purposes of § 1302(b)(9)? For purposes of § 503(b)(1)(B)?
 - What does § 346 and 26 U.S.C. § 1398/1399 have to do with this problem?

- Does it matter to any of the answers above that the confirmed plan prevented vesting of the estate under § 1327(b)?
- Does it matter whether the taxing authority filed a request for payment?
- What advice would you give the IRS and the property tax folks about filing claims for the 2012 taxes?
- Would you advice be different with respect to the 2013 property taxes?

APPLICABLE CASES

Michigan Dep't of Treasury v. Hight (In re Hight), 670 F.3d 699, 703, 705 (6th Cir. Mar. 5, 2012) (Martin, Gibbons, Steeh) (State income taxes for 2008 were a priority claim in case filed in January 2009, under both § 507(a)(8)(A)(i) and (iii); § 507(a)(8)(A)(i) phrase "for which a return . . . is last due . . . after three years before the date of the filing of the petition" is not limited to tax claims arising before commencement of case. "The district court correctly interpreted the Bankruptcy Code in finding that § 1305 does not exclusively govern the filing of postpetition claims and that Hight was permitted to file a protective claim under § 501(c) because §§ 502(i) and 507(a)(8) establish that she could treat a postpetition claim for a tax debt arising from the immediately preceding tax year as if it were a prepetition claim."), *aff'g* 434 B.R. 505, 511 (W.D. Mich. Aug. 10, 2010) (Bell) (Rejecting *In re Turner*, 420 B.R. 711 (Bankr. E.D. Mich. Dec. 21, 2009) (McIvor), in Chapter 13 case filed on January 28, 2009, "straddling" tax claim for 2008 income taxes is treated as prepetition debt by §§ 502(i), 507(a)(8) and 1322(a)(2); debtor can file protective proof of claim on behalf of state under § 501(c). "[T]he Court . . . agree[s] with the Bankruptcy Court's conclusion that, based upon the interplay of sections 501(c), 502(i), 507(a)(8), and 1322(a)(2), Debtor can file a claim on behalf of Treasury for the straddling tax claim, although the Court arrives at this conclusion by a slightly different route than that taken by the Bankruptcy Court. . . . Treasury's claim for Debtor's 2008 income tax falls within § 502(i) because it is a claim entitled to priority under § 507(a)(8) that did not arise until after the commencement of the bankruptcy case. Because Treasury has a claim against the estate of a kind specified in § 502(i), Treasury is a 'creditor' as defined in § 101(10)(B). Because Treasury is a creditor, Debtor can file a claim on Treasury's behalf pursuant to § 501(c). This analysis of the interactions of sections 501(c), 502(i) and 507(a)(8) is the same analysis applied by the court in *In re Flores*, 270 B.R. 203 (Bankr. S.D. Tex. 2001), to a straddling sales tax liability. . . . This analysis is consistent with the requirement in § 1322(a)(2) that a debtor's plan provide for the full payment of all claims entitled to priority under § 507. . . . *Turner's* assumption that § 1305(a)(1) governs straddling tax claims is wrong. *Turner* erroneously assumed that the Code enforced a strict dichotomy between prepetition and postpetition claims. *Turner* failed to consider the import of §§ 502(i), 507(a)(8) and 1322(a)(2), which establish a Congressional intent to treat taxes on income for the taxable year preceding the bankruptcy case as prepetition claims and to bring those claims into the bankruptcy plan."), *aff'g on other grounds* 426 B.R. 258, 260-64 (Bankr. W.D. Mich. Mar. 24, 2010) (Hughes) (Citing *United States v. Ripley (In re Ripley)*, 926 F.2d 440 (5th Cir. Mar. 5, 1991) (Brown, Smith, Wiener), and without mention of *Joye v. Franchise Tax Board (In re Joye)*, 578 F.3d 1070 (9th Cir. Aug. 21, 2009) (Wallace, Thomas, Graber), income taxes for 2008 are a postpetition claim in Chapter 13 case filed on January 28, 2009; claim is priority under § 507(a)(8) and § 502(i), and debtor can file protective proof of claim under § 501(a) when state does not timely file its own claim for those taxes. At the petition, debtor had not completed her state income tax return for 2008. She filed that return just before April 15, 2009, and owed \$4,900. State did not file proof of claim for 2008 taxes. Debtor filed protective claim, and state moved to strike. "[T]his court concludes . . . that a straddling tax liability is a postpetition claim. . . . However, the timing of Ms. Hight's case results in a postpetition claim being included among the tax priority claims that must be so paid, for there is no question that what she owed to the State on April 15, 2009 was 'a tax . . . measured by income . . . for a taxable year ending . . . before the date of the filing of the petition. . . .' 11 U.S.C. § 507(a)(8)(A). The inclusion, though, of such a postpetition debt

among the claims to receive distributions under the plan contradicts the underlying presumption that a debtor's Chapter 13 plan is intended only to address prepetition claims. Moreover, the fact that its inclusion in the plan is mandatory challenges the impression created by Section 1305 that postpetition tax claims may be paid for under a plan only if the governmental entity itself chooses to file a proof of claim. . . . [T]hese apparent contradictions are reconciled by Section 502(i). . . . [T]he State's claim against Ms. Hight for her 2008 income taxes, which clearly arose postpetition but which is nonetheless entitled to Section 507(a)(8) priority status, is to be determined and allowed 'the same as if such claim had arisen before the date of the filing of the petition.' . . . [T]he notion that a straddling income tax claim is to be treated as if it in fact arose prepetition is carried over to the claims process as well. . . . [S]ubpart (B) of Section 101(10)[(A)] expands the definition of creditor to also include claims against the estate 'of a kind specified in section . . . 502(i) of this title' . . . Consequently, not only does Section 1322(a)(2), in conjunction with Section 507(a)(8) and 502(i), compel a Chapter 13 debtor to provide in his plan for straddling postpetition tax claims, but Section 501(a), in conjunction with Section 101(10)(B), also makes it clear that any taxing authority owed such a straddling debt must file a proof of claim in order for it to be paid under the plan. But if the taxing authority is required to file a proof of claim under Section 501(a) for this type of postpetition claim, then it stands to reason that the debtor too may file under Section 501(c) a protective proof of claim for that same debt if the taxing authority does not do so. . . . Although the claim did not in fact become a 'right to payment' . . . within the meaning of Section 101(5) until after Ms. Hight commenced her case, Section 1322(a)(2) required that it be paid as if it were a prepetition claim and, under Ms. Hight's plan, proofs of claim are required if such claims are to be allowed. . . . Ms. Hight clearly had the opportunity under Section 501(c) to file a protective claim when the State elected not to file its own proof of claim.").

Joye v. Franchise Tax Bd. (In re Joye), 578 F.3d 1070 (9th Cir. Aug. 21, 2009) (Wallace, Thomas, Graber) (In a Chapter 13 case filed on March 7, 2001, state income taxes for 2000 are "payable" prepetition and are not a postpetition claim under § 1305(a)(1); state of California taxing authority received constitutionally adequate notice when it received official notice of filing of Chapter 13 case, and its failure to file a proof of claim results in discharge of taxes at completion of payments under plan.).

California Franchise Tax Bd. v. Jones (In re Jones), 420 B.R. 506, 510-17 (B.A.P. 9th Cir. Nov. 24, 2009) (Baum, Dunn, Jury) (Because state income taxes for 2002 are not priority taxes under § 507(a)(8)(A)(i) in a Chapter 13 case filed on July 22, 2002, the statutory tolling added by BAPCPA to § 507(a)(8) for anytime in which a stay was applicable in a prior case is not available to toll the counting periods for priority and nondischargeability in a subsequent Chapter 7 case; distinguishing *Young v. United States*, 535 U.S. 43, 122 S. Ct. 1036, 152 L. Ed. 2d 79 (Mar. 4, 2002), equitable tolling is not available because the plan vested property in the debtors at confirmation and no stay prevented collection of postpetition taxes during the prior Chapter 13 case. "BAPCPA added an unnumbered paragraph at the end of Section 507(a)(8) that provides for suspension of the priority time periods under certain conditions. . . . We interpret the phrase 'an otherwise applicable time period' to mean that the tax year at issue falls within the three-year lookback period in a prior case and the subject claim is for a priority tax. . . . An income tax obligation for which the return is due post-petition (here, also post-confirmation) does not meet the priority definition contained in Section 507(a)(8)(A)(i). . . . [A]nd therefore cannot fall within 'an applicable time period' as contemplated by the unnumbered paragraph. The income tax at issue, for the 2002 tax year, was due (based on an extension granted by the FTB) on October 15, 2003. Debtor's Prior Case was filed on July 22, 2002. The three-year lookback period in the Prior Case is July 22, 1999 to July 22, 2002. . . . Since Debtor's 2002 income tax return was due on October 15, 2003, the 2002 income taxes did not fall within the three-year lookback period. . . . [A]nd suspension is in appropriate under Section 507(a)(8)'s unnumbered paragraph. . . . Under the estate termination approach, . . . there was no automatic stay in effect at the time the return was filed. Here, estate property reverted in Jones on September 12, 2002, when her Chapter 13 plan was confirmed. When she filed her return on October 15, 2003 . . . there was no estate property for the automatic stay to protect, leaving the FTB free to collect on its tax claim. . . . Based on the facts here, we decline to apply equitable tolling under Section 105.").

In re Halabu, No. 11-59449, 2012 WL 5306128, at *5-*14, *13 n.13 (Bankr. E.D. Mich. Oct. 26, 2012) (Tucker) (Distinguishing *Hall v. United States*, ___ U.S. ___, 132 S. Ct. 1882, 182 L. Ed. 2d 840 (May 14, 2012), property tax is incurred by Chapter 13 estate between the petition and dismissal before confirmation and is likely to be an administrative expense after BAPCPA amendments notwithstanding that it is secured by a lien; taxing authority need not file a request for payment of postpetition tax incurred by Chapter 13 estate. "Under current law, . . . a governmental unit is not required to file any request for payment of an administrative expense—'timely,' 'tardily,' or at all—in order to be allowed an administrative expense for a tax incurred by the estate under § 503(b)(1)(B)(i). . . . This creates procedural questions for

the Chapter 13 Trustee, and for the Court. . . . [H]ow is the Chapter 13 Trustee to know whether such taxing authority actually has such an administrative claim, and if so, what is the amount of such claim, when the Trustee has heard nothing from the taxing authority? . . . [I]n this situation, . . . the Trustee must investigate, and the Court must determine, whether the taxing authority has an allowed administrative claim for unpaid real estate taxes incurred by the bankruptcy estate. . . . The type of administrative claim at issue in this case—unpaid real estate taxes incurred by the estate—is special, in that it need not be filed at all in order to be allowed, under 11 U.S.C. § 503(b)(1)(D). . . . [T]he Court must allow an administrative expense for any unpaid real estate tax incurred by the Chapter 13 bankruptcy estate, whether or not the governmental unit has filed a request for payment or allowance of such an administrative expense. . . . [A] property tax on the debtor's home is 'incurred by the estate,' within the meaning of § 503(b)(1)(B)(i), if the tax was incurred while the home is property of the bankruptcy estate. . . . That may change, . . . when and if a plan is confirmed. . . . [T]he 2005 BAPCPA amendment to § 503(b)(1)(B)(i) . . . clearly establishes an exception to the general rule Section 503(b)(1)(B)(i) now says that the taxing authority has an allowed administrative claim, whether the tax is 'secured or unsecured.'" In a footnote: "The rule is different with respect to income taxes. In a Chapter 13 case, as in a Chapter 12 case, the bankruptcy estate is not a separate taxable entity for purposes of federal, state, and local income taxes, and the estate does not incur such income taxes. Rather, only the bankruptcy debtor incurs income taxes. . . . But that rule does not extend to state or local property taxes.").

In re Halabu, No. 11-59449, 2013 WL 780757, at *2 (Bankr. E.D. Mich. Mar. 1, 2013), *supplementing* No. 11-59449, 2012 WL 5306128 (Bankr. E.D. Mich. Oct. 26, 2012) (Tucker) (Unpaid real estate taxes incurred during Chapter 13 case before dismissal are administrative expenses to be paid pro rata with other administrative expenses from money on hand before returning balance to the debtor; real estate taxes paid by mortgagee after dismissal are not allowable administrative expenses either to the mortgagee or to the taxing authority. Chapter 13 case was dismissed on February 24, 2012. There were real estate taxes that accrued during the Chapter 13 case that were paid by the mortgagee after dismissal. There were also real estate taxes that accrued during the Chapter 13 case that remained unpaid at dismissal. "[U]nder Michigan law, the Winter 2012 taxes . . . were incurred on December 31, 2011, while this bankruptcy case was pending, and before this case was dismissed on February 24, 2012. . . . [T]hese unpaid taxes were incurred by the bankruptcy estate, and . . . the City of Orchard Lake has an allowed administrative expense in this case, under 11 U.S.C. § 503(b)(1)(B)(i) Comerica Bank requests that the Court allow, either to the taxing authority or to Comerica Bank, an administrative expense under § 503(b)(1)(B)(i) for the Summer 2012 real estate taxes. . . . [T]hese taxes were paid in full by Comerica Bank to the City of Orchard Lake . . . on September 19, 2012 [T]he Court cannot allow an administrative expense in favor of the City of Orchard Lake for these taxes, because the City of Orchard Lake has already been paid in full for these taxes. Second, the Court cannot allow an administrative expense for these taxes in favor of Comerica Bank, for the reasons discussed at length in . . . the Court's October 26, 2012 opinion.").

Michigan Dep't of Treasury v. Senczyszyn (In re Senczyszyn), No. 10-11586, 2011 WL 500060, at *2-*9 (E.D. Mich. Feb. 11, 2011) (Cleland) (Rejecting *Michigan Department of Treasury v. Hight (In re Hight)*, 434 B.R. 505 (W.D. Mich. Aug. 10, 2010) (Bell), and *United States v. Ripley (In re Ripley)*, 926 F.2d 440 (5th Cir. Mar. 5, 1991) (Brown, Smith, Wiener), and embracing *Joye v. Franchise Tax Board (In re Joye)*, 578 F.3d 1070 (9th Cir. Aug. 21, 2009) (Wallace, Thomas, Graber), state income taxes for 2008 are a prepetition priority claim in a Chapter 13 case filed in March of 2009; when Michigan failed to timely file a proof of claim, the debtors appropriately filed a claim on behalf of the state under Bankruptcy Rule 3004 and § 501(c). "Relevant here is § 502(i) Appellant's state income tax claim is entitled to priority under § 507(a)(8) because it is an unsecured claim of a governmental unit for an income tax of a taxable year that ended before the petition was filed and which meets other certain specified criteria. . . . [A] pre-petition tax claim is one filed under § 501, and is so named because it 'arise[s] before the date of the filing of the petition.' . . . Tax claims that arise after the commencement of a case may be included in a bankruptcy pursuant to § 502(i). In addition, in chapter 13 cases, proofs of claim for those taxes that 'become payable . . . while the case is pending' may be filed under § 1305(a)(1). . . . [I]n passing § 1305(a)(1) into law, Congress created an exception to the general means of distinguishing pre-petition claims from post-petition claims, and of filing proofs of claim as set forth in chapter 5. . . . [T]he choice of 'become payable' over 'arise' in subsection (a)(1) was not a mere slip of the pen, because the latter term is utilized in subsection (a)(2), directly juxtaposed to 'become payable.' . . . Congress used the phrase 'become payable' to distinguish the post-petition from the pre-petition in this narrow class of tax claims. . . . [C]ourts that have decided the issue of whether a straddling tax claim is a pre- or post-petition claim appear to have split. Courts have followed at least three different rules, finding the relevant date on which taxes 'become payable' to be either the end of the tax year, the date the tax return was *actually* filed, or the date the tax return was due. . . . The court finds that taxes 'become payable' in the meaning of § 1305 at the end of a taxable period, typically a year, consistent with

Joye . . . The court does not agree with the *Ripley* court’s reading of Black’s Law Dictionary . . . Congress chose the phrase ‘become payable’ rather than ‘become due and owing’ or ‘must be paid.’ . . . As noted in *Joye* and [*Dixon v. IRS (In re Dixon)*, 218 B.R. 150 (B.A.P. 10th Cir. Mar. 6, 1998) (McFeeley, Pusateri, Clark)], what congressional record there is supports the notion that ‘become payable’ in § 1305 references tax obligations that are ‘incurred’ during the pendency of a bankruptcy case, meaning after the chapter 13 petition has been filed. . . . [T]he tax liability was brought on by earning income during the preceding year. Tax liability is *not* incurred only after the tax year is over [T]he ambiguity of the *Ripley* court in its own holding evinces the practical problem with departing from the natural reading of the statute and adopting the view that taxes ‘become payable’ when the return is due. Are taxes ‘due’ on April 15, the deadline for filing a return in most jurisdictions? Or are they ‘due’ when the return is filed, whether that filing comes early or late? . . . Appellees’ tax year ended at the very beginning of January and they filed their chapter 13 petition in March. Their income taxes ‘bec[a]me payable’ before the petition was filed, and so the claim based on that tax obligation is a pre-petition claim. Section 1305 does not apply. As Appellant failed to timely file a proof of claim, Appellees were permitted, under Rule 3004 and § 501(c), to file the proof of claim on their behalf.”), *aff’g on other grounds*, 426 B.R. 250, 256-58 (Bankr. E.D. Mich. Apr. 7, 2010) (Shefferly) (In a Chapter 13 case filed on March 31, 2009, state income taxes for 2008 are a prepetition priority claim; when state failed to timely file a proof of claim, debtors can file a claim on behalf of state under Bankruptcy Rule 3004, and § 1305 is not a ground to disallow that claim. Distinguishing *In re Hight*, 426 B.R. 258 (Bankr. W.D. Mich. Mar. 24, 2010) (Hughes), and *In re Turner*, 420 B.R. 711 (Bankr. E.D. Mich. Dec. 21, 2009) (McIvor), and claiming not to resolve split of authority between *Joye v. California Franchise Tax Board (In re Joye)*, 578 F.3d 1070 (9th Cir. Aug. 21, 2009) (Wallace, Thomas, Graber), and *United States v. Ripley (In re Ripley)*, 926 F.2d 440 (5th Cir. Mar. 5, 1991) (Brown, Smith, Wiener): “[T]here is nothing in § 1305 that provides a basis to disallow a proof of claim filed by a debtor on behalf of a creditor under § 501(c) of the Bankruptcy Code. . . . Section 1305(a)(1) does not define what is and is not a post-petition tax claim. . . . Debtors earned the income for which the taxes are owing in 2008. . . . The Debtors’ liability for 2008 income taxes arose out of this pre-petition relationship. . . . [T]he 2008 income taxes owed by the Debtors to the State of Michigan constitute a pre-petition claim. The fact that the Debtors’ tax return with the State of Michigan was not due until April 15, 2009 does not change the character of this claim from a pre-petition claim to a post-petition claim, particularly in this case, where the Debtors filed their income tax return on February 14, 2009, weeks before they filed their bankruptcy petition. Nor does the fact that § 1305 permits a governmental unit to file certain types of post-petition claims somehow transform the Debtors’ tax liability for income earned during the pre-petition year 2008, into a post-petition claim in their bankruptcy case that was not filed until March 31, 2009. . . . [I]t is not necessary for the Court in this case to try to resolve the split in cases construing § 1305, because § 1305 does not control the issue in this case.”).

In re Stokes, No. 06-11296, 2010 WL 3980232, at *2-*3 (Bankr. E.D. Tenn. Oct. 8, 2010) (Cook) (Property taxes for postpetition tax years are administrative expenses under § 503(b)(1)(B)(i) and not postpetition claims under § 1305(a)(1) when confirmation order overcame vesting effect in § 1327(b) and state law made property taxes both a lien and a personal liability of the owner. Chapter 13 case was filed on May 3, 2006. Debtor failed to pay real property taxes for tax years 2006, 2007, 2008 and 2009. City filed request for payment of administrative expenses on July 16, 2010. Tennessee law provides that real property taxes become a lien and a personal debt of the property owner on January 1 of the tax year. The confirmation order provided that property of the estate did not vest in the debtor until completion of the plan. “Because the owner of the property on January 1, 2006, was the prepetition debtor and not the chapter 13 estate, the 2006 taxes were not ‘incurred by the estate’ and cannot, therefore, constitute an administrative expense. However, because the property belonged to the debtor’s chapter 13 estate on January 1 of each of the three succeeding years, the 2007, 2008, and 2009 taxes were ‘incurred by the estate.’ . . . [For § 507(a)(8) purposes] it is clear that the 2007, 2008, and 2009 real property taxes were ‘assessed’ postpetition. . . . [T]he trustee believes that § 1305(a)(1) conflicts with § 503(b)(1)(B)(i) and that § 1305(a)(1), being the more specific statute, should control over the more general administrative expense statute. The two statutes, however, are not in conflict. They simply apply in different circumstances: § 503(b)(1)(B)(i) applies when the tax is ‘incurred by the estate’ and § 1305(a)(1) applies when the governmental entity ‘holds a claim against the debtor.’ . . . [A] Tennessee real property tax that becomes a personal liability of the owner of the property is ‘incurred by the estate’ if the property belongs to the estate on January 1 of the tax year. Hence, so long as the property remains property of the estate, § 503(b)(1)(B)(i) applies and § 1305 does not. The reverse is true with respect to income taxes Section 1305 would also apply, and § 503(b)(1)(B)(i) would not, with respect to real property taxes when the plan or confirmation order does not provide that property of the estate remains property of the estate after confirmation; in that event, any tax becoming a personal liability of the owner of the property after confirmation would be a ‘claim against the debtor’ because, after confirmation, it would be the debtor, not the bankruptcy estate, that owns the property. . . . [T]he trustee asserts that the City’s request for payment of the

administrative expenses was untimely. . . . [T]he trustee has failed to cite any authority that would support denying the request as untimely.”).

In re Turner, 420 B.R. 711, 712–16 (Bankr. E.D. Mich. Dec. 21, 2009) (McIvor) (Embracing *United States v. Ripley* (*In re Ripley*), 926 F.2d 440 (5th Cir. Mar. 5, 1991) (Brown, Smith, Wiener), and rejecting *Dixon v. IRS* (*In re Dixon*), 218 B.R. 150 (B.A.P. 10th Cir. Mar. 6, 1998) (McFeeley, Pusateri, Clark), and *Joye v. California Franchise Tax Board* (*In re Joye*), 578 F.3d 1070 (9th Cir. Aug. 21, 2009) (Wallace, Thomas, Graber), income taxes for 2008 are § 1305 postpetition claims in Chapter 13 case filed on January 13, 2009, and debtor cannot file a “priority claim” on behalf of the taxing authority. “[F]or any Chapter 13 bankruptcy filed between January 1 and April 15, the taxes for the prior year are a postpetition § 1305 claim because the taxes do not ‘become payable’ until April 15 **after** the date of the filing of the bankruptcy. . . . In a Chapter 13 case, whether a tax claim is treated as prepetition or postpetition is controlled by 11 U.S.C. § 1305(a). Under that section, taxes ‘become payable’ when the tax is ascertainable by the taxing authority, that is, when the return is filed. . . . Debtor filed for bankruptcy on January 13, 2009. The claims bar date for governmental units is 180 days from the date of filing Debtor had until April 15, 2009 to file his 2008 income tax return. Until the return was filed, Treasury had no idea whether it had a claim. If all taxes incurred by Debtor ‘become payable’ on December 31, 2008, the tax debt was a prepetition debt and the claims bar date would apply to Treasury even though Treasury had no knowledge as to whether a claim existed until the return was filed. . . . The Court recognizes that § 502(i) provides a general rule for determining the allowance or disallowance of tax claims which arise after the commencement of the case, for a tax period which ends on or before the filing of the case. . . . Notwithstanding the general rule, however, the rules of statutory construction require that specific statutory provisions control over broader provisions. . . . 11 U.S.C. § 1305 is a specific provision, drafted to address claims of taxing authorities which ‘arise’ or ‘become payable’ after the petition is filed. . . . [T]he primary purpose of § 502(i) is to differentiate priority tax claims from administrative tax claims. 11 U.S.C. § 502(i) makes clear that a claim for a tax period which ends prior to the filing of the petition, but for which the return is not due until after the petition, is a priority claim as defined by 11 U.S.C. § 507(a)(8), not an administrative expense claim under 11 U.S.C. § 503(b). 11 U.S.C. § 502(i) simply does not address the specific issue of how a tax claim entitled to priority status under § 507(a)(8)(A) is to be treated in a Chapter 13 case. Thus a § 1305 claim (should Treasury choose to file a claim) is entitled to priority, rather than administrative expense status.”).

DISPOSE OF THESE ISSUES

With respect to each of the following debtors, how do the facts affect calculation of disposable income? Is CMI changed? Are deductions from CMI different? How do the answers change if the debtor has CMI greater than applicable median family income or CMI less than applicable median family income? How are the facts accounted for on Schedules I and J and on Form B22C?

- ★ **DEBTOR1:** Debtor1 typically receives an annual bonus in February of each year. The bonuses average \$10,000 and Debtor1 anticipates a bonus in approximately that amount in the future. Does CMI change depending upon whether the petition is filed within six months of a previous bonus? Is § 101(10A)(B) implicated?
- ★ **DEBTOR2:** Debtor2 lives in Denver with his wife and two children but works five days a week at Boeing in Portland, Oregon. Debtor2 owns a home in Denver and rents an apartment in Portland. He has double utilities and many ordinary household expenses are significantly higher.
- ★ **DEBTOR3:** Debtor3's Spouse receives \$1,400 per month from SSI. Does it matter whether Spouse is a joint debtor?
- ★ **DEBTOR4:** Debtor4 owns Car1 with no debt; Car2 secures a note with a balance of \$250; and, Car3 is leased for \$750 per month. Should Debtor4 surrender Car2?
- ★ **DEBTOR5:** Debtor5's gas bill includes \$300 per month payment toward a \$10,000 furnace financed by the gas company.
- ★ **DEBTOR6:** Debtor6's actual home mortgage payment is \$900 and the Local Standard for housing is \$1,100.
- ★ **DEBTOR7:** Debtor7 has actual monthly rent of \$800. The applicable Housing and Utility Local Standard is \$1,644.
- ★ **DEBTOR8:** Debtor8's actual home mortgage payment is \$1,100 and the Local Standard for housing is \$900.
- ★ **DEBTOR9:** Debtor9 has a second mortgage that is \$1,000 a month but it is wholly unsecured.

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- ★ **DEBTOR10:** Debtor10's spouse is pregnant and her substantial income will be gone when she takes pregnancy leave in four months. She does not plan to return to work for at least six months.
- ★ **DEBTOR11:** Debtor11's Spouse has children by a previous marriage. Spouse's former spouse is required to pay \$1,500 per month to Mortgage holder as a mortgage payment for the house in which Spouse, children and Debtor11 live. How do answers change if Spouse is/is not a joint debtor?
- ★ **DEBTOR12:** Debtor12's daughter receives a \$10,000 scholarship that is credited directly against tuition, room and board at her college.
- ★ **DEBTOR13:** Debtor13 has a pension loan that will be repaid in 24 months at contractual amount.
- ★ **DEBTOR14:** Debtor14 received a \$2,000 tax refund during the six months before the petition. Debtor14 anticipates receiving a \$4,000 tax refund during the current tax year. Does it matter that the larger tax refund is caused by an unreimbursed medical emergency?
- ★ **DEBTOR15:** Debtor15 with CMI greater than applicable median family income deducts contractual debt secured by bass boat and by vacation home. Plan proposes to surrender bass boat and vacation home mortgage will be paid by former spouse consistent with divorce decree.
- ★ **DEBTOR16:** Debtor16 averages expenses of \$2,000 per month for medical care in excess of any available insurance coverage. Would it matter if half of these medical expenses are for a parent who is not a dependent?
- ★ **DEBTOR17:** Debtor17's household size changes from two persons to six persons two months after the petition when Debtor17's daughter, son-in-law and two grandchildren move in with the debtor. What if the debtor lost a job a month after the petition? How do these facts change calculation of the applicable commitment period?
- ★ **DEBTOR18:** At the petition, Debtor18 is unemployed and has been for more than six months. Debtor18 and Spouse have been living off of Spouse's \$5,000 per month income. How do CMI and disposable income calculations change depending on whether Debtor18 files separately or jointly with Spouse? How do the calculations change if CMI is above or below applicable median family income?
- ★ **DEBTOR19:** Debtor19 is a long-haul truck driver on the road 90% of the time. Debtor19's nonfiling Spouse has \$5,000 per month of separate income and spends the entire amount on her separate food, clothing, transportation, child support for her separate dependents, credit cards and gambling. How do nonfiling Spouse's income and expenses figure into disposable income calculation?

- ★ **DEBTOR20:** During the six months before the petition, Debtor20 received a \$25,000 distribution from a qualified 401k plan. Is that distribution included in CMI? in disposable income? Does it matter that Debtor20 used the distribution as the down payment on a personal residence?
- ★ **DEBTOR21:** Debtor21 owns and operates a donut shop as a sole proprietorship. Gross income for the business is \$20,000 per month. Average monthly business expenses are \$15,000 per month. How do these numbers affect CMI? Does it matter whether Debtor21 has CMI greater than applicable median family income? What if the business expenses include salary to Debtor21? Does it matter that Debtor21 retains the \$5,000 net income each month for distribution as a bonus in December? What if the business provides Debtor21 a \$500 per month car as a benefit? What if the business pays \$600 per month for Debtor21's health insurance?
- ★ **DEBTOR22:** Debtor22's CMI is \$100 above the applicable median family income according to the chart found on the U.S. Trustee's Web page. The Census Bureau's Web page contains links to four charts that produce applicable median family income figures that are as much as \$500 above and \$500 below the amount shown on the UST's Web page, with a margin of error of \$1,000 according to the Census Bureau.
- ★ **DEBTOR23:** Debtor23 cosigned car note for fiancé. Debtor23 occasionally drives car and occasionally helps with payments but car is primarily driven by fiance and paid for by fiance.
- ★ **DEBTOR24:** Debtor24 has \$165 per month expense for cell phones, \$80 a month for cable that includes Internet service and \$35 per month for a land telephone line.
- ★ **DEBTOR25:** Debtor25 makes court-ordered payments to Exspouse in the amount of \$600 per month for child support. The child will turn 18 and be emancipated in 24 months. How is this obligation accounted for on B22C? on Schedules I and J? Does accounting change if the debtor's CMI is less than or greater than applicable median family income?
- ★ **DEBTOR26:** Debtor26 has a qualified 401k plan and could contribute as much as \$1,250 per month. Debtor26 consults you before filing Chapter 13 petition and is currently only paying \$500 per month into the 401k plan. Should Debtor26 kick up the 401k payment before filing? after filing? Does timing of or change in 401k contribution change CMI or disposable income calculations?

APPLICABLE CASES

Ransom v. FIA Card Servs., N.A., ___ U.S. ___, 131 S. Ct. 716, 178 L. Ed. 2d 603, 721-26, 725 n.5 (Jan. 11, 2011) (“Congress adopted the means test . . . to help ensure that debtors who *can* pay creditors *do* pay them. . . . For a debtor whose income is above the median for his State, the means test identifies which expenses qualify as ‘amounts reasonably necessary to be expended.’ The test supplants the pre-BAPCPA practice of calculating debtors’ reasonable expenses on

a case-by-case basis, which led to varying and often inconsistent determinations. . . . A debtor may claim a deduction from a National or Local Standard table . . . if but only if that deduction is appropriate for him. And a deduction is so appropriate only if the debtor has costs corresponding to the category covered by the table—that is, only if the debtor will incur that kind of expense during the life of the plan. . . . Because Congress intended the means test to approximate the debtor’s reasonable expenditures on essential items, a debtor should be required to qualify for a deduction by actually incurring an expense in the relevant category. If a debtor will not have a particular kind of expense during his plan, an allowance to cover that cost is not ‘reasonably necessary’ within the meaning of the statute. . . . Although the statute does not incorporate the IRS’s guidelines, courts may consult this material in interpreting the National and Local Standards; after all, the IRS uses those tables for a similar purpose—to determine how much money a delinquent taxpayer can afford to pay the Government. The guidelines of course cannot control if they are at odds with the statutory language. But here, the Collection Financial Standards’ treatment of the car-ownership deduction reinforces our conclusion that, under the statute, a debtor seeking to claim this deduction must make some loan or lease payments.” In a footnote: “This interpretation also avoids the anomalous result of granting preferential treatment to individuals with above-median income. Because the means test does not apply to Chapter 13 debtors whose incomes are below the median, those debtors must prove on a case-by-case basis that each claimed expense is reasonably necessary. . . . If a below-median-income debtor cannot take a deduction for a nonexistent expense, we doubt Congress meant to provide such an allowance to an above-median-income debtor—the very kind of debtor whose perceived abuse of the bankruptcy system inspired Congress to enact the means test.”).

Hamilton v. Lanning, ___ U.S. ___, 130 S. Ct. 2464, 2469-78, 177 L. Ed. 2d 23 (June 7, 2010) (Adopting “forward-looking approach,” bankruptcy courts should begin by calculating disposable income and in “unusual cases” may go further to account for “known or virtually certain” information about the debtor’s future income or expenses. “We granted certiorari to decide how a bankruptcy court should calculate a debtor’s ‘projected disposable income.’ Some lower courts have taken what the parties term the ‘mechanical approach,’ while most have adopted what has been called the ‘forward-looking approach.’ We hold that the ‘forward-looking approach’ is correct. . . . [R]espondent’s argument is supported by the ordinary meaning of the term ‘projected.’ . . . [T]he word ‘projected’ appears in many federal statutes, yet Congress rarely has used it to mean simple multiplication. . . . [P]re-BAPCPA case law points in favor of the ‘forward-looking’ approach. . . . Congress did not amend the term ‘projected disposable income’ in 2005, and pre-BAPCPA bankruptcy practice reflected a widely acknowledged and well documented view that courts may take into account known or virtually certain changes to debtors’ income or expenses when projecting disposable income. . . . The mechanical approach also clashes repeatedly with the terms of 11 U.S.C. § 1325. . . . [A] court taking the forward-looking approach should begin by calculating disposable income, and in most cases, nothing more is required. It is only in unusual cases that a court may go further and take into account other known or virtually certain information about the debtor’s future income or expenses. . . . We decline to infer from § 1325’s incorporation of § 707 that Congress intended to eliminate, *sub silentio*, the discretion that courts previously exercised when projecting disposable income to account for known or virtually certain changes. . . . In cases in which a debtor’s disposable income during the 6-month lookback period is either substantially lower or higher than the debtor’s disposable income during the plan period, the mechanical approach would produce senseless results that we do not think that Congress intended. . . . [W]e hold that when a bankruptcy court calculates a debtor’s projected disposable income, the court may account for changes in the debtor’s income or expenses that are known or virtually certain at the time of confirmation.”).

Drummond v. Welsh (In re Welsh), No. 12-60009, 2013 WL 1192961 (9th Cir. Mar. 25, 2013) (Good-faith analysis under § 1325(a)(3) does not include consideration of Social Security income excluded from CMI by § 101(10A)(B) and does not include consideration of payments on secured debts deductible from CMI to determine projected disposable income under § 707(b)(2)(A)(iii). “We cannot conclude . . . that a plan prepared completely in accordance with the very detailed calculations that Congress set forth is not proposed in good faith. To hold otherwise would be to allow the bankruptcy court to substitute its judgment of how much and what kind of income should be dedicated to the payment of unsecured creditors for the judgment of Congress. Such an approach would not only flout the express language of Congress, but also one of Congress’s purposes in enacting the BAPCPA, namely to ‘reduce[] the amount of discretion that bankruptcy courts previously had over the calculation of an above-median debtor’s income and expenses.’ . . . Congress has spoken directly, and it explicitly excluded Social Security income from the calculation of disposable income. We thus join every court of appeals that has decided the issue in concluding that, ‘[w]hen a Chapter 13 debtor calculates his repayment plan payments exactly as the Bankruptcy Code and the Social Security Act allow him to, and thereby excludes [Social Security income], that exclusion cannot constitute a lack of good faith.’ . . . In sum, the inquiry focuses on the debtor’s motivation and forthrightness with the court in seeking relief. The disposable income

requirement, in contrast, focuses on the amount of funds that Congress expects a debtor to devote to paying off unsecured creditors. These two inquiries are, indeed, separate and distinct. Therefore, consideration of disposable income—now defined in great detail by Congress—has no role in the good faith analysis. . . . Again, in the BAPCPA, Congress chose to remove from the bankruptcy court’s discretion the determination of what is or is not ‘reasonably necessary.’ It substituted a calculation that allows debtors to deduct payments on secured debts in determining disposable income. That policy choice may seem unpalatable either to some judges or to unsecured creditors. Nevertheless, that is the explicit choice that Congress has made. We are not at liberty to overrule that choice. . . . BAPCPA requires debtors to subtract their payments to secured creditors from their current monthly income. . . . Congress did not see fit to limit or qualify the kinds of secured payments that are subtracted from current monthly income to reach a disposable income figure. . . . [W]e would not be justified in imposing such a limitation under ‘the guise of interpreting ‘good faith.’ . . . We conclude that Congress’s adoption of the BAPCPA forecloses a court’s consideration of a debtor’s Social Security income or a debtor’s payments to secured creditors as part of the inquiry into good faith under 11 U.S.C. § 1325(a).”), *aff’g*, 465 B.R. 843, 849–55 (B.A.P. 9th Cir. Feb. 17, 2012) (Perris, Pappas, Hollowell) (Debtors with CMI greater than applicable median family income are allowed to deduct secured debt payments under § 707(b)(2)(A)(iii) without regard to necessity if debtor determines not to surrender the collateral or to strip the lien. “If the future secured debt payments referred to in § 707(b)(2)(A)(iii)(I) were limited to secured debt payments on property necessary for the debtor’s or debtor’s dependents’ maintenance and support, there would be no reason for § 707(b)(2)(A)(iii)(II) to limit allowable cure payments to cure payments on *necessary* property. . . . [Section] 707(b)(2)(A)(iii) allows deduction as an expense of payments on secured debt, unless the debtor determines that payment on the outstanding amount of the secured claim is unnecessary by either surrendering the property or avoiding the lien securing the claim. The bankruptcy court did not err in allowing debtors in calculating their disposable income to deduct their secured debt payments on the six vehicles that they intend to retain. . . . Congress has made the policy choice that payments on secured claims are ‘[a]mounts reasonably necessary to be expended’ for the debtor’s or the debtor’s dependents’ maintenance and support. *See* § 1325(b)(3); § 707(b)(2). In making its good faith determination under § 1325(a)(3), the bankruptcy court cannot find lack of good faith based on a debtor’s deduction of those allowed expenses in their calculation of disposable income. To do so would be to second-guess the Congressional policy choice about what expenses are reasonably necessary for a debtor’s maintenance and support.”).

Burden v. Seafort (In re Seafort), 669 F.3d 662 (6th Cir. Feb. 15, 2012) (Suhrehrich, Gibbons, McKeague), *aff’g on other grounds*, 437 B.R. 204, 209-11 (B.A.P. 6th Cir. Sept. 14, 2010) (Boswell, McIvor, Shea-Stonum) (Citing *Hamilton v. Lanning*, 130 S. Ct. 2464, 177 L. Ed. 2d 23 (June 7, 2010), and citing *McCarty v. Lasowski (In re Lasowski)*, 575 F.3d 815 (8th Cir. Aug. 12, 2009) (Bye, Colloton, Gruender), and *Nowlin v. Peake (In re Nowlin)*, 576 F.3d 258 (5th Cir. July 17, 2009) (King, Dennis, Elrod), when debtor is eligible for but not making contributions to qualified retirement plan at the petition, plan cannot commence contributions to retirement plan when retirement loans are repaid. “[O]nly 401(k) contributions which are being made at the commencement of the case are excluded from property of the estate under § 541(b)(7). . . . Notably, [§ 1306], which addresses property and earnings that come into existence *after* the debtor files a petition for relief does not exclude 401(k) contributions from property of the estate. . . . [Section] 541(b)(7) does not exclude income which becomes available post-petition in order to start making contributions to a 401(k) plan. . . . Conspicuously, § 541(b)(7) makes no reference to ‘projected disposable income.’ . . . Income which becomes available after the filing of a case is ‘projected disposable income’ and that income is not excluded from property of the estate. Projected disposable income must be used to pay creditors pursuant to § 1325(b)(1)(B) and may not be used to commence making payments to a 401(k) plan. . . . Because repayment of a 401(k) loan during the life of the plan can be reasonably anticipated at the time of confirmation, the Panel concludes that post-petition income that becomes available after 401(k) loans are repaid must be considered as projected disposable income available to unsecured creditors.”).

Baud v. Carroll, 634 F.3d 327, 345-57 (6th Cir. Feb. 4, 2011) (Cole, Clay, Katz) (To determine projected disposable income for debtors with CMI greater than applicable median family income, the statutory exclusions from income in § 101(10A)—such as Social Security—should not be included and the statutory deductions in § 707(b)(2)(A) and (B) are allowed—for example, a contractually scheduled mortgage expense larger than the Local Standards Housing allowance; applicable commitment period and duration must be the same without regard to whether the debtor has positive, negative or no projected disposable income. Debtors had Social Security benefits of \$1,758 per month and a monthly mortgage payment of \$1,699.93 in a state in which the IRS Local Standard Housing allowance was \$791. “We conclude that benefits received under the Social Security Act . . . should not be included in the calculation of projected disposable income. . . . Neither [*Hamilton v. Lanning*, ___ U.S. ___, 130 S. Ct. 2464, 177 L. Ed. 2d 23 (June 7, 2010),]

nor [*Darrohn v. Hildebrand (In re Darrohn)*, 615 F.3d 470 (6th Cir. July 22, 2010) (Suhrehrich, McKeague, Griffin),] . . . supports the view that a court may disregard the Code’s definition of disposable income (which incorporates the income exclusions of § 101(10A)) simply because there is a disparity between the amount calculated using that definition and the debtor’s actual available income as set forth on Schedule I. In other words, the discretion *Lanning* affords does not permit bankruptcy courts to alter BAPCPA’s formula for calculating disposable income (*i.e.*, does not permit the court to alter the items to be included in and excluded from income). . . . Were we to follow the approach espoused by the Appellant, bankruptcy courts—contrary to what the Supreme Court contemplated in *Lanning* and contrary to the express statutory language—would be permitted to depart from the definition of disposable income set forth in § 1325(b)(2) in virtually every case, given the improbability of a debtor’s actual financial circumstances matching perfectly the disposable-income calculation set out by BAPCPA. . . . In sum, it is appropriate to calculate a debtor’s projected disposable income using the inclusions and exclusions from disposable income set forth in the Code and the deductions permitted by the Code, supplemented as of the date of confirmation and adjusted to take into account changes during the applicable commitment period that are known or virtually certain at the time of confirmation. . . . [T]he calculation of a debtor’s projected disposable income (a) must exclude income—such as benefits received under the Social Security Act—that are excluded from the definition of current[] monthly income set forth in § 101(10A) and (b) must deduct ‘amounts reasonably necessary to be expended’ as defined in § 1325(b)(3) which, for an above-median-income debtor, means that the debtor’s average monthly payments on account of secured debts calculated pursuant to § 707(b)(2)(A)(iii) must be subtracted if the debtor intends as of the date of confirmation to continue making those payments.”).

SWEET TALKER

Sweet Talker talked his banker into a \$100,000 loan to open a bar and grill. He kept promising a written financial statement, but delivered lots of talk and no paper.

Sweet Talker told his banker that he “made a million dollars last year.” This was true but for the distinction between “gross” and “net.” Net was more like \$30,000.

Sweet Talker told his banker that he “owned a \$500,000 house free of debt.” This was true but for the \$750,000 IRS lien.

Sweet Talker told his banker that he had a liquor license that would allow him to open the bar and was independently worth “at least \$100,000.” This license had expired and the state refused to renew because of unpaid taxes.

Sweet Talker talked a lot about his Tennessee Titans PSLs and season tickets and how folks were always offering him \$25,000 or more because his seats were so good.

Sweet Talker offered the bank a security interest in Sweet Talker Mixers, Inc.—a business he claimed to own that developed and marketed exotic mixed drink preparations for bars and restaurants. Sweet Talker Mixers, Inc. may have been a good idea but it was only an idea.

When it came time to make the loan, bank took mortgage on Sweet Talker’s home in a “stated income” transaction. Bank did not verify Sweet Talker’s income.

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- Sweet Talker is in Chapter 7 and you must advise both the debtor and the bank with respect to § 523(a)(2) actions.
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APPLICABLE CASES

Bandi v. Becnel (In re Bandi), 683 F.3d 671 (5th Cir. 2012) (Misrepresentations regarding ownership of a commercial building, a condominium development, and a residence—while intended to convey impression that debtors owned valuable real property and that their personal guarantees would be backed by some measure of wealth—were not statements respecting financial condition for purposes of § 523(a)(2). “[T]he phrase ‘a statement respecting the debtor’s

or an insider's financial condition' as used in § 523(a)(2) was meant to embody terms commonly understood in commercial usage rather than a broadly descriptive phrase intended to capture any and all misrepresentations that pertain in some way to specific assets or liabilities of the debtor. The term 'financial condition' has a readily understood meaning. It means the general overall financial condition of an entity or individual, that is, the overall value of property and income as compared to debt and liabilities. A representation that one owns a particular residence or a particular commercial property says nothing about the overall financial condition of the person making the representation or the ability to repay debt. . . . We find support for construing 'financial condition' in § 523(a)(2) to connote the overall net worth of an entity or individual in other provisions of the Bankruptcy Code. The term 'financial condition' is part of the definition of the term 'insolvent.' The words 'financial condition' are used three times to define 'insolvent' with respect to three classes of entities. In each instance, 'insolvent' is a 'financial condition.' In the first two instances, the financial condition of insolvency is defined by reference to debts as compared to property. With respect to the third instance, which pertains to municipalities, the financial condition of insolvency is defined by reference to 'generally not paying its debts as they become due' or 'unable to pay its debts as they become due.' . . . [S]tatements within the meaning of th[is] section 'are those that purport to present a picture of the debtor's overall financial health.'").

Heritage Pacific Fin., LLC v. Machuca (In re Mashuca), BAP No. NC-12-1081-MkHPa, 2012 WL 6523187 (B.A.P. 9th Cir. Dec. 14, 2012) (Mortgage lender presented no admissible facts to prove reasonable reliance on "stated income" in debtor's application for loan. As bankruptcy court observed, "'stated income loans were . . . a convenient excuse by lenders to bypass even the most rudimentary attempt at due diligence of the borrower's income, all in an effort to make the loan and sell it on the secondary market.'").

Barnes v. Belice (In re Belice), 461 B.R. 564 (B.A.P. 9th Cir. 2011) (Oral misrepresentations "regarding various items that might ultimately be included as assets in a balance sheet or in a statement of net worth" were not statements respecting financial condition and were actionable under § 523(a)(2)(A). "Section 523(a)(2)(A) excepts debts from discharge when those debts were incurred by way of 'false pretenses, false representation, or actual fraud. . . .' But not all fraud leads to nondischargeability. Congress expressly excluded oral 'statement[s] respecting the debtor's or an insider's financial condition' from § 523(a)(2)(A)'s coverage. . . . [C]ourts have sharply differed over [the] proper scope [of the phrase 'statements respecting the debtor's or an insider's financial condition']. . . . Those cases adopting a broad interpretation of the phrase have concluded that the phrase includes 'any statement that has a bearing on the financial position of the debtor or an insider.' This includes any statement regarding 'the status of a single asset or liability,' . . . as is the case here. Those cases adopting a narrow or strict interpretation have concluded that the phrase includes 'only statements providing information as to a debtor's net worth, overall financial health, or an equation of assets and liabilities.' . . . [T]he phrase 'statement respecting the debtor's . . . financial condition' should be narrowly interpreted. . . . [S]uch statements 'are those that purport to present a picture of the debtor's overall financial health.'" Complaint alleged these false statements by debtor: "a) Debtor's monthly salary as an attorney . . . was \$30,000; b) Debtor had made a \$100,000 profit on the sale of his La Jolla residence in 2007; c) Debtor was paying \$7,000 per month in rent which he could well afford; d) Debtor was a San Diego Charger [*sic*] season ticket holder; e) Debtor had purchased a \$28,000 diamond engagement ring in July 2007; f) Debtor voluntarily left [his law firm] in late 2007 because of more lucrative income in the luxury transportation sector (helicopter and jet service) and his involvement with a computer systems company; g) The security for Plaintiff's loan would be a partial ownership interest in the BELICE-MEHTA PARTNERSHIP, an investor in an entertainment establishment in Macau, called the Monkey Bar; h) The Monkey Bar was extremely successful, would likely be sold to the Sands Casino company in 2008, and would provide the Debtor with yet another revenue source; and i) Debtor's interest in the BELICE-MEHTA PARTNERSHIP was worth far more than the loan from the Plaintiff to the Debtor." Neither individually nor in combination did these amount to statements concerning debtor's financial condition. "Statements a, b, c and f relate to [debtor's] income and expenses, but they simply cannot be conceived as akin to any sort of complete or comprehensive statement of income and expenses. . . . [T]hey do not either separately or when taken together reflect his overall cash flow situation, his overall income and expenses, or the relative values and amounts of his assets and liabilities. . . . Statements d, e, g, h and i relate to a handful of [debtor's] assets, but they do not reveal anything meaningful or comprehensive about his overall net worth. These statements do not purport to reflect all of [debtor's] assets, and they tell us nothing regarding his liabilities or any liens against any of his property. . . . At most, they are isolated representations regarding various items that might ultimately be included as assets in a balance sheet or in a statement of net worth. The bankruptcy court thus erred when it ruled that [plaintiff] had not stated and could not state a claim for relief under § 523(a)(2)(A)[.]"

Sharfarz v. Goguen (In re Goguen), 453 B.R. 452 (B.A.P. 1st Cir. 2011) (per curiam) (For purposes of § 523(a)(2)(A), plaintiff’s damages were caused by breach of contract in failing to finish job and negligence in estimating cost—not by debtor’s misrepresentations about building permit. “Section 523(a)(2)(A) ‘requires a ‘direct link’ between the alleged fraud and the creation of the debt to be excepted from discharge.’ . . . ‘The Restatement explains that proximate causation encompasses two elements, ‘causation in fact’ and ‘legal causation.’ . . . There is causation in fact ‘[w]hen a creditor establishes that a debtor fraudulently induced the creditor to enter into a transaction by a misrepresentation that goes to the essence of the transaction.’ . . . Courts typically find that a debtor’s misrepresentation regarding his/her expertise to complete the work contemplated by the transaction satisfies this standard, ‘if the misrepresentation was a substantial factor in entering into the transaction, the debtor’s work later proves to be defective, and the creditor suffers a loss.’ . . . , ‘A fraudulent misrepresentation is a legal cause of a pecuniary loss resulting from action or inaction in reliance upon it if, but only if, the loss might reasonably be expected to result from the reliance.’ Restatement (Second) of Torts at § 548A. . . . The Restatement definition of ‘causation in fact’ required [plaintiff] to demonstrate that [debtor’s] misrepresentation induced him to enter into the construction contract. . . . [Debtor’s] misrepresentation regarding the permit application post-dated the signing of the construction contract, so it could not possibly have induced [plaintiff] to enter into the contract in the first instance. . . . While [debtor’s] lie might have prevented [plaintiff] from canceling the contract once entered into, that alone does not satisfy the Restatement requirement that the misrepresentation go to the essence of the contract. . . . [C]ausation in fact is absent. The second element of proximate cause, legal causation, required [plaintiff] to establish that his damages could reasonably have been expected to result from his reliance on [debtor’s] misrepresentation. It is not reasonable to suggest that Goguen could have foreseen that Sharfarz would spend \$88,000.00 beyond the contract price because he misrepresented the status of the permit application for a ten-week period after they signed the contract. . . . Alternatively, it was foreseeable that [debtor] could have completed the renovation in a timely and workman-like manner, even after lying about the permit, thereby preventing [plaintiff’s] pecuniary harm. . . . [L]egal causation is also absent. . . . While [debtor’s] breach of contract might have caused [plaintiff’s] damages, breach of contract is not a ground for nondischargeability under § 523.”).

Duncan v. Fidelity Nat’l Title Co. (In re Duncan), No. NC-09-1372-KiSaH, 2011 WL 3300162, *6-*7 (B.A.P. 9th Cir. Feb. 4, 2011) (unpublished) (Intentional omissions and false representations regarding liens on property rendered damages on title insurance nondischargeable under § 523(a)(2)(A). That title company failed to update search before closing—relying instead on search it conducted three months prior and on debtor’s representations—did not preclude justifiable reliance. “[C]ourts apply a subjective ‘justifiable’ reliance standard, which turns on a person’s knowledge under the particular circumstances. ‘Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases.’ ‘[A] person is justified in relying on a representation of fact although he might have ascertained the falsity of the representation had he made an investigation.’ . . . [N]egligence in failing to discover an intentional misrepresentation is no defense for the fraudulent party. . . . [D]ebtor’s nondisclosure of a material fact in the face of a duty to disclose can establish the requisite reliance and causation for actual fraud under the Bankruptcy Code. A party to a business transaction is under a duty to disclose to the other party facts basic to the transaction before the transaction is consummated, if he or she knows that the other is about to enter into the transaction under a mistake as to them and that the other party, because of the relationship between them, would reasonably expect disclosure of such facts. Reliance may also be presumed when ‘the case can be characterized as one that primarily alleges omissions.’ . . . In order to determine whether the presumption applies, the court must analytically characterize the action as either primarily a nondisclosure case or a positive misrepresentation case. . . . [Plaintiff] Fidelity’s contributory negligence of not conducting a title search . . . , which likely would have revealed the . . . first deed of trust, is no bar to recovery because [debtor’s] fraudulent conduct constitutes an intentional tort. Although Fidelity is a sophisticated party in the business of investigating and insuring titles, no obvious ‘red flags’ existed on the face of the . . . loan documents to alert Fidelity of possible fraud and that it should have investigated further. No red flags could have existed because [debtor] intentionally omitted the . . . first deed of trust on all of the pertinent . . . loan documents The bankruptcy court correctly determined that Fidelity’s reliance was established by [debtor’s] intentional omissions, which proximately caused Fidelity’s loss[.]”).

Prim Capital Corp. v. May (In re May), 368 B.R. 85 (B.A.P. 6th Cir. July 19, 2007) (unpublished) (Aug, Latta, Parsons) (Neither debtor’s statement as to why he needed a loan, how he expected to repay the loan, nor an intention to pledge home for security amounted to statements respecting financial condition for purposes of 11 U.S.C. § 523(a)(2). “Two views have emerged on the proper interpretation of the phrase ‘respecting the debtor’s . . . financial condition.’ The

'broad interpretation' includes any communication that has a bearing on the debtor's financial position. In other words, any communication addressing the status of a single asset or liability qualifies. . . . The 'strict interpretation,' on the other hand, limits statements 'respecting the debtor's . . . financial condition' to communications that purport to state the debtor's overall net worth, overall financial health, or equation of assets and liabilities. . . . The strict interpretation, limiting statements concerning the debtor's financial condition only to those that actually claim to state the debtor's overall financial health, net worth or assets and liabilities, is most consistent with the text and structure of the Bankruptcy Code. . . . A broad interpretation simply brings too many statements under the rubric 'concerning the debtor's financial condition,' rendering the limitation meaningless. . . . There is support in the Bankruptcy Code for a narrow construction of the phrase 'concerning the debtor's . . . financial condition' that would define the term as relating only to information on the debtor's overall financial condition. The term 'insolvent,' as defined in the Code, refers to the 'financial condition such that the sum of [an] entity's debts is greater than all of such entity's property . . . exclusive of [certain types] of property.' . . . The use of the term financial condition to describe insolvency suggests that the term financial condition 'relates to a debtor's net worth or overall financial condition.' . . . Thus, a narrow interpretation, defining financial condition as statements that are made regarding a debtor's overall net worth, assets and liabilities, best adheres to the meaning and purpose of the Bankruptcy Code and is the interpretation that we adopt. . . . [At issue are] three oral statements that the Debtor allegedly made to Prim: (1) that the Debtor needed the loan to satisfy a large tax assessment; (2) that the Debtor would be able to repay the loan with proceeds from an expected large settlement; and (3) that the Debtor promised to pledge his own house as collateral. . . . [N]either of the first two statements is in respect of the Debtor's financial condition as we strictly interpret that phrase. Regarding the first statement, no conclusions can be drawn about the Debtor's net worth, overall financial health or equation of assets or liabilities from the simple statement that a loan is needed to satisfy a tax obligation. That is a statement about only one of the Debtor's liabilities and not the Debtor's overall financial condition. Similarly, the second statement is not related to the Debtor's overall financial health but is again related to a single debt and the potential of one source of income. . . . [Similarly,] Debtor['s] promise[] to pledge his own house as collateral is not related to the Debtor's overall financial condition.").

THE PROOF IS IN THE CLAIM

MassiveMortgageServicer is the latest in a long line of servicers with rights to service Debtors' home mortgage. LargeTrust sends an e-mail to MassiveMortgageServicer stating that it is owed \$157,000 secured by a first mortgage on Debtors' home. The monthly mortgage payment is \$1,500 and it adjusts every six months. It will go to \$1,700 a month in less than 60 days. The escrow account is short \$4,500 and Debtor is three months in arrears of regular monthly payments. Insurance may be lapsed, but forced-placed insurance is in effect with a premium of \$3,000 per year. Attorneys fees for ongoing foreclosure total \$3,700 and are rising.

Debtors' Chapter 13 plan proposes to cure default in 36 months and to maintain payments on the first mortgage.

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- Should Massive file a motion for relief from the stay? Does it matter that LargeTrust can't find the note? Does it matter if the mortgage was separated from the note and is in a warehouse, maybe? What information would you want before you would file a motion for relief from the stay for Massive? What defensive tactics would you use for Debtor if Massive does file a motion for relief from the stay?
 - Should Massive file a proof of claim? What should the proof of claim say? What should be attached to the proof of claim? Should it be a real or a "fake" proof?
 - What are Massive's obligations during the Chapter 13 case under new Bankruptcy Rule 3002.1? What are Debtors' rights and responsibilities under the new rule? Against what standards will the new rule be tested?
 - During the case Massive discovers that it failed to include attorneys fees and forced-placed insurance premiums in its arrearage claim. What can/should it do? Will a notice of fees work? What would be the debtor's response? What happens to fees and expenses that accrued before there was a Bankruptcy Rule 3002.1? What about fees and expenses that are now more than 180 days old? What if the fees and expenses accrued postpetition but are now more than 180 days old?
 - During the case, Massive accrues postpetition fees and expenses until it receives the trustee's notice that all arrears have been cured and the mortgage is current. Was this a good strategy for Massive? What should it do in response to the trustee's notice.

- Massive realizes at the end of the case that the debtor has postpetition defaults totalling several thousand dollars because of interest rate adjustments. No notices of changed payments were sent during the case because Massive’s counsel instructed Massive not to send any notices to Chapter 13 debtors. What happens now?

APPLICABLE CASES

In re Taylor, 655 F.3d 274 (3d Cir. Aug. 24, 2011) (Fuentes, Smith, Van Antwerpen) (Sanctions against HSBC Mortgage Corp., its attorneys and their law firm for blind reliance on inaccurate data supplied by HSBC through a computerized system called NewTrak in support of a stay relief motion and in claim litigation. The Third Circuit described the case as “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.” The original proof of claim contained factual errors; the wrong mortgage was attached, debtors’ monthly payment was incorrect and the value of the debtors’ home was understated by \$100,000. Although those errors were corrected in an amended proof of claim, the debtors objected to the claim based on a long running dispute over forced flood insurance. “HSBC does not deign to communicate directly with the firms it employs in its high-volume foreclosure work; rather its uses [the NewTrak system] to assign individual firms discrete assignments and provide the limited data the system deems relevant to each assignment. The firms are selected and the instructions generated without any direct human involvement. The firms so chosen generally do not have the capacity to check the data (such as the amount of mortgage payment or time in arrears) provided to them by NewTrak and are not expected to communicate with other firms that may have done related work on the matter. Although it was technically possible for a firm hired through NewTrak to contact HSBC to discuss the matter on which it has been retained, it is clear from the record that this was discouraged and that some attorneys, including at least one Urden Firm attorney, did not believe it to be permitted. . . . We appreciate that the use of technology can save both litigants and attorneys time and money, and we do not, of course, mean to suggest that the use of databases or even certain automated communications between counsel and client are presumptively unreasonable. However, 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.”).

Veal v. American Home Mortg. Servicing, Inc. (In re Veal), 450 B.R. 897 (B.A.P. 9th Cir. June 10, 2011) (Markell, Kirscher, Jury) (Wells Fargo lacked standing to seek stay relief because its documents failed to show a colorable claim that Wells Fargo had interest in underlying note, either as a holder or as an “other person entitled to enforce the note,” or that it had ownership or other interest in the note. Debtors’ objection to servicer’s proof of claim on behalf of Wells Fargo was remanded for fact finding with respect to whether servicer had an agency relationship with a person entitled to enforce the note. Bankruptcy court granted Wells Fargo relief from stay and overruled debtors’ objection to proof of claim filed by American Home Mortgage Servicing, Inc. (AHMSI) on behalf of Wells Fargo. “Given the limited nature of the relief obtained through a motion for relief from the stay, the expedited hearing schedule § 362(e) provides, and because final adjudication of the parties’ rights and liabilities is yet to occur, this Panel has held that a party seeking stay relief need only establish that it has a colorable claim to enforce a right against property of the estate. . . . [U]nder the common law generally, the transfer of a mortgage without the transfer of the obligation it secures renders the mortgage ineffective and unenforceable in the hands of the transferee. . . . [T]o show a colorable claim against the Property, Wells Fargo had to show that it had some interest in the Note, either as a holder, as some other ‘person entitled to enforce,’ or that it was someone who held some ownership or other interest in the Note. . . . None of the exhibits attached to Wells Fargo’s papers, however, establish its status as the holder, as a ‘person entitled to enforce,’ or as an entity with any ownership or other interest in the Note. . . . [W]ithout any evidence tending to show it was a ‘person entitled to enforce’

the Note, or that it has an interest in the Note, Wells Fargo has shown no right to enforce the Mortgage securing the Note. Without these rights, Wells Fargo cannot make the threshold showing of a colorable claim to the Property that would give it prudential standing to seek stay relief or to qualify as a real party in interest.”).

Greenpoint Mortgage Funding, Inc. v. Herrera (In re Herrera), 422 B.R. 698, 705-06 (B.A.P. 9th Cir. Jan. 5, 2010) (Pappas, Hollowell, Dunn) (BAP approves “best practices” provision from model plan for Central District of California: “A2. Except as provided in paragraphs (3) and (4) below, if the Mortgage Creditor provided monthly statements to the debtor pre-petition, the Mortgage creditor must provide monthly statements to the debtor. The monthly statements must contain at least the following information concerning post-petition payments to be made outside the Plan: (a) The date of the statement and the date of the next payment due; (b) The amount of the current monthly payment; (c) The portion of the payment attributable to escrow, if any; (d) The post-petition amount past due, if any, and from what date; (e) Any outstanding late charges; (f) The amount and date of receipt of all payments received since the date of the last statement; (g) A telephone number and contact information that the debtor or the debtor’s attorney may use to obtain reasonably prompt information regarding the loan and recent transactions; and (h) The proper payment address. A4. If, pre-petition, the Mortgage Creditor provided the debtor with “coupon books” or some other preprinted, bundled evidence of payments due, the Mortgage Creditor is not required to provide monthly statements under subsection (2) of this section. However, the Mortgage Creditor must supply the debtor with additional coupon books as needed or requested in writing by the debtor. If a Mortgage Creditor does send a monthly statement to the debtor or the chapter 13 trustee and the statement complies with subsection (B)(2) below, the Mortgage Creditor is entitled to the protections set out in such subsection. A5. The Mortgage Creditor must provide the following information to the debtor upon reasonable written request of the debtor: (a) The principal balance of the loan; (b) The original maturity date; (c) The current interest rate; (d) The current escrow balance, if any; (e) The interest paid to date; and (f) The property taxes paid year to date, if any. A6. The Mortgage Creditor must provide the following information to the debtor, the debtor’s attorney and, when the debtor is making ongoing mortgage or arrearage payments through the chapter 13 trustee, the chapter 13 trustee, at least quarterly, and upon reasonable written request of the debtor or the chapter 13 trustee: (a) any other amounts due or proposed change in payments arising from an adjustable interest rate, charges paid by the Mortgage Creditor for taxes, insurance, attorney’s fees or any other expenses or fees charged or incurred by the Mortgage Creditor, such as property inspection fees, servicing fees or appraisal fees; (b) the nature of the expense or charge; and (c) the date of the payment. B3. As a result of a Mortgage Creditor’s alleged non-compliance with this Addendum, the debtor may file a Motion for Order to Show Cause in compliance with Local Bankruptcy Rule 9020–1 no earlier than sixty days after the Mortgage Creditor’s failure to comply with sections (A) or (B). Before filing the motion, the debtor must make good faith attempts in writing to contact the Mortgage Creditor and to determine the cause of non-compliance, and must indicate in the Motion for Order to Show Cause the good faith steps taken, together with a summary description of any response provided by the Mortgage Creditor. B4. If a Mortgage Creditor’s regular billing system can provide a statement to the debtor that substantially complies with this Addendum, but does not fully conform to all its requirements, the Mortgage Creditor may request that the debtor accept such statement. If the debtor declines to accept the non-conforming statement, a Mortgage Creditor may file a motion, on notice to the debtor, the debtor’s attorney and the chapter 13 trustee, seeking a declaration of the Court that cause exists to allow such non-conforming statements to satisfy the Mortgage Creditor’s obligations under this Addendum. For good cause shown, the Court may grant a waiver for purposes of this case and for either a limited or unlimited period of time.”).

In re Kreidler, No. 5-06-bk-50864-JJT, 2013 WL 1334910, at *2–*3 (Bankr. M.D. Pa. Mar. 29, 2013) (Thomas) (By not appearing to prove postpetition arrearage in response to trustee’s Bankruptcy Rule 3002.1(f) notice of final cure payment mortgagee failed to establish any postpetition default in direct payments by debtor and mortgage is declared current. After the debtor completed payments under a five-year plan, the trustee served the mortgagee notice under Rule 3002.1(f) that mortgage arrearages provided for in the plan were fully paid and that postpetition mortgage payments directly by the debtor were current. The mortgagee responded untimely that the debtor owed \$7,938.83 in postpetition arrears set forth on a claim supplement. The debtor filed a motion for determination of the status of the mortgage under Rule 3002.1(h). The court scheduled a hearing. The debtor appeared. The mortgagee did not appear. “The filing of the supplement to the claim required by Rule 3002.1(g) does not enjoy the same prima facie presumption set forth in Rule 3001(f) as does the claim itself. Rule 3002.1(g). In order to prevail on its claim for postpetition defaults, the holder was required to appear and establish that fact. Having failed to attend the hearing, the holder has not met its burden to establish the existence of the alleged postpetition default. . . . HSBC argues that Rule 3002.1 does not apply because the postpetition delinquency was not ‘provided for’ in the plan as required in Rule 3002.1(a). . . . It asserts that only the pre-petition arrearage was provided for and not the payments made directly from the Debtor to the holder of the

claim. . . . In discussing the term ‘provided for,’ our Supreme Court referenced Bankruptcy Code § 1328 by stating that ‘§ 1328(a) unmistakably contemplates that a plan ‘provides for’ a claim when the plan cures a default and allows for the maintenance of regular payments on that claim, as authorized by § 1322(b)(5).’ *Rake v. Wade*, 508 U.S. 464, 474–475 [T]he HSBC mortgage was provided for. . . . Since HSBC had the burden to establish its postpetition arrearage, I conclude that, in not pursuing this burden, a postpetition arrearage either did not exist or the holder of the claim has waived the opportunity to advance the claim. Accordingly, I conclude that pre- and postpetition arrearages are satisfied as of the date of the mortgagee’s last statement supplementing its proof of claim.”).

Padilla v. Wells Fargo Home Mortg. Inc. (In re Padilla), 379 B.R. 643, 654-56 (Bankr. S.D. Tex. Aug. 3, 2007) (Isgur) (Postpetition and preconfirmation, 11 U.S.C. § 506(b) and Rule 2016(a) govern a mortgage lender’s collection of fees and expenses. Section 506(b) authorizes oversecured creditors to recover interest and reasonable fees and expenses that accrue between the petition and plan confirmation. Oversecured lenders’ requests for fees and expenses are reviewed by bankruptcy courts through Rule 2016(a) applications. Following confirmation, 11 U.S.C. § 1322(b)(2), Rule 2016(a), the confirmation order, and applicable nonbankruptcy law control how fees and expenses may be collected. While § 1322(b)(2) “requires a confirmed plan to preserve a lenders’ pre-petition rights under its pre-petition contract . . . [a] lender’s exercise of contract rights is not without its limits.” Rule 2016(a) is applicable post-confirmation as its language contains no limitation on its applicability, but provides a procedural vehicle for the lender to assert its contract rights during bankruptcy. Section 1322(b)(2) effectively incorporates the lender’s prepetition contract rights into the confirmed Chapter 13 plan. Both the mortgage contract and Texas law permit collection of only reasonable and necessary fees and expenses. Those limitations are incorporated into the Chapter 13 plan. Post-confirmation application of Rule 2016(a) merely provides a vehicle by which the debtors, trustee and court can assure compliance with all plan terms.).

Bankruptcy Rule 2016—Professional Fees Issues

Rule 2016. Compensation for Services Rendered and Reimbursement of Expenses

(a) Application for compensation or reimbursement

An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. . . . [T]he applicant shall transmit to the United States trustee a copy of the application.

FED. R. BANKR. P. 2016(a).

Rule 3001. Proof of Claim

* * * *

(c) Supporting Information

(1) Claim Based on a Writing. Except for a claim governed by paragraph (3) of this subdivision, when a claim, or an interest in property of the debtor securing the claim, is based on a writing, a copy of the writing shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

(2) Additional Requirements in an Individual Debtor Case: Sanctions for Failure to Comply. In a case in which the debtor is an individual:

(A) If, in addition to its principal amount, a claim includes interest, fees, expenses, or other charges incurred before the petition was filed, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim.

(B) If a security interest is claimed in the debtor's property, a statement of the amount necessary to cure any default as of the date of the petition shall be filed with the proof of claim.

(C) If a security interest is claimed in property that is the debtor's principal residence, the attachment prescribed by the appropriate Official Form shall be filed with the proof of claim. If an escrow account has been established in connection with the claim, an escrow account statement prepared as of the date the petition was filed and in a form consistent with applicable nonbankruptcy law shall be filed with the attachment to the proof of claim.

(D) If the holder of a claim fails to provide any information required by this subdivision (c), the court may, after notice and hearing, take either or both of the following actions:

(i) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(ii) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

(3) Claim based on an open-end or revolving consumer credit agreement

(A) When a claim is based on an open-end or revolving consumer credit agreement--except one for which a security interest is claimed in the debtor's real property--a statement shall be filed with the proof of claim, including all of the following information that applies to the account:

(i) the name of the entity from whom the creditor purchased the account;

(ii) the name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account;

(iii) the date of an account holder's last transaction;

(iv) the date of the last payment on the account; and

(v) the date on which the account was charged to profit and loss.

(B) On written request by a party in interest, the holder of a claim based on an open-end or revolving consumer credit agreement shall, within 30 days after the request is sent, provide the requesting party a copy of the writing specified in paragraph (1) of this subdivision.

Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

(a) In General. This rule applies in a chapter 13 case to claims that are (1) secured by a security interest in the debtor's principal residence, and (2) provided for under § 1322(b)(5) of the Code in the debtor's plan.

(b) Notice of Payment Changes. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest rate or escrow account adjustment, no later than 21 days before a payment in the new amount is due.

(c) Notice of Fees, Expenses, and Charges. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

(d) Form and Content. A notice filed and served under subdivision (b) or (c) of this rule shall be prepared as prescribed by the appropriate Official Form, and filed as a supplement to the holder's proof of claim. The notice is not subject to Rule 3001(f).

(e) Determination of Fees, Expenses, or Charges. On motion of the debtor or trustee filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.

(f) Notice of Final Cure Payment. Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision (g). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.

(g) Response to Notice of Final Cure Payment. Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).

(h) Determination of Final Cure and Payment. On motion of the debtor or trustee filed within 21 days after service of the statement under subdivision (g) of this rule, the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts.

(i) Failure to Notify. If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:

- (1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or
- (2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

TO STRIP OR NOT TO STRIP

Debtors have personal residence worth \$250,000 subject to three mortgages:

- First mortgage \$300,000 secured by residence (only)
- Second mortgage \$50,000 secured by residence and business inventory/receivables
- Third mortgage \$25,000 secured by residence (only)

Debtors are eligible for Chapter 7, Chapter 13 or Chapter 11. If “lien stripping” is your answer to any of the questions below, what procedure, timing and conditions apply and what Code sections are implicated in your answers.

- ◆ What can debtors do to first, second and third mortgages in a Chapter 7 case?
- ◆ What can debtors do to first, second and third mortgages in a Chapter 13 case?
- ◆ What can debtors do to first, second and third mortgages in a Chapter 11 case?
- ◆ Do your answers change if debtors start in Chapter 7 and convert to Chapter 13 (or to Chapter 11) before discharge? after discharge?
- ◆ What if debtors file a new Chapter 13 case after discharge in a Chapter 7 case?
 - ▶ What can debtors do to first, second and third mortgages in the Chapter 13 case?
 - ▶ What is effect of prior discharge on debtors and creditors in new Chapter 13 case?
- ◆ What if debtors file a new Chapter 11 case after discharge in a Chapter 7 case?
 - ▶ What can debtors do to first, second and third mortgages in the Chapter 11 case?
 - ▶ What is effect of prior discharge on debtors and creditors in new Chapter 11 case?

APPLICABLE CASES

Woolsey v. Citibank, N.A. (In re Woolsey), 696 F.3d 1266, 1274-79 (10th Cir. Sept. 4, 2012) (Gorsuch, Holmes, Matheson) (Until Supreme Court retreats from *Dewsnup v. Timm*, 502 U.S. 410, 112 S. Ct. 773, 116 L. Ed. 2d 903 (Jan. 15, 1992), Chapter 13 debtor cannot void a wholly unsecured junior mortgage using *only* § 506(d). Repudiating “the only possible winning argument they may have had,” debtors’ plan proposed to strip off wholly unsecured junior lien, relying only on lien-voiding language in § 506(d). “*Dewsnup* has created more than a little ‘methodological confusion[.]’ . . . [T]he Dewsnupian departure from the statute’s plain language is the law. . . . [E]very federal court of appeals to consider the question has already refused to extend *Dewsnup*’s definition of the term ‘secured claim’ to other statutory provisions using that term in Chapter 13, where the focus is on reorganization rather than liquidation. . . . So it is that *Dewsnup* has lost every away game it has played: its definition of ‘secured claim’ has been rejected time after time elsewhere in the code and seems to hold sway only in § 506(d). . . . [O]f all the circuit courts approving of lien stripping in reorganization cases, not a single one has taken up the Woolseys’ invitation to do so using § 506(d). Instead, they have relied exclusively on other statutory provisions particular to those chapters. . . . [M]any courts have already identified one apparently promising candidate in § 1322(b)(2). . . . [N]o fewer than six circuits have already read [*Nobelman v. American Savings Bank*, 508 U.S. 324, 113 S. Ct. 2106, 124 L. Ed. 228 (June 1, 1993),] this way and held a debtor may invoke § 1322(b)(2) to remove a wholly unsecured lien, even if that lien is secured against the debtor’s principal residence. . . . [T]he Woolseys didn’t choose to pursue this line of argument [W]e opt today against forcing a § 1322(b)(2) argument onto the unwilling Woolseys and leave that statute and its meaning for another day when a bankruptcy petitioner actually wants to pursue the question.”), *aff’g* 438 B.R. 432, 437-38 (Bankr. D. Utah Oct. 8, 2010) (Thurman) (Plan stripping off wholly unsecured junior lien must provide that lien will be retained until full payment under nonbankruptcy law or until debtors receive discharge. Interpretation of allowed secured claim in § 1325(a)(5) must be consistent with the way the Supreme Court read § 506(d) in *Dewsnup v. Timm*, 502 U.S. 410, 416, 112 S. Ct. 773, 116 L. Ed. 2d 903 (Jan. 15, 1992). Mortgage creditor filed proof of claim to which no objection had been filed. Allowed claim is also “secured” and must be treated in manner consistent with § 1325(a)(5) requirement that lien be retained until debtor makes full payment or receives discharge. “The Court believes this outcome is not only demanded by the statutory language as explained by the Supreme Court, but is also the best outcome to prevent debtors from avoiding or satisfying a lien in chapter 13 without completing a plan in chapter 13. . . . The Court sees nothing prohibiting a debtor from treating a mortgage as unsecured pursuant to § 506(a) and then avoiding or deeming it satisfied upon receipt of a discharge at the completion of the plan. Such relief being available at the completion of the plan provides an incentive for debtors to fulfill their plans.”).

Fisette v. Keller (In re Fisette), 455 B.R. 177, 182-87 (B.A.P. 8th Cir. Aug. 29, 2011) (Schermer, Venters, Nail) (Chapter 13 debtor ineligible for discharge because of § 1328(f) can strip off wholly unsecured junior liens on residence at completion of payments under plan; § 1325(a)(5)(B)(i)(I)(bb) does not apply because wholly unsecured liens are not allowable secured claims. “[Section] 1322(b)(2) does not bar a Chapter 13 debtor from stripping off a wholly unsecured lien on his principal residence, a position that has been adopted by all Circuit Courts of Appeal to address this issue. . . . In accordance with the language of § 1322(b)(2), only if the creditor is the holder of a secured claim, meaning that its claim is at least partially secured after application of § 506(a), will it be eligible for the protection of § 1322(b)(2)’s antimodification provision. . . . [N]othing in the Bankruptcy Code conditions a Chapter 13 debtor’s ability to modify a wholly unsecured creditor’s lien under § 1322(b)(2) on his eligibility for a discharge. . . . [Section] 1325(a)(5)(B)(i)(I)(bb)[] does not apply in the case of a wholly unsecured lien on a debtor’s principal residence. . . . [N]othing in § 1328(f)(1) . . . limits the debtor’s rights under § 1322(b)(2).”).

Orkwis v. MERS (In re Orkwis), 457 B.R. 243, 249-50 (Bankr. E.D.N.Y. Sept. 19, 2011) (Grossman) (Debtors can strip off wholly unsecured junior mortgage without violating protection from modification in § 1322(b)(2), but § 506 does not void lien; because § 1325(a)(5)(B)(i)(I) applies, lien is not removed until entry of discharge. “Courts considering this issue generally fall within two schools of thought. According to one position, which has been referred to as the majority position, the lien is removed only upon entry of the debtor’s discharge. See *In re Gerardin*, 447 B.R. 342 (Bankr. S.D. Fla. 2011); *In re Erdmann*, 446 B.R. 861 (Bankr. N.D. Ill. 2011); *In re Victorio*, 454 B.R. 759 (Bankr. S.D. Cal. 2011); *In re Fenn*, 428 B.R. 494 (Bankr. N.D. Ill. 2010); *In re Lindskog*, 451 B.R. 863 (Bankr. E.D. Wis. 2011); *In re Mendoza*, No. 09-22395 HRT, 2010 WL 736834 (Bankr. D. Col. Jan. 21, 2010); *In re Blosser*, No. 07-28223-svk,

2009 WL 1064455 (Bankr. E.D. Wis. Apr. 15, 2009)[;] and *In re Jarvis*, 390 B.R. 600, 604-06 (Bankr. C.D. Ill. 2008). A growing number of courts have taken the opposite position, finding that the lien is removed upon completion of the plan payments in the Chapter 13 case, regardless of whether the debtor is entitled to a discharge. See *In re Fisette*, 455 B.R. 177 (8th Cir. BAP [Aug. 29,] 2011); *In re Davis*, No. 09-26768-WIL, 2011 WL 1237638 (Bankr. D. Md. Mar. 30, 2011); *In re Jennings*, 454 B.R. 252 (Bankr. N.D. Ga. [July 11,] 2011); *In re Okosisi*, 451 B.R. 90 (Bankr. D. Nev. 2011); *In re Fair*, 450 B.R. 853 (E.D. Wis. 2011); *In re Waterman*, 447 B.R. 324 (Bankr. D. Colo. 2011); *In re Tran*, 431 B.R. 230 (Bankr. N.D. Cal. 2010); and *In re Hill*, 440 B.R. 176 (Bankr. S.D. Cal. 2010). . . . This Court finds that the Defendant's lien is not removed until entry of the debtor's discharge. . . . [T]he lien against the Property exists as of the date the Debtors' case was filed, and remains a lien against the Property as of the date of confirmation of the Plan. This is true in what is commonly called a Chapter 20 case as well, where the *in personam* obligation of the debtor has been previously discharged, leaving only the *in rem* lien as a claim pursuant to [*Johnson v. Home State Bank*, 501 U.S. 78, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (June 10, 1991)]. . . . Because § 1325(a)(5) governs lien retention in Chapter 13 cases, a discharge is required pursuant to subsection (B)(i)(I) before the lien is removed. The *Gerardin* court cited *Fenn* with approval, finding that a 'discharge under Chapter 13 is a necessary condition for stripping off an unsecured lien' based on the express language of § 1325(a)(5). . . . This Court agrees with the reasoning of the *Fenn* and *Gerardin* courts.").

In re Gomez, 456 B.R. 574, 576-77 (Bankr. M.D. Fla. Feb. 8, 2011) (Briskman) (Under §§ 727(d) and 727(e)(1), debtor cannot vacate Chapter 7 discharge entered two years earlier to overcome effect of § 1328(f) on lien stripping in current Chapter 13 case. Debtor was not eligible for discharge in current Chapter 13 case under § 1328(f)(1) because of Chapter 7 discharge two years earlier. Debtor moved to reopen prior Chapter 7 case and to revoke or vacate discharge. In current Chapter 13 case, debtor sought to cram down liens on investment property and to strip off wholly unsecured liens. "Chapter 13 allows for the modification [of] secured claims, with certain exceptions, but a Chapter 13 discharge is required to be able to permanently modify such claims. . . . Where a debtor is ineligible to receive a discharge in a Chapter 13, any modifications to the creditor's rights are not permanent and have no binding effect once the plan ends. . . . A debtor does not have standing to seek revocation of her discharge pursuant to the plain and unambiguous language of Section 727(d). . . . Aurora seeks to reopen her Chapter 7 case and vacate her Chapter 7 discharge because it prevents her from receiving a discharge in her Chapter 13 case pursuant to 11 U.S.C. Section 1328(f). Aurora requires a Chapter 13 discharge to carry out her intended cramdown and strip off of the mortgage liens encumbering her real property. The relief Aurora seeks is not authorized by the Bankruptcy Code and is contrary to the fundamentals of bankruptcy.").

In re Victorio, 454 B.R. 759, 774-81, 781 (Bankr. S.D. Cal. July 8, 2011) (Bowie) (Citing *Zimmer v. PSB Lending Corp.* (*In re Zimmer*), 313 F.3d 1220 (9th Cir. Dec. 24, 2002) (D.W. Nelson, T.G. Nelson, Schwarzer), Chapter 13 debtors ineligible for discharge because of § 1328(f) can strip off wholly unsecured mortgage without violating protection from modification in § 1322(b)(2), but strip-off is not permanent. Disagreeing with *In re Okosisi*, 451 B.R. 90 (Bankr. D. Nev. May 16, 2011) (Markell): "With a wave of the virtual wand of 11 U.S.C. § 506(a), one instantly determines that for purposes of the Chapter 13 case the creditor's bundle of state law rights in the property have disappeared. That is the instruction of the Ninth Circuit Court of Appeals in *In re Zimmer*. . . . [T]he disappearance occurs immediately under [*Scovis v. Henrichsen (In re Scovis)*, 249 F.3d 975 (9th Cir. May 11, 2001) (D.W. Nelson, Brunetti, Kozinski)], even before formally resorting to procedures of avoidance of lien interests. . . . [B]efore enactment of BAPCPA, even when a debtor was eligible for a discharge, the only way to make 'permanent' a lien strip under § 506(d) and § 1322(b) was to earn a discharge. . . . 'A debtor who files a Chapter 13 case despite not being eligible for a discharge, nevertheless has the power to modify a secured creditor's rights under Section 1322(b)(2), and the power to pay the creditor's claim with interest at the *Till* rate under Section 1325(a)(5)(B)(ii). Without a discharge, however these modifications are effective only for the term of the plan.' . . . [T]he *Okosisi* court . . . invents the idea that enactment of § 1328(f) 'created a fourth option' . . . [T]his Court does not believe a court-invented 'fourth option' is either appropriate or necessary There is nothing . . . which even hints that Congress intended to change the pre-existing state of the law that the only way a debtor could make a lien strip 'permanent' was through a discharge [D]ebtors in a Chapter 20 case cannot 'permanently' avoid a wholly unsecured junior lien without a discharge, or without paying it in full. They could not do so before BAPCPA, and there is nothing in the 2005 amendments that even hints that Congress believed that any ending other than conversion or dismissal was possible, much less desirable." With respect to the wholly unsecured mortgage holder's claim: "CitiMortgage still has an unsecured claim in this case, in accordance with [*Johnson v. Home State Bank*, 501 U.S. 78, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (June 10, 1991),] and 11 U.S.C. § 102 [O]nly the personal liability was discharged, while *Johnson* and § 102 make clear CitiMortgage continues to have a claim against the estate.").

In re Jennings, 454 B.R. 252, 255-60 (Bankr. N.D. Ga. July 11, 2011) (Mullins) (Subject to review for good faith, debtors ineligible for discharge because of § 1328(f) can strip off wholly unsecured junior lien without violating antimodification protection in § 1322(b)(2); § 1325(a)(5) does not apply after application of § 506(a). Citing *Tanner v. FirstPlus Financial, Inc. (In re Tanner)*, 217 F.3d 1357 (11th Cir. July 13, 2000) (Black, Carnes, Kravitch), “[t]he anti-modification provision only protects the rights of creditors classified as holders of secured claims after applying section 506(a). . . . Plan completion voids the lien. Discharge cannot be the legal mechanism that voids the lien. . . . There is an accruing split of authority among courts across the country regarding the permissibility of chapter 20 lien stripping. . . . [T]his split of authority can be grouped into three approaches. In the first approach courts hold that chapter 20 lien stripping is impermissible because it amounts to a de facto discharge. . . . [T]he second approach permit[s] chapter 20 lien stripping; however after plan consummation, without a discharge, the parties’ pre-bankruptcy rights are reinstated. . . . [T]he third approach allow[s] chapter 20 lien stripping because nothing in the Bankruptcy Code prevents it. . . . [N]othing in the Bankruptcy Code prevents chapter 20 lien stripping. Pursuant to BAPCPA, Congress was deliberate in only prohibiting discharge in a chapter 20 case. . . . Lien-stripping is one of the tools in the chapter 13 toolbox. And use of the chapter 13 lien stripping tool is not conditioned on discharge eligibility. . . . Although Debtors may strip the liens securing the claims of the second mortgagees, the plans must treat the allowed claims as unsecured claims. . . . [S]ection 1325(a)(5) does not apply. . . . [I]f the plan is filed in good faith, a chapter 20 debtor may strip off the lien of a wholly underwater second mortgage in a chapter 13 plan.”).

In re Okosisi, 451 B.R. 90, 93-102 (Bankr. D. Nev. May 16, 2011) (Markell) (Wholly unsecured junior lien on principal residence can be stripped off notwithstanding that debtors are not eligible for discharge when Chapter 13 case was filed in good faith, conditioned that debtors complete payments under plan. “[T]he antimodification protection of Section 1322(b)(2) only operates to benefit creditors who may be classified as secured creditors after operation of Section 506(a). See *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220, 1226 (9th Cir. [Dec. 24,] 2002) [(D.W. Nelson, T.G. Nelson, Schwarzer)]. . . . [I]t is permissible for a debtor to provide that a lien will be avoided through a chapter 13 plan, making such avoidance permanent upon successful completion of the chapter 13 plan and so long as confirmation of the plan is not subsequently set aside. . . . [T]he discharge itself has no affect [sic] on liens. . . . [A] prerequisite to the application of Section 1325(a)(5)(B) is that the claim first be classified as ‘an allowed secured claim’ within the meaning of Section 1325(a)(5). Under [*Nobelman v. American Savings Bank*, 508 U.S. 324, 113 S. Ct. 2106, 124 L. Ed. 2d 228 (June 1, 1993),] and *Zimmer*, . . . when a creditor is wholly unsecured after application of Section 506(a), the creditor has only an unsecured claim for purposes of Section 1322(b)(2). . . . Section 1325(a)(5) . . . applies only to secured claims BAPCPA added Section 1328(f), and thus opened up the possibility of a fourth option, the completion of all plan payments without a discharge. In this post-BAPCPA regime, lien avoidance actions are still undone if the chapter 13 case is converted or dismissed At the successful completion of all payments in a no-discharge chapter 13 case, . . . the proper result is for the court to close the case without discharge. . . . Because the no-discharge case is closed without discharge, rather than dismissed, the code sections that reverse any lien avoidance actions contained within a chapter 13 plan upon conversion or dismissal are not implicated, and, thus, do not act to prevent the permanence of the lien avoidance. . . . Once a debtor successfully completes all plan payments required by a chapter 13 plan, the provisions of the plan become permanent, and the lien avoidance is, similarly, permanent. Support for this conclusion is found in Section 1327 [C]onfirmation of a chapter 13 plan ‘vests all of the property of the estate in the debtor,’ . . . ‘free and clear of any claim or interest of any creditor provided for by the plan.’ . . . [I]nterest encompasses liens on real property. . . . [L]iens avoided through a confirmed chapter 13 plan remain avoided so long as the plan and the order confirming it remain in effect. . . . The Debtors have a valid bankruptcy purpose in filing the present chapter 13 case, as the plan accomplishes a reorganization that was not possible in their previous chapter 7 and ‘represents their best effort[s] to pay creditors.’”).

In re Gerardin, 447 B.R. 342, 345-52 (Bankr. S.D. Fla. Feb. 17, 2011) (Mark, Isicoff, Cristol) (Rejecting *In re Tran*, 431 B.R. 230 (Bankr. N.D. Cal. June 25, 2010) (Jellen), and embracing *In re Fenn*, 428 B.R. 494 (Bankr. N.D. Ill. May 17, 2010) (Cox), debtors not eligible for discharge because of § 1328(f) must satisfy lien retention requirement in § 1325(a)(5)(B)(i)(II) and cannot strip off wholly unsecured junior liens. “In [*Dewsnup v. Timm*, 502 U.S. 410, 112 S. Ct. 773, 116 L. Ed. 2d 903 (Jan. 15, 1992)], the Supreme Court held that § 506(d) did not mean that a lien would be modified based solely upon a § 506(a) valuation. Instead, it held that § 506(d) acts to avoid liens only if the underlying claim is disallowed. . . . *Dewsnup* does not preclude lien stripping in chapter 13 cases. However, a chapter 13 debtor may not strip down a lien secured solely by a debtor’s principal residence. 11 U.S.C. § 1322(b)(2); *Nobelman v. American Savings Bank*, 508 U.S. 324, 113 S. Ct. 2106, 124 L. Ed. 2d 228 [(June 1,]1993). Nonetheless, in the Eleventh Circuit, as well as several other circuits, a debtor may strip off a lien even if it is secured solely by a debtor’s principal residence,

if the creditor's claim is completely unsecured because the property is worth less than the senior liens. *Tanner v. First-Plus Financial, Inc.* (*In re Tanner*), 217 F.3d 1357 (11th Cir. [July 13,] 2000) [(Black, Carnes, Kravitch)]. . . . However, *Tanner* is inapposite. The Eleventh Circuit focused its attention on the interplay between section 506(a) and section 1322(b)(2) in light of the *Nobelman* holding. It did not consider how section 1325(a) and a prior bankruptcy discharge might impact the treatment of a lien. . . . [A] § 506(a) valuation must be implemented in conjunction with another provision of the Bankruptcy Code to accomplish the strip down or strip off of a lien. . . . [Section] 1325 is the applicable section . . . lien stripping may not be accomplished under § 1325 when a debtor is ineligible to receive a discharge. . . . In *Johnson v. Home State Bank*, 501 U.S. 78, 11 S. Ct. 2150, 115 L. Ed. 2d 66 ([June 10] 1991), the Supreme Court ruled that a creditor with an obligation secured by a lien on a debtor's property, but which creditor has no *in personam* claim against a debtor due to a prior bankruptcy discharge, nonetheless has a claim against a debtor in a subsequent chapter 13 case. . . . [T]he Court interprets that ruling to mean that the claim that exists after the Debtors' chapter 7 discharge is a secured claim. . . . For debtors to strip off a lien in a chapter 13 case, their proposed treatment of the secured claim must comply with 11 U.S.C. § 1325(a)(5). . . . This Court rejects the analysis of *Tran* and its progeny and agrees with the many other courts which have held that a debtor's inability to receive a discharge in a 'Chapter 20' case prevents a debtor from stripping wholly unsecured liens in a Chapter 13 plan as the actual strip off or lien avoidance only occurs at discharge. . . . The Court believes the *Fenn* court got it right. . . . [A] debtor who is ineligible for a chapter 13 discharge may not strip down or strip off a lien.").

In re Tran, 431 B.R. 230, 235, 236-37 (Bankr. N.D. Cal. June 25, 2010) (Jellen) ("[T]he Bankruptcy Code does not condition a chapter 13 debtor's right to strip off a wholly unsecured junior lien on the debtor's eligibility for a discharge, . . . such right is conditioned on the debtor's obtaining confirmation of, and performing under, a chapter 13 plan that meets all of the statutory requirements[; however,] . . . if a chapter 13 case is filed primarily to avoid a junior lien in an effort to skirt the Supreme Court's holding in [*Dewsnup v. Timm*, 502 U.S. 410, 112 S. Ct. 773, 116 L. Ed. 2d 903 (Jan. 15, 1992)], then such a filing would not be in good faith, and such a case should be dismissed." If totality of circumstances demonstrated that debtor filed Chapter 13 solely to avoid second deed of trust when avoidance was not available in Chapter 7, and when no independent reason exists for Chapter 13 filing, lack of good faith in filing case would be cause for dismissal under § 1307(c). In decision involving two unrelated debtors: one debtor lacked good faith and case was dismissed because filing was solely for purpose of avoiding lien that would be unavoidable in Chapter 7 and debtor was ineligible for discharge; but second case was not dismissed because debtor had justifications for filing Chapter 13 other than lien avoidance. Section 109 does not condition eligibility for Chapter 13 on debtor's eligibility for discharge, nor does it preclude Chapter 13 relief to debtor who has received recent Chapter 7 discharge. Section 1325(a) and (b) do not condition confirmation on debtor's being eligible for discharge. Under § 349(b)(1)(C), dismissal of bankruptcy case reinstates lien that had been avoided under § 506(d), but Chapter 13 case in which confirmed plan is completed is not dismissed at conclusion of plan; rather, case is closed under § 350(a). Section 1325(a)(5)(B)(i)(II) conditions lien modification of a secured claim on completion of the plan rather than on discharge. "Permitting a chapter 13 debtor in a no-discharge case to strip off a junior lien would not deprive the lienholder of its right of redemption during the course of the chapter 13 proceeding, if for example, the holder of a senior lien were to obtain relief from § 362(a)'s automatic stay. This is so because, as stated above, the court can condition any permanent modification or stripping on the debtor's performance and completion of the debtor's chapter 13 plan. And if such a chapter 13 case is dismissed or converted to chapter 7 prior to full plan performance, the lien would remain intact, under § 349(b)(1)(C) in the case of a dismissal, or under *Dewsnup* in the case of a conversion to chapter 7.").