

Bankruptcy Taxation/Consumer Bankruptcy/Young and New Members

Issues Related to Chapter 13 Plans,
Including the Impact of a National Form
Plan on Local Practice

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MEMORANDUM

TO: Judge Mullins
FROM: CC Ragan
RE: Chapter 20 Lien Stripping Update

Modification of a creditor's lien in bankruptcy is commonly known as "lien stripping." There are two varieties of lien stripping. The first, known as a "strip-down," is where the secured portion of a lienholder's claim is reduced to the value of its interest in the collateral. The second, known as a "strip-off," involves the complete removal of a creditor's lien when the junior lienholder's claim is wholly unsecured; because there is no equity left to secure the junior lienholder's claim, that lien is voided or "stripped-off."

In *Nobelman v. Am. Sav. Bank*, 508 U.S. 324 (1993), the debtor sought to "strip down" a mortgage lender's secured claim of \$71,335.00 to the home's reduced value of \$23,500.00. The Court concluded that the anti-modification clause of section 1322(b)(2) of the Bankruptcy Code prevents debtors from removing, or stripping down, an unsecured portion of an under-secured claim on the debtor's homestead.¹ *Id.* at 325-26. Thus a chapter 13 debtor may not strip down a creditor's claim when any portion of that claim is secured by the debtor's home. *See id.* While chapter 13 debtors may not strip down partially secured homestead mortgages, the *Nobelman* decision left open the issue of whether debtors may strip off wholly unsecured homestead mortgages. Federal circuit courts have nearly unanimously held that a chapter 13 debtor may strip off wholly unsecured junior liens on the debtor's primary residence.²

Lien stripping, while generally permitted in chapter 13 proceedings, has proved divisive in the context of chapter 20 proceedings. A "chapter 20" is a chapter 13 case filed on the heels of a chapter 7 case in which the debtor obtained a discharge.³ Following a chapter 7 discharge, creditors

1 Section 1322(b)(2) of the Bankruptcy Code permits a debtor, through the chapter 13 plan, to modify the rights of certain but not all creditors. The section provides that a chapter 13 plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims[.]" 11 U.S.C. § 1322(b)(2). This provision is commonly referred to as the "anti-modification provision."

2 *Nobelman* notwithstanding, courts have generally permitted a "strip off" of completely valueless liens in chapter 13 cases because, unlike the lienholder in *Nobelman*, holders of such liens are not "holders of secured claims" and, therefore, are not entitled to the protection of section 1322(b)(2). *See Pond v. Farm Specialist Realty (In re Pond)*, 252 F.3d 122 (2d Cir. 2001); *McDonald v. Master Fin., Inc. (In re McDonald)*, 205 F.3d 606 (3d Cir. 2000), *cert. denied*, 531 U.S. 822 (2000); *Branigan v. Davis (In re Davis)*, 716 F.3d 331 (4th Cir. 2013); *Bartee v. Tara Colony Homeowners Ass'n (In re Bartee)*, 212 F.3d 277 (5th Cir. 2000); *Lane v. W. Interstate Bancorp (In re Lane)*, 280 F.3d 663 (6th Cir. 2002); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Tanner v. FirstPlus Fin. (In re Tanner)*, 217 F.3d 1357 (11th Cir. 2000); *see also Domestic Bank v. Mann (In re Mann)*, 249 B.R. 831 (B.A.P. 1st Cir. 2000); *Fisette v. Keller (In re Fisette)*, 455 B.R. 177 (B.A.P. 8th Cir. 2011); *Griffey v. U.S. Bank (In re Griffey)*, 335 B.R. 166, 170 (B.A.P. 10th Cir. 2005).

3 Filing a chapter 13 petition shortly after receiving a chapter 7 discharge (colloquially referred to as a "chapter 20") is not a new phenomenon. In *Johnson v. Home State Bank*, 501 U.S. 78 (1991), the Supreme Court held that a mortgage holder's *in rem* right against property survives a chapter 7 discharge, and thus the mortgage holder's interest could be scheduled as a claim for purposes of a debtor's subsequent chapter 13 case. The Court reviewed various prohibitions on serial filing in place at the time, and concluded that the absence of a similar prohibition against chapter

may not seek a personal judgment against the debtor but may pursue recovery against the property securing the debt. At the center of the chapter 20 debate is whether a debtor may use a chapter 13 proceeding to strip off a wholly unsecured junior mortgage that survived the discharge of the debtor's *in personam* liability in the preceding chapter 7 case, even though the debtor is not eligible for a chapter 13 discharge.⁴

Bankruptcy courts are split on whether a debtor may strip off liens in a chapter 20 case. In June 2013, one article noted that “[m]ore than 10 reported decisions permitting and 10 prohibiting chapter 20 lien-stripping have been issued in the last 18 months alone.” Benjamin A. Ellison, *Is It Possible that Dewsnup v. Timm Might Finally Be Overturned?*, 32-5 Am. Bankr. Institute L. J. 60, 61 (2013). The issue is dividing bankruptcy courts within states⁵ and within districts.⁶

To begin, courts must determine whether a second mortgage lender has a secured or unsecured claim. Pursuant to section 506(a):

An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.

11 U.S.C. § 506(a).

Classification under section 506(a) is important because section 1322(b)(2) of the Bankruptcy Code permits a debtor, through the chapter 13 plan, to modify the rights of certain but not all creditors. The section provides that a chapter 13 plan may “modify the rights of holders of secured 20 filings “convince us that Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization to a debtor who previously filed for Chapter 7 relief.” *Id.* at 87.

4 Under BAPCPA, after filing for chapter 7 relief and receiving a discharge, a debtor is ineligible for a discharge in a chapter 13 proceeding for four years. 11 U.S.C. § 1328(f)(1). Section 1328(f) states:

(f) the court shall not grant a discharge of all debts provided for in the plan . . . if the debtor has received a discharge —

(1) in a case filed under chapter 7 . . . during the 4-year period preceding the date of the order for relief under this chapter. . . .

11 U.S.C. § 1328. Notwithstanding the bar on discharge, a debtor may still take advantage of the protections offered by chapter 13 short of a discharge. Courts have recognized that “it is the ability to reorganize one’s financial life and pay off debts, not the ability to receive a discharge, that is the debtor’s holy grail.” *Branigan v. Bateman (In re Bateman)*, 515 F.3d 272, 283 (4th Cir. 2008). A debtor might pursue this course “to cure a mortgage, deal with other secured debts, or simply pay debts under a plan with the protection of the automatic stay.” *Id.*; see also *In re Lewis*, 339 B.R. 814 (Bankr. S.D. Ga. 2006).

5 The Eastern and Southern Districts of California have reached conflicting decisions on chapter 20 lien stripping. Compare *Frazier v. Real Time Resolutions (In re Frazier)*, 469 B.R. 889 (E.D. Cal. 2012) (affirming bankruptcy court’s decision confirming a chapter 20 debtor’s plan that provided for the wholly unsecured lien to be stripped upon completion of the debtor’s plan), with *Victorio v. Billingslea (In re Victorio)*, 470 B.R. 545 (S.D. Cal. 2012) (affirming the bankruptcy court’s decision denying confirmation of a plan that provided for the strip-off of a wholly unsecured junior lien).

6 An *en banc* panel of judges in the Southern District of Florida held in *In re Gerardin* that chapter 20 debtors may not permanently strip off wholly unsecured liens because they were ineligible for a chapter 13 discharge. In both *In re Dang*, 467 B.R. 227 (Bankr. M.D. Fla. 2012) (Glenn, J.), and *In re Scantling*, 465 B.R. 671 (Bankr. M.D. Fla. 2012) (Williamson, J.), bankruptcy judges concluded that discharge was not necessary for a debtor to strip off wholly unsecured liens. The Eleventh Circuit has granted a petition for direct appeal of *Scantling*, 465 B.R. 671.

claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims[.]” 11 U.S.C. § 1322(b)(2). This provision is commonly referred to as the “anti-modification provision.” The anti-modification provision affords protection to holders of secured claims against principal residences. Section 1322, however, expressly permits modification of the rights of unsecured creditors. Section 506(a), which classifies valueless liens as unsecured claims, operates with section 1322(b)(2) to permit a bankruptcy court, in a chapter 13 case, to strip off a lien against a primary residence with no value. Thus, in a chapter 13 case in which the debtor is eligible for a discharge, the debtor is able to use the chapter 13 plan to void the liens of mortgagees holding unsecured claims.

Classification is also important because section 1325 sets forth the requirements for plan confirmation and presents a holder of an allowed secured claim with three choices regarding its treatment. The holder of an allowed secured claim: (1) may accept the plan's proposed treatment under § 1325(a)(5)(A); (2) may accept the surrender of its collateral under § 1325(a)(5)(C); or (3) may demand the treatment specified in § 1325(a)(5)(B). Section 1325(a)(5)(B), as amended by BAPCPA, in turn requires that the plan provide for the retention of an allowed secured claim holder's liens until the earlier of “payment of the underlying debt determined under nonbankruptcy law; or . . . discharge under section 1328.” 11 U.S.C. § 1325(a)(5)(B)(i). Since section 1325(a)(5) is applicable only “with respect to each allowed secured claim,” courts have grappled with whether a second mortgage lien claim is an “allowed secured claim.”

Generally speaking, cases interpreting these sections and addressing the chapter 20 lien strip issue are grouped into three approaches: those that hold that chapter 20 lien stripping is impermissible, those that permit chapter 20 lien stripping but not permanently, and those that allow chapter 20 lien stripping and find that it is permanent upon plan completion. *In re Jennings*, 454 B.R. 252, 256-57 (Bankr. N.D. Ga. 2011).

In the first approach, courts treat the wholly underwater second mortgagee as a holder of an allowed secured claim and hold that chapter 20 lien stripping is impermissible. These courts interpret the term “allowed secured claim” to mean: a claim, which is a right to payment or a right to an equitable remedy as defined in section 101(5); that is allowed, meaning not objected to by an interested party under section 502(a); and that is secured by the debtor's real property. *See e.g. Branigan v. Davis (In re Davis)*, 716 F.3d 331, 340 (4th Cir. 2013) (Keenan, J., dissenting). These courts reason that second mortgage lien claims are allowed and secured by the debtor's real property. Since the claims are “allowed secured claims,” the anti-modification provision and section 1325(a)(5)(B)(i) apply. Pursuant to section 1325(a)(5)(B)(i), a debtor's chapter 13 plan must provide for lien retention until the earlier of (1) full payment by the debtors or (2) discharge and, because chapter 20 debtors are prevented from obtaining a discharge by section 1328(f), chapter 20 debtors may not strip off valueless junior mortgages. These courts also reason that allowing chapter 20 debtors to permanently avoid liens amounts to a *de facto* discharge.⁷ *See e.g., Grandstaff v. Casey*

⁷ Courts responding to this argument note that nothing in the Bankruptcy Code or Rules state that a no discharge chapter 13 must end only through dismissal. *See In re Dolinak*, Case No. 12-13500, 2013 Bankr. LEXIS 2639 (Bankr. D.N.H. June 28, 2013). In an analogous context, chapter 7 cases in which the debtor fails to complete a personal financial management course as required by § 727(a)(11) are closed without discharge, not dismissed. *See Fed. R. Bankr. P. 4006*. Section 350(a) and Rule 5009 also contemplate closing a case once an estate has been fully administered.

(*In re Casey*), 428 B.R. 519, 522 (Bankr. S.D. Cal. 2010) (explaining that any alternative that would make lien stripping permanent upon completion of the chapter 13 plan would make an end run around section 1328(f) and result in a *de facto* discharge when by statute no discharge is available).

Courts that adopt the second approach permit chapter 20 lien stripping; however after plan consummation, without a discharge, the parties' pre-bankruptcy rights are reinstated. These courts contend that discharge is the mechanism that voids the lien and that chapter 20 plans end in dismissal. Judge Bowie in *In re Victorio*, 454 B.R. 759, 774 (Bankr. S.D. Cal. 2011), *aff'd*, 470 B.R. 545, 553 (S.D. Cal. 2012), for example, states that chapter 20 lien stripping is not permanent. He reasons that before 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. While a chapter 20 debtor may modify a creditor's rights under section 1322(b)(2), without a discharge, these modifications are effective only for the term of the plan. Thus, debtors in a chapter 20 case cannot "permanently" avoid a wholly unsecured junior lien without a discharge, or without paying it in full. *Id.* at 774–81. A few other cases have come to the same conclusion.

The courts utilizing the third approach allow chapter 20 lien stripping because nothing in the Bankruptcy Code prevents it. These courts find that second lien creditors do not hold secured claims and, as such, section 1325(a)(5), which, by its language applies only to secured claims, does not apply.⁸ Accordingly, these unsecured creditors' rights are subject to modification through the chapter 13 plan—pursuant to section 1322(b)(2)—and do not qualify to be treated as secured creditors for purposes of section 1325(a)(5). Some commentators have recently called this approach "the better reasoned view." See Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy* § 128.1 (4th ed. 2011) ("Given that a wholly unsecured lien cannot be an allowable secured claim under § 506(a), the better reasoned view is that § 1325(a)(5)(B) does not apply to wholly unsecured liens—without regard to whether the debtor is eligible for discharge under § 1328(f).").

The cases allowing chapter 20 lien stripping reason that nothing in the Bankruptcy Code prevents it. Pursuant to BAPCPA, Congress was deliberate in only prohibiting discharge in a chapter 20 case. 11 U.S.C. § 1328(f). Congress provided no limitation on a debtor's eligibility to be a chapter 13 debtor after receiving a chapter 7 discharge. 11 U.S.C. § 109; see also *Johnson v. Home State Bank*, 501 U.S. 78, 87 (holding a debtor could file a chapter 13 after a chapter 7 because the Bankruptcy Code did not prohibit it and Congress specifically prohibited other types of consecutive filings, therefore its choice not to prohibit it meant that this type of filing was allowed). Given chapter 13 eligibility, nothing in the Code limits a chapter 20 debtor's ability to take advantage of

⁸ These cases point out that there is a difference between the term of art "secured claim" and the notion that a creditor has a security interest or lien outside of bankruptcy. See *In re Scantling*, 465 B.R. 671, 680 (Bankr. M.D. Fla. 2012). Having a security interest or lien outside of bankruptcy means the creditor has the "rights" of a secured creditor, not necessarily that it is the holder of a secured claim. After the discharge in the prior chapter 7 case, the second mortgage holder retains its *in rem* rights against the property, which included its lien and the right to foreclose. However, without any collateral value to support those rights, it is difficult to assign those rights any value at all in the pending chapter 13 case - such rights are "illusory, hyper-technical, and possibly relevant only in law review articles." See *In re Fair*, 450 B.R. 853, 857-58 (E.D. Wis. 2011) (explaining that while claims that survive chapter 7 could properly be characterized as "secured" claims, that characterization is subject to change once a chapter 13 petition is filed). Wholly unsecured junior mortgages are thus essentially "worthless" - because the liens in these cases have no value, they are wholly unsecured claims, which leaves no role in the analysis for section 1325(a)(5). See *Branigan v. Davis (In re Davis)*, 716 F.3d 331, 338 (4th Cir. 2013); see also *In re Okosisi*, 451 B.R. 90, 98 (Bankr. D. Nev. 2011) (listing cases that found section 1325(a)(5) inapplicable in Chapter 20 cases).

the protections chapter 13 provides. Lien-stripping is one of the tools in the chapter 13 toolbox. As a result, the analysis permitting lien-stripping in chapter 20 cases is no different than that in any other chapter 13 case. If Congress intended to prevent lien stripping in chapter 20 cases, it could have added a provision saying just that. *See In re Gloster*, 459 B.R. 200, 205 (Bankr. D.N.J. 2011) (explaining that BAPCPA did not make any changes to sections 506 or 1322, which form the basis for a chapter 13 debtor to strip-off a wholly unsecured junior lien; given the wide-ranging changes effected by BAPCPA, it is significant that no changes were made to disallow lien stripping in chapter 20 cases).

Courts adopting the third approach also reason that the unavailability of a discharge in the chapter 20 context is not determinative. As the Supreme Court has explained, a bankruptcy discharge “extinguishes only one mode of enforcing a claim – namely, an action against the debtor *in personam* – while leaving intact another – namely, an action against the debtor *in rem*.” *Johnson*, 501 U.S. at 84. In contrast, a lien-stripping order alters *in rem* liability where the creditor’s lien has no value – the strip off does not affect a debtor’s personal liability for repayment of the underlying debt. *See Fisette v. Keller (In re Fisette)*, 455 B.R. 177, 187 n.9 (B.A.P. 8th Cir. 2011). Thus, stripping off a lien is not the same thing as being discharged from personal liability for the debt underlying that lien. Similarly, stripping is not dependent on discharge because plan completion – rather than discharge – voids the lien. These cases hold that lien stripping occurs at confirmation but becomes permanent when plan payments are completed. *See In re Okosisi*, 451 B.R. 90 (Bankr. D. Nev. 2011). The theory that plan completion voids the lien is supported by the fact that debtors may void liens in chapter 13 (utilizing the chapter’s plan provisions) but not in chapter 7 (where debtors receive discharges but do not propose, perform, and complete plans). *Jennings*, 454 B.R. at 255-256. A chapter 20 case will then end with an administrative closing.

Courts emphasize that in order for a chapter 13 plan to be confirmed, the plan must otherwise comply with all other requirements for plan confirmation set forth in the Bankruptcy Code. One requirement is that the debtor’s “plan has been proposed in good faith and not by any means forbidden by law.” 11 U.S.C. § 1325(a)(3). Good faith is always a consideration at confirmation and the court has an independent duty to review a chapter 13 plan to ensure it complies with the Bankruptcy Code. *United Student Aid Funds v. Espinosa*, 559 U.S. 260 (2010). Bankruptcy courts should thus carefully scrutinize a chapter 20 debtor’s plan to ensure that it was proposed in good faith but the fact that some chapter 20 debtors may not propose their plans in good faith is not reason to bar every chapter 20 debtor from utilizing the lien stripping tools made available to him by Congress. *See In re Scotto-DiClemente*, 459 B.R. 558, 569 (Bankr. D.N.J. 2011). Some courts also note that creditors are also protected by section 349(b)(1)(C), which provides that a lien springs back if the case is dismissed.

Note that when lien stripping is permitted, courts generally allow the lien-holder to pool its wholly unsecured claim with other general unsecured claimants. *See e.g., Fisette v. Keller (In re Fisette)*, 455 B.R. 177, 186 (B.A.P. 8th Cir. 2011) (“The second and third lienholders are, thus, entitled to a pro rata share of the distribution made to other unsecured creditors.”); *In re Frazier*, 448 B.R. 803, 811 (Bankr. E.D. Cal. 2011) (the court determined that the stripped lien should be treated as a general unsecured claim); *In re Hill*, 440 B.R. 176, 184 (Bankr. S.D. Cal. 2010) (finding that the second mortgage holder must receive its pro-rata share of the distribution to the unsecured creditors). Indeed, this Court has held that “[a]lthough Debtors may strip the liens securing the

claims of the second mortgagees, the plans must treat the allowed claims as unsecured claims.” *Jennings*, 454 B.R. at 258-59. This is because, with or without liens securing the second mortgage claims, the second mortgagees still have a “right to payment.” *Id.* The claims are allowed per section 502 and unsecured per section 506(a). Thus, they must be treated as holders of allowed unsecured claims in the chapter 13 plans.

Below please find a summary of cases grouped according to each of the three approaches.

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1) Chapter 20 debtor cannot permanently strip an unsecured junior lien without a discharge or payment in full			
Name	Description	Opinion by	Date
<i>In re Jarvis</i> , 390 B.R. 600, 603 (Bankr. C.D. Ill. 2008)	Order denying confirmation of debtor's chapter 13 plan. The court reasoned that liens pass through bankruptcy unaffected and that there was no legislative intent to alter the pre-Code rule. Pre-BAPCPA precedent demonstrated that avoidance of a lien is contingent upon the debtor's completing a plan and receiving a discharge. Thus, chapter 13 debtors may strip wholly unsecured liens but that the strip occurs at discharge. The court relied on <i>King</i> (Illinois's equivalent to <i>Tanner</i>), which was decided pre 2005, and <i>Lilly</i> —a 2007 case that found that, absent a discharge, a chapter 13 debtor could not permanently modify a creditor's rights (change to the interest rate) (but note that the <i>Lilly</i> creditor was unquestionably a secured creditor). The court did not address good/bad faith because it found it impossible to lien strip without a discharge and denies plan confirmation.	Gorman	7/9/2008
<i>Blosser v. KLC Fin., Inc. (In re Blosser)</i> , Adv. No. 08-2353, 2009 Bankr. LEXIS 1049 (Bankr. E.D. Wis. Apr. 15, 2009)	Debtor filed a complaint to avoid a second mortgage lien on his residence. The court looked to the <i>Jarvis</i> decision and found that allowing a debtor to file chapter 7, discharge all dischargeable debts and then immediately file chapter 13 to strip off a second mortgage lien would not be much different than simply avoiding the mortgage lien in the chapter 7 itself. The court also noted that lien stripping in a chapter 20 case did not appear to comport with Congressional intent, as evidenced by the 4-year bar for discharge. The court concluded that since avoidance of the lien is contingent upon a chapter 13 discharge (the court did not explain why), and the debtor did not qualify for a chapter 13 discharge, the complaint failed to state a claim for relief.	Kelley	4/15/2009
<i>In re Winitzky</i> , Case No. 08-bk-19337-MT, 2009 Bankr. LEXIS 2430 (Bankr. C.D. Cal. May 7, 2009).	The court looked to <i>Jarvis</i> and found that because the debtors could not receive a discharge, they could not strip the second mortgage on their home. The court allowed the debtors to amend their plan or to voluntarily dismiss their case. The court noted that if the debtors wished to amend their plan, they would have to present information re: good faith.	Tighe	5/7/2009
<i>In re Mendoza</i> , Case No. 09-22395, 2010 Bankr. LEXIS 664 (Bankr. D. Colo. Jan. 21, 2010)	Order denying motion to strip lien. The court looked to <i>Jarvis</i> , where the court held that the avoidance of a lien is contingent upon completing a plan and receiving a discharge. The court also looked to <i>Blosser</i> for the proposition that allowing a debtor to file chapter 7, discharge all dischargeable debts, and then immediately file chapter 13 to strip off a second mortgage lien would not be much different than simply avoiding the mortgage lien in the chapter 7 itself.	Tallman	1/21/2010

WINTER LEADERSHIP CONFERENCE 2013

1) Chapter 20 debtor cannot permanently strip an unsecured junior lien without a discharge or payment in full			
<i>Bank of the Prairie v. Picht (In re Picht)</i> , 428 B.R. 885, 890 (B.A.P. 10th Cir. 2010)	On appeal, the panel found that the debtors' chapter 13 plan did not comply with § 1325(a)(5) and that the bankruptcy court erred in confirming the plan because the plan improperly discharged or extinguished the bank's lien. Under nonbankruptcy law, the bank's lien would encumber the debtors' residence regardless of whether the value of the residence exceeded the first mortgage at any point in time. Moreover, over the life of the plan, the value of the residence might increase, and the debtors would be paying down the principal on their first mortgage, creating additional value to which <u>the bank would be entitled under nonbankruptcy law.</u>	Rasure	5/4/2010
<i>In re Fenn</i> , 428 B.R. 494, 500 (Bankr. N.D. III. 2010)	Bank objected to plan confirmation and the bankruptcy court sustained the objection. The court cited to <i>Jarvis</i> and reasoned that discharge is the mechanism that strips a lien and that section 1325(a)(5)(B)(i) was added in 2005 to prevent chapter 13 debtors from stripping their <u>liens when they cannot get a discharge.</u>	Cox	5/16/2010
<i>In re Collins</i> , Case No. 10-32098, 2010 Bankr. LEXIS 4640 (Bankr. D. Ore. Dec. 15, 2010)	The chapter 13 trustee and second mortgage lender objected to debtor's proposed chapter 13 plan. In a short opinion, the court concluded that the second mortgage lender held a claim secured by the debtor's real property. The court said that the value of that secured claim may be less than the amount of the underlying debt did not change the bank's status as the holder of an allowed secured claim. Accordingly, absent the bank's consent, the debtor had to either surrender the collateral or provide for full payment of the underlying debt. The court denied confirmation and allowed the debtor 14 <u>days to file an amended plan.</u>	Brown	12/15/2010
<i>In re Gerardin</i> , 447 B.R. 342, 349 (Bankr. S.D. Fla. 2011)	Considering a variety of motions in seven cases, the bankruptcy court held that a chapter 20 debtor may not use 506 to value an allowed secured claim and remove a lien from the debtor's property in a chapter 13 plan. The court reasoned that the second mortgage holder had a secured claim and, thus, 1325(a)(5) applies and a debtor's inability to get a discharge prevents a lien strip. The court also noted that there has been a consistent <u>congressional policy to protect secured home lenders.</u>	Mark	2/17/2011
<i>Erdmann v. Charter One Bank (In re Erdmann)</i> , 446 B.R. 861, 868 (Bankr. N.D. Ill. 2011)	Order granting bank's motion for summary judgment and motion to vacate order of confirmation. The court found that the district's model chapter 13 plan provided that a claim secured by a lien on property remains until the debt supporting the lien is satisfied or a discharge is entered. The court stated that majority of courts and commentators taking up this issue require a discharge be entered prior to the lien being removed. (The court only cited <i>Fenn</i> and <i>Gerardin</i> in support of this proposition.) The court concluded that "this is the best reading of section 1325" and that the plan could not provide for its lien to be stripped off until the underlying debt was <u>fully paid or a discharge was entered.</u>	Black	3/10/2011

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1) Chapter 20 debtor cannot permanently strip an unsecured junior lien without a discharge or payment in full			
<p><i>Orkwis v. Mers (In re Orkwis)</i>, 457 B.R. 243, 248 (Bankr. E.D.N.Y. 2011);</p>	<p>Debtors requested to strip the second lien on their residence upon entry of default judgment in an adversary proceeding. The court held that the mortgage lien could not be removed unless and until the debtors received a discharge. The court found that the second lienholder’s claim remained secured because claims secured by liens on property, even if the value of the property is insufficient to collateralize the debt, do not disappear upon the filing of the petition, or upon entry of an order of confirmation, or upon completion of plan payments. The court concluded that only payment in full under non-bankruptcy law, entry of the discharge, or surrender of the collateral could extinguish the lien.</p>	<p>Grossman</p>	<p>9/19/2011</p>
<p><i>In re Quiros-Amy</i>, 456 B.R. 140 (Bankr. S.D. Fla. 2011)</p>	<p>In two separate cases, chapter 20 debtors filed motions to strip liens. The court found that the junior lienholders had “allowed secured claims” against the bankruptcy estate. The Court relied on <i>Geradin</i>, which in turn looked to <i>Johnson v. Home State Bank</i>, 501 U.S. 78 (1991), where the Supreme Court ruled that a creditor with an obligation secured by a lien on a debtor’s property, but which creditor has no <i>in personam</i> claim against a debtor, nonetheless has a claim against a debtor in a subsequent chapter 13 case.</p>	<p>Olson</p>	<p>9/19/2011</p>
<p><i>In re Sadowski</i>, 473 B.R. 12 (Bankr. D. Conn. 2011)</p>	<p>The court sustained the trustee’s objection to confirmation and continued the confirmation hearing to allow the debtor to amend the plan. The court explained that regardless of the fact that the current value of the real property is insufficient to recover the junior lien, the claim is nonetheless “secured” in the ordinary sense – it is backed up by a security interest in property. The court concluded that the phrase “allowed secured claim,” as used in section 1325(a)(5) refers to any claim that is allowed under section 502 and for which the creditor holds a lien to secure payment; whether such claim is recourse or nonrecourse, collectible or uncollectible. The court further found that, with BAPCPA, Congress sought to correct perceived abuses of the bankruptcy system (including serial filings to achieve what would otherwise not be possible in a single file) and that chapter 20 lien stripping would allow debtors to make an end run around <i>Dewsnup</i>.</p>	<p>Dabrowski</p>	<p>9/30/2011</p>
<p><i>In re Judd</i>, Case No. 11-bk*04093-ABB, 2011 Bankr. LEXIS 4553 (Bankr. M.D. Fla. Dec. 1, 2011)</p>	<p>Order denying plan confirmation. The court found that the debtors were attempting to circumvent the discharge prohibition of section 1328(f) and the anti-modification provision of section 1322(b) by attempting to value second-priority mortgage claims at \$1.00. The court stated that the allowed claims had value and had to be treated in the manners prescribed by section 1325(a)(5).</p>	<p>Briskman</p>	<p>12/1/2011</p>

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1) Chapter 20 debtor cannot permanently strip an unsecured junior lien without a discharge or payment in full			
<i>In re Pierre</i> , 468 B.R. 419 (Bankr. M.D. Fla. 2012)	Order denying debtor's motion to strip lien. The debtor owned property with her nondebtor spouse as tenants by the entireties. The spouse had previously received a chapter 7 discharge; the debtor was fully liable to the creditor (she had revoked her chapter 7 discharge). The court concluded that the debtor could not strip off a lien on the property unless the spouse was also a debtor and entitled to a chapter 13 discharge. The court stated that "the vast majority of courts, including this one, uniformly have held that any modifications to secured creditors' rights through cram down or strip off are not effective unless and until the debtor receives a chapter 13 discharge."	Jennemann	3/16/2012
<i>In re Woolsey</i> , 438 B.R. 432, 438 (Bankr. D. Utah 2010), <i>aff'd</i> , 696 F.3d 1266 (10th Cir. 2012)	Bankruptcy court denied plan confirmation, the district court affirmed, the debtors appealed and the Tenth Circuit affirmed. The circuit court read <i>Dewsnup</i> to say that any lien secured under state law must be respected and protected from removal under section 506(d) and that, as such, the second mortgage holder's claim was an allowed secured claim for the purposes of 1325(a)(5).	Thurman <i>Aff'd by</i> Gorsuch	10/8/2010 9/4/2012
<i>Lindskog v. M&I Bank FSB (In re Lindskog)</i> , 451 B.R. 863, 866 (Bankr. E.D. Wis. 2011), <i>aff'd</i> , 480 B.R. 916 (E.D. Wis. 2012)	Short opinion on appeal concluding that stripping off the wholly unsecured lien on the debtor's residence amounts to a <i>de facto</i> discharge and undermines Congress' desire to prevent debtors from exploiting loopholes in the bankruptcy system. The court said that allowing a chapter 20 debtor to lien strip would not comport with section 1328(f), that it could potentially result in a windfall for debtor, and would run afoul of the well-established principle that liens pass through bankruptcy.	Shapiro <i>Aff'd by</i> Clevert	4/13/2011 9/28/2012

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2) Chapter 20 lien stripping is permitted; after plan consummation, the parties' pre-bankruptcy rights are reinstated			
Name	Description	Opinion by	Date
<i>In re Lilly</i> , 378 B.R. 232, 236 (Bankr. C.D. Ill. 2007)	An automobile creditor objected to confirmation of chapter 20 debtor's plan arguing that section 1325(a) (5) prevented the chapter 20 debtor from modifying the interest rate on its claim. The court overruled the objection and allowed the debtor to pay interest at the <i>Till</i> rate rather than the contract rate. The court held, though, that since the debtor was not entitled to a discharge, "any modifications to a creditor's rights imposed in the plan are not permanent and have no binding effect once the term of the plan ends."	Perkins	10/30/2007
<i>In re Trujillo</i> , Case No. 10-02615, 2010 Bankr. LEXIS 3834 (Bankr. M.D. Fla. Nov. 10, 2010)	Short opinion on motion to strip lien. The court cited to <i>Jarvis and Lilly</i> and stated that a discharge was necessary to permanently modify the second lienholder's claim. The court concluded that where a debtor is ineligible to receive a discharge, any modifications to the creditor's rights are not permanent and have no binding effect once the plan ends.	Briskman	11/10/2010
<i>Grandstaff v. Casey (In re Casey)</i> , 428 B.R. 519 (Bankr. S.D. Cal. 2010)	Third position creditor moved for relief from stay arguing that lien stripping was not allowed if the debtor was ineligible for a discharge. The court held that lien stripping in a chapter 20 case is permitted but that everything reverts back at the end of the case. The court reasoned that there are only three ways a chapter 13 can end: discharge, conversion, or dismissal. In the case of a chapter 20, there can be no discharge and conversion is not an option; dismissal is thus the result when a debtor performs a plan that leaves one or more debts wholly or partially unpaid. The court concluded that "any other outcome would give the debtor a de facto discharge when by statute no discharge is available."	Bowie	4/19/2010
<i>In re Jazo</i> , Case No. 09-16609-JM13, 2010 Bankr. LEXIS 3534 (Bankr. S.D. Cal. Sept. 28, 2010)	The court looked to <i>Casey</i> and stated that it would grant the debtors' motion to strip lien so long as it did not permanently avoid or grant a de facto discharge of the underlying debt.	Bowie	9/28/2010
<i>In re Victorio</i> , 454 B.R. 759, 774 (Bankr. S.D. Cal. 2011), <i>aff'd</i> , 470 B.R. 545, 553 (S.D. Cal. 2012)	Order finding that the bankruptcy court did not err in concluding that a chapter 20 debtor cannot permanently strip liens in absence of discharge of payment in full. According to the bankruptcy court, <i>Okosisi</i> simply invented the idea that enactment of § 1328(f) created a fourth option - closing a case without discharge - where no such option existed.	Bowie <i>Aff'd</i> Anello	7/8/2011 <i>Aff'd</i> 2/24/2012

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3) Chapter 20 debtor may permanently strip an unsecured junior mortgage lien; lien strip effective upon plan completion			
Case Name	Description	Opinion by	Date
<i>In re Picht</i> , 2009 Bankr. LEXIS 1725 (Bankr. D. Kan. June 20, 2009), <i>reversed & remanded, Bank of the Prairie v. Picht (In re Picht)</i> , 425 B.R. 885 (B.A.P. 10th Cir. 2009)	<p>Bankruptcy court confirmed the debtor’s chapter 13 plan over the objections of the creditor bank. The bankruptcy court looked to <i>Johnson</i> to determine the effect of the debtors’ prior chapter 7 case. The court explained that the bank’s lien passed through the prior chapter 7 bankruptcy case unaffected; however, the debtors’ liability on the debt to the bank was discharged so the bank was left with only its mortgage lien, <i>i.e.</i>, its <i>in rem</i> claim for payment. The <i>in rem</i> claim constituted a right to payment from the proceeds of the homestead or the right to foreclose but only existed to the extent that there was value in the debtor’s property to secure the claim. If debtors had not filed for bankruptcy, the bank could have foreclosed its interest, but the bank could only recover the home’s value to the extent it exceeded the value of the first mortgage. The court concluded that the bank should not obtain a more favorable result in bankruptcy than it would be able to obtain outside bankruptcy.</p> <p>On appeal, the panel found that the plan improperly extinguished the bank’s lien. Under nonbankruptcy law, the bank’s lien would encumber the debtors’ residence regardless of whether the value of the residence exceeded the first mortgage at any point in time.</p>	<p>Berger</p> <p><i>Reversed by</i> Rasure</p>	<p>6/20/2009</p> <p><i>Reversed</i> 5/4/2010</p>
<i>In re Tran</i> , 431 B.R. 230, 235 (Bankr. N.D. Cal. 2010), <i>aff’d</i> , 814 F. Supp. 2d 946 (N.D. Cal. 2011)	<p>The trustee objected to plan confirmation and requested dismissal in two cases. Looking to the facts of the <i>Tran</i> case, the court found that the debtor had not acted in good faith (precluding plan confirmation per 1325(a)(3) and (a)(7) and requiring dismissal per 1307(c)) in filing a chapter 13 case “solely for purposes of avoiding the second deed of trust under circumstances where such avoidance was not available to [the debtor] in chapter 7 . . .” Regarding the <i>Bennett</i> debtor, the court overruled the trustee’s objection but ultimately denied confirmation on other grounds.</p>	<p>Jellen</p> <p><i>Aff’d by</i> Wilken</p>	<p>6/25/2010</p> <p><i>Aff’d</i> 8/31/2011</p>
<i>Hart v. San Diego Credit Union</i> , 449 B.R. 783 (S.D. Cal. 2010)	<p>The court reversed and remanded the bankruptcy court’s decision that found that lien stripping was conditional upon plan completion and discharge. The court explained that there is no discharge requirement prior to avoidance or stripping of a lien under section 506, and that it would not impose one absent guidance from the Ninth Circuit or plain language in the Bankruptcy Code.</p>	<p>Sammartino</p>	<p>3/1/2010</p>
<i>In re Hill</i> , 440 B.R. 176 (Bankr. S.D. Cal. 2010)	<p>The court granted the debtors’ motion to strip lien and confirmed the debtors’ plan. The court looked to <i>Tran</i> and found nothing in the Code ties lien stripping to discharge and that section 1325(a)(5) did not apply. The court found that the lien would remain until the plan was consummated that that the claimant had to receive its pro-rata share of the distribution to unsecured creditors.</p>	<p>Mann</p>	<p>11/29/2010</p>

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3) Chapter 20 debtor may permanently strip an unsecured junior mortgage lien; lien strip effective upon plan completion			
<i>In re Grignon</i> , Case No. 10-34196-tmb13, 2010 Bankr. LEXIS 4279 (Bankr. D. Or. Dec. 7, 2010)	The court overruled the trustee's objections to confirmation and held that chapter 20 debtors could strip liens in certain cases. The court relied on <i>Tran</i> to find that using § 506(a) to strip off a wholly unsecured lien was not, <i>per se</i> , impermissible in a no-discharge chapter 13 case. The court found that the debtors filed their plan in good faith but ordered the debtors to file an adversary proceeding to obtain a judgment that could be recorded in real property records to show that the junior lien had been avoided.	Brown	12/7/2010
<i>In re Fair</i> , 450 B.R. 853 (E.D. Wis. 2011)	The district court reversed and remanded the bankruptcy court's decision dismissing an adversary proceeding seeking to strip a wholly unsecured second mortgage lien. The court found that the second lien was unsecured and cited the <i>Tran</i> and <i>Hill</i> decisions to support its conclusion that there is nothing in the Code that ties the modification of an unsecured lien to obtaining a chapter 13 discharge.	Randa	4/19/2011
<i>In re Okosisi</i> , 451 B.R. 90 (Bankr. D. Nev. 2011)	At plan confirmation, the court found that the debtors filed their chapter 20 case in good faith and held that they were permitted to permanently avoid their second mortgage. The court looked to <i>Nobelman</i> and <i>Zimmer</i> (Ninth Circuit equivalent to <i>Tanner</i>) to find that when a creditor is wholly unsecured under section 506(a), the creditor has an unsecured claim for purposes of section 1322(h)(2) and section 1325(a)(5) does not apply.	Markell	5/16/2011
<i>Jennings</i> , 454 B.R. 252, 255 (Bankr. N.D. Ga. 2011)	Considering two cases, the court held that, if a plan is filed in good faith, a chapter 20 debtor may strip off the lien of a wholly unsecured second mortgage. However, the plans were not confirmable – the debtors had to amend their plans to treat the claims of the wholly underwater second mortgage holders as unsecured claims. Confirmation denied without prejudice.	Mullins	7/11/2011
<i>In re Gloster</i> , 459 B.R. 200 (Bankr. D.N.J. 2011)	The bankruptcy court overruled the trustee's objections and confirmed the debtor's chapter 13 plan. (The debtor had submitted a certification describing the circumstances that caused her to file her chapter 13 case.) The court found that BAPCPA did not make any changes to sections 506 or 1322, which form the basis for chapter 13 lien stripping and looked to <i>Hill</i> and <i>Okosisi</i> to find that ineligibility for a discharge does not preclude stripping off a junior lien.	Winfield	10/13/2011
<i>Fisette v. Keller (In re Fisette)</i> , 455 B.R. 177 (B.A.P. 8th Cir. 2011)	Order reversing and remanding bankruptcy court decision (confirming debtor's chapter 13 plan over debtor's objection). The panel found that the Code permits a chapter 13 debtor to strip off a wholly unsecured lien and a debtor's ability to strip off a lien is effective upon completion of the plan, rather than on his receipt of a discharge. It was for the bankruptcy court to consider whether the debtor's plan complied with the additional requirements for confirmation.	Schermer	11/14/2011

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3) Chapter 20 debtor may permanently strip an unsecured junior mortgage lien; lien strip effective upon plan completion			
<p><i>In re Scotto-DiClemente</i>, 459 B.R. 558, 566 (Bankr. D.N.J. 2011), <i>reconsideration denied</i>, 463 B.R. 308 (Bankr. D.N.J. 2012); <i>see also</i> 2012 U.S. Dist. LEXIS 113799 (D.N.J. Aug. 13, 2012) (affirming bankruptcy court's order denying debtor's motion for reconsideration)</p>	<p>The court found that chapter 20 lien stripping was permitted as long as the chapter 13 case is filed in good faith and the plan is completed to fruition. The court found that the debtor filed the chapter 20 case in good faith but dismissed the case for failing to satisfy the requisite qualifications for eligibility under section 109(e) (section 109(e) states that "only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than \$ 360,475 . . . may be a debtor under chapter 13 of this title."). The court included the wholly unsecured second and third mortgages in making the section 109(e) calculation and found that the debtor owed more than \$200,000 over the allowed statutory limit under section 109(e). The court dismissed the debtor's case under section 1307(c).</p>	Kaplan	11/18/2011
<p><i>In re Miller</i>, 462 B.R. 421, 431 (Bankr. E.D.N.Y. 2011)</p>	<p>In two cases, confirmation depended on the debtors' ability to strip liens. The court concluded that chapter 20 lien stripping is permissible and that the debtors' plans should be confirmed. The court looked to <i>In re Pond</i>, 252 F.3d 122, (2d Cir. 2001) (Second Circuit equivalent of <i>Tanner</i>), which found that the anti-modification provision protects a creditor's right in a mortgage lien only where the debtor's residence retains enough value so that the lien is at least partially secured under section 506(a).</p>	Trust	12/15/2011
<p><i>In re Blenheim</i>, No. 09-10283-MLB, 2011 Bankr. LEXIS 5122 (Bankr. W.D. Wash. Dec. 27, 2011)</p>	<p>Considering debtors' motion to confirm amended plan, the court found that although there was no inherent prohibition against lien stripping in a chapter 20 case, it would not confirm the debtors' plan because it was not proposed in good faith. The court looked to the good faith factors in <i>Hill</i> ((1) whether debtors have a need for bankruptcy other than to do a lien strip, (2) whether the debtors acted equitably in proposing a plan, (3) whether the debtors are insolvent and are devoting all of their income to the plan, and (4) whether the debtors used serial filings to avoid payment to creditors) and found that the debtors did not act equitably in proposing their plan. The debtors had filed a motion to avoid the first lien on their residence and then proposed to strip the second lien and pay general unsecured creditors 0%.</p>	Barreca	12/27/2011
<p><i>In re Scantling</i>, 465 B.R. 671, 682 (Bankr. M.D. Fla. 2012)</p> <p>Note that the 11th circuit has certified a direct appeal: case no. 13-10558. It looks like there may be a hearing during the week of 12/9/2013.</p>	<p>The court overruled the objections to confirmation and the debtor's motion to strip lien to the extent that they were based on the debtor's ineligibility for a discharge. The court noted that <i>Nobelman</i> dealt with a claim that was partially undersecured - it was the existence of some collateral for the bank's claim that made the bank a "holder" of a "secured claim" and brought into play the anti-modification provision. Nothing in BAPCPA suggested that the new provision in section 1325(a)(5) (B) was intended to abrogate a debtor's right to strip off a wholly unsecured junior mortgage.</p>	Williamson	2/24/2012

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3) Chapter 20 debtor may permanently strip an unsecured junior mortgage lien; lien strip effective upon plan completion			
<i>In re Frazier</i> , 448 B.R. 803, 807 (Bankr. E.D. Cal. 2011), <i>aff'd</i> , 469 B.R. 889 (E.D. Cal. 2012)	Bankruptcy court entered order confirming plan and permitting chapter 20 lien strip; the district court affirmed. The district court explained that holding an allowed secured claim is not necessarily synonymous with holding a security interest outside of bankruptcy. The junior lien was wholly unsecured and, under Ninth Circuit precedent, <i>Lam</i> and <i>Zimmer</i> , the anti-modification provision does not protect a creditor whose junior lien on a debtor's primary residence has been classified as an "unsecured claim" by section 506(a)(1). Congress was deliberate in only prohibiting discharge in a chapter 20 case. The district court agreed that plan completion is the appropriate end to a chapter 20 case and that the plan was filed in good faith.	Sagris <i>Aff'd by</i> England	1/10/2011 3/9/2012
<i>In re Linh Dang</i> , 467 B.R. 227, 237 (Bankr. M.D. Fla. 2012)	The court overruled the trustee's amended objection to confirmation. The Court looked to <i>Tanner</i> and found that it allowed the debtor to strip the junior lien on her homestead even though the lien "passed through" her prior chapter 7 case and even though the debtor could not receive a chapter 13 discharge.	Glenn	3/12/2012
<i>In re Waterman</i> , 447 B.R. 324, 329 (Bankr. D. Colo. 2011), <i>aff'd</i> , 469 B.R. 334 (D. Colo. 2012)	The court found that the bankruptcy court did not err in finding that a chapter 20 debtor could strip off a wholly unsecured second lien on his home affirmed the bankruptcy court's order confirming the debtor's plan.	Brooks <i>Aff'd by</i> Arguello	3/23/2011 3/13/2012
<i>In re Renz</i> , 476 B.R. 382, 389-92 (Bankr. E.D.N.Y. 2012)	Order denying confirmation of debtors' plan. The court found that the plan was not filed in good faith when debtors filed claim on behalf of the junior lienholder, then filed adversary proceeding to strip off the lien, then withdrew the claim and proposed a plan that made no payment to the stripped-off lienholder. The court found that while debtors could strip off a wholly unsecured junior lien, the stripped-off junior lienholder was entitled to payment as an unsecured creditor.	Trust	8/1/2012
<i>In re North</i> , Case No. 11-72843, 2012 Bankr. LEXIS 4836 (Bankr. N.D. Cal. Oct. 15, 2012)	The court found that the lien stripping proposed by the debtor's plan was permissible and would be permanent upon completion of the plan. The court cited <i>Scantling</i> to support its conclusion that the second mortgage creditor did not have an allowed secured claim and <i>Tran</i> for its conclusion that nothing in the Code provides that a chapter 13 debtor's right to strip is conditioned on eligibility for a discharge. The court emphasized that good faith is always a consideration at confirmation and found that the debtor had a clear need for bankruptcy.	Efremsky	10/15/2012
<i>Wong v. Green Tree Servicing, LLC (In re Wong)</i> , 488 B.R. 537 (Bankr. E.D.N.Y. Mar. 14, 2013)	Order denying chapter 13 trustee's motion to dismiss debtor's adversary proceeding seeking to strip a wholly unsecured lien. The court noted that while the chapter 20 lien strip issue has divided courts, there appears to be a growing consensus that in a chapter 20 case, the rights of a creditor who does not hold a secured claim pursuant to section 506(a) are subject to modification pursuant to section 1322(b)(2) and that such creditors do not qualify as secured creditors for purposes of section 1325(a)(5).	Strong	3/14/2013

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3) Chapter 20 debtor may permanently strip an unsecured junior mortgage lien; lien strip effective upon plan completion			
<i>Branigan v. Davis (In re Davis)</i> , 716 F.3d 331 (4th Cir. 2013)	Bankruptcy court confirmed chapter 13 plan, the trustee appealed and the district court affirmed. On further appeal, the Fourth Circuit affirmed. The court first held that the Code permits stripping off of valueless liens in chapter 13 proceedings. The court then found that the analysis permitting lien-stripping in chapter 20 cases is no different than that in any other chapter 13 case. BAPCPA does not prevent chapter 20 debtors from stripping off a wholly unsecured mortgage because discharge is not a condition for modification under section 1322(b)(2) and section 1325(a)(5) is not applicable to a wholly unsecured <i>in rem</i> claim. The debtors' junior liens were worthless and, therefore, unsecured claims under section 506(a). While <i>Dewsnup</i> admittedly requires that section 506 operate in tandem with another statutory provision to effectuate lien-stripping, section 506 has always operated in tandem with section 1322(b) to strip liens in chapter 13 cases. Further, the law already provides a mechanism for preventing abuse of the bankruptcy process: good faith. Creditors are also protected by section 349(b)(1)(C) (a lien springs back if the case is dismissed).	Diaz	5/10/2013
<i>In re Wapshare</i> , 492 B.R. 211, 217 (Bankr. S.D.N.Y. 2013)	The court granted the debtor's motion to avoid lien and to reclassify creditor's claim as unsecured. The court relied on the Fourth Circuit's opinion in <i>Davis</i> and a second circuit case, <i>Wong</i> , to find that the wholly underwater second lien did not give rise to an "allowed secured claim." The court noted that the debtor must still prevent dismissal of the case and must still meet each of the other applicable provisions of § 1325 to obtain confirmation of his or her plan.	Morris	5/15/2013
<i>In re Dolinak</i> , Case No. 12-13500, 2013 Bankr. LEXIS 2639 (Bankr. D.N.H. June 28, 2013)	The court granted the debtors' motions to strip lien. The court looked to <i>Davis</i> and found that since the property had no value in excess of the first mortgage, the second mortgage holder's claim was not secured. The court found that the analysis permitting lien-stripping in chapter 20 cases is no different than that in any other chapter 13 case since section 1328(f)(1) only prevents a chapter 20 debtor from receiving a discharge, it does not limit a chapter 20 debtor's rights under § 1322(b). The court relied on <i>Okosisi</i> , to find that lien avoidance becomes permanent when the debtor successfully completes all payments under a confirmed plan.	Deasy	6/28/2013

Addressing Student Loans in Chapter 13 Post-BAPCPA
Adam M. Goodman
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Student loan debt in the United States exceeds \$1.2 trillion and is the second largest form of consumer debt after home mortgages.¹ For the class of 2011, the average student loan debt for a bachelor's degree was \$26,600 per borrower.² Meanwhile, in fiscal year 2012, there were 1,219,132 non-business bankruptcy filings, down from 1,417,326 in fiscal year 2011.³ So as the economy begins to recover, the bankruptcy courts will continue to see individuals filing for relief and attempting to deal with student loan debt. However, this is not new as the courts have struggled⁴ with addressing student loans for years, and virtually each time Congress amends the Bankruptcy Code, it gets a little murkier. BAPCPA did not alter the § 1322 provisions that cause tension in treating student loans, but interest payments may have become a deal breaker and the means test continues to rear its head.

The student loan is a bankruptcy platypus: it is not a priority debt which must be paid in full through the plan;⁵ rather it is a general unsecured debt that is nondischargeable⁶ unless the debtor can establish undue hardship.⁷ In addition, interest continues to accrue and is nondischargeable.⁸ Logically, if the debtor is financially capable she will prefer to pay down her student loan as much as possible. For the debtor who does not propose, and is not being required,⁹ to pay her general un-

1 Rohit Chopra, Consumer Financial Protection Bureau; Student Debt Swells, Federal Loans Now Top A Trillion (July 17, 2013). <http://www.consumerfinance.gov/speeches/student-debt-swells-federal-loans-now-top-a-trillion/>.

2 The Project on Student Debt, An Initiative of the Institute for College Access & Success; Student Debt and the Class of 2011. (October 18, 2012). <http://www.projectonstudentdebt.org/>.

3 <http://news.uscourts.gov/bankruptcy-filings-down-fiscal-year-2012> (Nov. 7, 2012).

4 See *In re Precise*, 2013 WL 5201264, *5 (Bankr. E.D. Pa. June 24, 2013); *In re Orawsky*, 387 B.R. 128, 141 (Bankr. E.D. Pa. 2008).

5 11 U.S.C. § 1322(a)(2).

6 11 U.S.C. § 523(a)(8).

7 11 U.S.C. §§ 523(a)(8), 1328(a)(2), and 1328(c)(2). In 1990 Congress made certain federally back student loans nondischargeable (See Student Loan Default Prevention Initiative Act of 1990, Pub. L. 101-508 (Nov. 5, 1990)) and in 2005 Congress made privately owned student loans nondischargeable (Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 110 Stat. 23, generally effective for cases filed on or after October 17, 2005).

8 E.g., *Leeper v. Pennsylvania Higher Educ. Assistance Agency*, 49 F.3d 98 (3rd Cir. 1995).

9 See 11 U.S.C. §§ 1325(a)(4) (best interest of creditors test) and 1325(b) (projected disposable income test). Good faith under 11 U.S.C. § 1325(a)(3) may also be a consideration, however,

secured debt in full, the question is can she provide a greater payment to her student loan creditors than her other unsecured creditors.

The answer is maybe, as Chapter 13 does not simply and uniformly address student loans.¹⁰ This lack of ease where student loans and bankruptcy intersect is not surprising considering the principled crossroads at which they reside: providing the debtor a fresh start; the legislative intent to have people repay student loans; and providing fair treatment to all creditors.¹¹

Practically, the debtor who proposes to specially classify her student loan will either seek to pay the student loan through payments to the trustee but provide a lesser, or no, return to her other unsecured creditors; or she provides to cure the default and maintain payments on the long term debt directly to the creditor; or a combination of both.¹²

Code § 1322(b)(1) can permit the debtor to prefer her student loan debt, however in designating separate classes she “cannot discriminate unfairly against any class so designated.” What is unfair discrimination is not defined and a wide breadth of case law has developed with courts reviewing various subjective¹³ multi-part balancing tests.¹⁴ Though eventually it is a case-by-case

it is an element in many tests evaluating the preferential treatment of student loans.

10 See *In re Crawford*, 324 F.3d 539, 542 (7th Cir. 2003) (“We conclude, at least provisionally, that this is one of those areas of the law in which it is not possible to do better than to instruct the first-line decisionmaker, the bankruptcy judge, to seek a result that is reasonable in light of the purposes of the relevant law, which in this case is Chapter 13 of the Bankruptcy Code.”).

11 See *In re Harding*, 423 B.R. 568, 575 (Bankr. S.D. Fla. 2010).

12 See *In re Orawsky*, 387 B.R. 128 (Bankr. E.D. Pa. 2008); *In re Machado*, 378 B.R. 14 (Bankr. D. Mass. 2007). This is not to ignore the debtor who wants to pay the student loan in full at an accelerated rate, which has been rejected by the courts, see, e.g., *In re Bentley*, 266 B.R. 229 (B.A.P. 1st Cir. 2001); *In re Mulkey*, 2005 WL 4659360 (Bankr. N.D. Ga. 2005), or the debtor who obtains a discharge of the student loan by plan declaration through confirmation without an undue hardship adversary proceeding. This latter approach was the subject a circuit split resolved by the Supreme Court in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010) but premised on due process and the confirmation order’s finality. Courts have since expressly rejected this approach. See *In re Wright*, 444 B.R. 883, 886-7 (Bankr. S.D. Ind. 2010) (“Debtors’ counsel and the consumer bar are well advised to take heed of this language and to exercise more care in how they treat student loans within Chapter 13 plans; otherwise they could, and probably should, be looking down the barrel of a Rule 9011 motion for sanctions.”).

13 See *In re Orawsky*, 387 B.R. 128 (Bankr. E.D. Pa. 2008).

14 E.g., *In re Leser*, 939 F.2d 669 (8th Cir. 1991) (conjoined with *In re Wolff*, 22 B.R. 510 (B.A.P. 9th Cir. 1982), the most frequently cited analysis on unfair discrimination and using 4 elements); *McCullough v. Brown*, 162 B.R. 506 (N.D. Ill. 1993) (analyzed from the viewpoint of the discriminated class); *In re Bentley*, 266 B.R. 229 (B.A.P. 1st Cir. 2001) (proposing a 4 point baseline review); *In re Husted*, 142 B.R. 72 (Bankr. W.D.N.Y. 1992) (5 part test).

analysis, looking at the differences in amounts to be received by each unsecured class by evaluating the return with and without the discrimination.¹⁵ Notably courts have rejected the discriminatory treatment when the sole reason is because the debt is nondischargeable.¹⁶

An alternative theory in preferring the student loan is found in § 1322(b)(5), which permits the debtor to propose a plan that cures the arrearage and maintains ongoing payments for long term debt. Some courts find that § 1322(b)(5) trumps the application of the § 1322(b)(1) unfair discrimination test.¹⁷ Most courts, though, continue to review the plan under the unfair discrimination analysis.¹⁸

BAPCPA added Code sections impacting the student loan treatment in Chapter 13, necessitating additional analysis and not ending the divided opinions on specially classifying student loan debt. The matters include the payment of interest as well as the student loan's relationship to the disposable income calculation and the means test result.

First, as noted above, the accruing student loan interest is nondischargeable. Whether the debtor or trustee remits the funds to the creditor, a large part of the payment will likely be applied to interest. Code § 1322(b)(10) was added¹⁹ in 2005 and provides that “the plan may provide for the payment of interest accruing after the date of the filing of the petition on unsecured claims that are nondischargeable under section 1328(a), except that such interest may be paid only to the extent that the debtor has disposable income available to pay such interest after making provision for full payment of all allowed claims.”

This appears to preclude the debtor from maintaining ongoing payments to student loans,

15 See, e.g., *In re Brown*, 162 B.R. 506, 518 (N.D. Ill. 1993) (See Appendix outlining cases with the return to the student loan creditor, the other creditors, and whether the discrimination was considered fair or unfair); *In re Boscaccy*, 442 B.R. 501 (Bankr. N.D. Miss. 2010).

16 E.g., *In re Labib-Kiyarash*, 271 B.R. 189 (B.A.P. 9th Cir. 2001); *In re Bentley*, 266 B.R. 229 (B.A.P. 1st Cir. 2001).

17 E.g., *In re Truss*, 404 B.R. 329 (Bankr. E.D. Wis. 2009); *In re Chandler*, 210 B.R. 898 (Bankr. D. N.H. 1997); *In re Cox*, 196 B.R. 744 (Bankr. N.D. Fla. 1995); *In re Benner*, 156 B.R. 631 (Bankr. Minn. 1993).

18 E.g., *In re Labib-Kiyarash*, 271 B.R. 189 (B.A.P. 9th Cir. 2001); *In re Belda*, 315 B.R. 477 (N.D. Ill. 2004); *In re Pracht*, 464 B.R. 486 (Bankr. M.D. Ga. 2012); *In re Harding*, 423 B.R. 568 (Bankr. S.D. Fla. 2010).

19 Technically, 11 U.S.C. § 1322(b)(10) existed pre-BAPCPA, but the provision occupying that space became § 1322(b)(11).

despite the presence of § 1322(b)(5). There is no useful legislative history explaining the reason for adding the provision and courts are split on the impact of § 1322(b)(10). Some courts look to the plain language of § 1322(b)(10) and determine that payment with interest in a composition plan is impermissible.²⁰ On the other hand, some courts permit special classification and the interest payment, reasoning that § 1322(b)(5) is the more specific provision and that if § 1322(b)(10) was an exception to § 1322(b)(5), then the exception would swallow the rule.²¹

Second, BAPCPA adjusted §§ 1325(b) and 707(b) by defining disposable income (and arguably conjoining it with projected disposable income), and creating the means test as well as the applicable commitment period. These changes to Chapter 13 have created a greater volume of litigation that so far has twice found its way to the Supreme Court to address issues related to calculating disposable income under the means test.²²

Bankruptcy courts are famously split on how to interpret the means test result and what the unsecured creditors should receive: Is the test purely mechanical? Can a party seek deviation from the result? Is the applicable commitment period a multiplier or a temporal requirement?²³ Depending on various factors, the means test can result in a situation where either the debtor does not actually have the financial ability to funds the formula's required return,²⁴ or in reality she has greater funds available to pay her unsecured creditors than the test requires.²⁵

Prior to BAPCPA most courts analyzed the § 1325(b) projected disposable income on a case-by-case basis by reviewing Schedules I and J, inspecting the expenses under the "reasonably necessary" analysis, and casting the available income over 36 monthly payments.²⁶ These funds

20 E.g., *In re Precise*, 2013 WL 5201264 (Bankr. E.D. Pa. June 24, 2013); *In re Stull*, 489 B.R. 217 (Bankr. D. Kan. 2013); *In re Kubeczko*, 2012 WL 2685115 (Bankr. D. Colo. July 6, 2012); *In re Edmonds*, 444 B.R. 898 (Bankr. E.D. Wis. 2010).

21 *In re Freeman*, 2006 WL 6589023 (Bankr. N.D. Ga. Dec. 22, 2006). See also *In re Brown*, 2013 WL 4806392 (Bankr. S.D. Ga. Sept. 6, 2013); *In re Boscaccy*, 442 B.R. 501 (Bankr. N.D. Miss. 2010); *In re Webb*, 370 B.R. 418 (Bankr. N.D. Ga. 2007).

22 See, e.g., *Ransom v. FIA Card Services, N.A.*, 131 S.Ct. 716 (2011); *Hamilton v. Lanning*, 560 U.S. 505 (2010).

23 See Hon. W. Homer Drake, Hon. Paul W. Bonapfel & Adam M. Goodman, Chapter 13 Practice and Procedure, § 9F (2013), for a more detailed explanation of the projected disposable income analysis as well as the applicable commitment period.

24 E.g., *Hamilton v. Lanning*, 560 U.S. 505 (2010).

25 E.g., *In re Berger*, 376 B.R. 42 (Bankr. M.D. Ga. 2007).

26 See, *In re Hutchinson*, 354 B.R. 523 (Bankr. D. Kan. 2006); *In re McLaughlin*, 217 B.R.

were then projected for payment to all creditor classes. In fashioning a permissible discriminatory class, some courts required a pro rata distribution of the projected disposable income that would be available to all the unsecured creditors during the 3 year period, but once that time expired, the debtor was allowed to redirect available funds to the student loan creditor.²⁷

Under BAPCPA, the § 1325(b)(1)(B) projected disposable income is calculated with the means test and is now focused solely on the unsecured creditors.²⁸ The standard 3 year minimum plan term was replaced with the applicable commitment period: 3 years if the debtor's income is below the median family income level and 5 years if her income is above the median.²⁹

The below median debtor's projected disposable income is not measured under the complete means test, and there is no BAPCPA guidance for calculating projected disposable income; so it is typically determined to be based on the pre-BAPCPA practice of using Schedules I and J.³⁰ Thus, the below median debtor's attempt to use income to fund the student loan is premised on the unfair discrimination analysis and a review of her reasonably necessary expenses, but she might not be permitted to carve out funds she otherwise makes available to pay the student loan.³¹

Meanwhile, the above median debtor completes the means test to determine her income that should be available to the unsecured creditors. How the court applies the means test and the applicable commitment period may determine whether the debtor has income available that allows for both the discrimination and honors the means test calculation.

Several courts have adjusted the focus of the unfair discrimination test through the prism

772 (Bankr. W.D. Tex. 1998).

27 E.g., *In re Simmons*, 288 B.R. 737 (Bankr. N.D. Tex. 2003); *In re Strickland*, 181 B.R. 598 (Bankr. N.D. Ala. 1995).

28 See 11 U.S.C. §§ 1325(b)(1)(B) and 707(b)(2).

29 11 U.S.C. § 1325(b)(4). See also 11 U.S.C. § 101(39A).

30 E.g., *In re Precise*, 2013 WL 5201264 (Bankr. E.D. Pa. June 24, 2013); *In re Renteria*, 2012 WL 1439104 (Bankr. D. Colo. Apr. 26, 2012). See also *In re Hornung*, 425 B.R. 242, 251 (Bankr. M.D.N.C. 2010).

31 E.g., *In re Precise*, 2013 WL 5201264 (Bankr. E.D. Pa. June 24, 2013); *In re Kubezko*, 2012 WL 2685115 (Bankr. D. Colo. July 6, 2012). See also *In re Towler*, 493 B.R. 239 (Bankr. D. Colo. 2013). Cf. *In re Machado*, 378 B.R. 14 (Bankr. D. Mass. 2007) (Debtor proposed 60 month plan with "cure and maintain" provision. Differential between discrimination and nondiscrimination was \$700; discrimination found to be fair).

of the means test's formulaic method.³² These courts determine that the above median debtor who possesses available income greater than the means test result has "discretionary income" with which she can direct payments to her student loan. The courts point out that the unsecured creditors are receiving at least as much as the means test requires, and that § 1322(b)(1)'s unfair discrimination test does not trump the §§ 1325(b)(3) and 707(b)(2) means test.

Other courts have reached the same result under different approaches. One thought is that § 1325(b)(1)(B) does not specifically address the allocation of the projected disposable income, which merely states the income will be "applied to make payments to unsecured creditors under the plan," thereby permitting the debtor to focus the means test disposable income to the student loan.³³ Another line may find that the student loan is a "special circumstance" deduction from the means test under § 707(b)(2)(B)(i),³⁴ thereby carving out from the means test result the funds for the student loan.

The Supreme Court has expressed its impression that "Congress designed the means test to measure debtors' disposable income and, in that way, 'to ensure that [they] repay creditors the maximum they can afford.'"³⁵ Further, the Court stated "in cases in which a debtor's disposable income during the 6-month look-back 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 Congress intended. In cases in which the debtor's disposable income is higher during the plan period, the mechanical approach would deny creditors payments that the debtor could easily make."³⁶

The Supreme Court thus allows for deviation from the means test calculation in certain circumstances. One could argue that an analysis permitting the use of the means test to justify creating

32 E.g., *In re King*, 460 B.R. 708 (Bankr. N.D. Tex. 2011); *In re Abaunza*, 452 B.R. 866 (Bankr. S.D. Fla. 2011); *In re Sharp*, 415 B.R. 803 (Bankr. D. Colo. 2009). See also *In re Orawsky*, 387 B.R. 128, 155-56 (Bankr. E.D. Pa. 2008).

33 E.g., *In re Knight*, 370 B.R. 429 (Bankr. N.D. Ga. 2007). See also *In re Rivera*, 490 B.R. 130 (B.A.P. 1st Cir. 2013); *In re Pracht*, 464 B.R. 486 (Bankr. M.D. Ga. 2012); *In re Orawsky*, 387 B.R. 128 (Bankr. E.D. Pa. 2008).

34 E.g., *In re Knight*, 370 B.R. 429 (Bankr. N.D. Ga. 2007); *contra*, *In re Maura*, 491 B.R. 493 (Bankr. E.D. Mich. 2013).

35 *Ransom v. FIA Card Services, N.A.*, 131 S.Ct. 716, 725 (2011).

36 *Hamilton v. Lanning*, 560 U.S. 505 (2010).

“discretionary income,” or a carve out for specific creditors, favors above median debtors with the ability to “pass” the means test, and gives new meaning to the phrase “discriminate unfairly.”

Furthermore, where courts interpret the applicable commitment period as a temporal requirement,³⁷ the above median debtor may be required to perform under her plan for the full 60 months, with local custom precluding the “discretionary income.”³⁸

Ultimately, regardless of the method to justify special classification there is virtually no escape from an unfair discrimination analysis. Courts will have to continue to subjectively interpret the interplay of §§ 1322(b)(1), 1322(b)(5), 1322(b)(10), 1325(b), and 707(b)(2) to determine whether the amount the separated classes will receive amounts to unfair discrimination. A uniform model plan cannot resolve the problem, and we will have to wait until, or if, Congress decides to tell us it is turning the platypus into a duck, a beaver, or an otter.

³⁷ See *In re Flores*, 2013 WL 4566428 (9th Cir. Aug. 29, 2013); *Baud v. Carroll*, 634 F.3d 327 (6th Cir. 2011); *Whaley v. Tennyson*, 611 B.R. 873 (11th Cir. 2010); *In re Fredrickson*, 545 F.3d 652 (8th Cir. 2008), cert. denied, 129 U.S. 1630 (2009); *In re Timothy*, 442 B.R. 28 (B.A.P. 10th Cir. 2010). Cf. *In re Kagenveama*, 541 F.3d 868 (9th Cir. 2008).

³⁸ See *In re LaSota*, 351 B.R. 56 (Bankr. W.D.N.Y. 2006).

Voluntary Retirement Contributions in Chapter 13 Plans

By: Aubrey L. Thomas¹²

Whether a Chapter 13 debtor can continue making contributions to a qualified retirement plan during the life of that debtor's plan is quickly become a divisive issue between the circuits. Unfortunately, the proposed Chapter 13 national model plan form does little to shed any light on the issue (to be fair, it probably isn't within the scope of the model plan to address the issue). To fully understand the source of the controversy regarding continuing retirement contributions during the life of a Chapter 13 plan, it is helpful to start with the statutory context.

The Main Statutes In Play

11 U.S.C. § 1325(b)(1)-(3):

“(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

“(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

“(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

“(2) For purposes of this subsection, the term “disposable income” means current monthly income received by the debtor . . . less amounts reasonably necessary to be expended - (A)(i) for the maintenance or support of the debtor or a dependent of the debtor[.]

“(3) Amounts reasonably necessary to be expended under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2) [for above median-income debtors.]”

11 U.S.C. § 541(b)(7)(A):

“(b) Property of the estate does not include –

“ . . .

“(7) any amount -

“(A) withheld by an employer from the wages of employees for

1 These materials are a summary of legal research that was completed in connection with an Article published by me and my colleague, Pernell W. McGuire, *401(k) Contributions under Post-BAPCPA Case Law*, ABI Journal, March 2013. Some of the statements provided are taken directly from that Article.

2 I welcome any thoughts or comments you may have regarding the issues addressed in these materials. I may be contacted at athomas@davismiles.com.

payment as contributions -

“(i) to - (I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986; (II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or (III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

“except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2)[.]” (subsection (B) includes the same “hanging paragraph”) (emphasis added)

Divergent Approaches

In adding the “hanging paragraph” to section 541(b)(7) in the 2005 BAPCA amendments, Congress included a seemingly misplaced provision regarding “disposable income” within the statute that defines “property of the estate.” Courts have struggled to interpret the “hanging paragraph” in light of the restrictions for above-median income debtors³ on what is considered disposable income under section 1325(b)(2). The critical issue between the two main competing approaches appears to be the words “except that” that begins the hanging paragraph. There are three current approaches (with two competing for dominance) to the meaning of the hanging paragraph and each tackles the words “except that” in a different way:

³ Courts have been able to side-step the issue of the allowance of retirement contributions for below-median income debtors. Because below-median income debtors are not subject to the expense restrictions of section 707(b), and are allowed to make contributions if the debtor can show that it is a “reasonably necessary” expense.

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<u>Approach</u>	<u>Exemplary Case</u>	<u>Test/Holding</u>	<u>Courts that Follow Approach</u>
<i>Johnson</i> Approach	<i>In re Johnson</i> , 346 B.R. 256, 263 (Bankr. S.D. Ga. 2006).	A debtor may contribute up to the full allowable contribution amount, even if the debtor did not make 401(k) contributions prior to filing bankruptcy. This approach essentially writes the words “except that” out of the hanging paragraph and takes the remainder of the paragraph at face value.	South District Georgia District of Vermont South District of Texas District of Massachusetts
<i>Prigge</i> Approach	<i>In re Prigge</i> , 441 B.R. 667 (Bankr. D. Mont. 2010).	Above-median income debtors cannot make voluntary retirement contributions during the entire life of the plan.	9 th Circuit BAP North District of CA Sixth Circuit
<i>Seafort</i> Approach	<i>In re Seafort</i> , 437 B.R. 204 (6 th Cir. BAP 2010), <i>aff'd on other grounds</i> , 669 F.3d 662 (6 th Cir. 2012).	A debtor may continue prepetition retirement contributions because section 541(b) (7) “grandfathers” in those types of contributions. Focuses analysis on wording of “commencement of the case” at the beginning of section 541 as being the limiting principle to create a compromise between <i>Johnson</i> and <i>Prigge</i> .	District of Utah East District of Wisconsin

Although the *Johnson* Approach is seen as the “majority” viewpoint, the *Prigge* Approach is quickly gaining steam and has recently been endorsed by both the 6th Circuit

and the 9th Circuit BAP. There have been very few published opinions that have provided a defense of the *Johnson* Approach in light of *Prigge*. *In re Drapeau*, 485 B.R. 29 (2013) is an exception and does a fair job of refuting the *Prigge* Approach, although it does artfully side-step the “except that” wording of the hanging paragraph in its endorsement of *Johnson*.

Thoughts on the Three Approaches

Although many courts have chimed in on the issue of voluntary retirement contributions, there is still a great amount of uncertainty as to the allowance of voluntary retirement contributions by above-median income debtors. None of the three approaches above is completely satisfactory (it may be possible that, due to the awkward wording of the “hanging paragraph,” no interpretation can completely harmonize the relevant provisions). Regardless, there must be a way to give the phrase “except that” meaning within the hanging paragraph. Here are some of my thoughts for your consideration:

1. *In re McCullers*, 451 B.R. 498 (Bankr. N.D. Cal. 2011), which really develops the *Prigge* Approach, provides that the words “except that” imply that the only purpose of the “hanging paragraph,” is to counteract any suggestion that funds withheld from a debtor’s paycheck by an employer to be contributed to a 401(k) plan *but that are still in the employer’s possession on the date of filing* are not “postpetition income.” Whether certain funds are “postpetition income,” however, is irrelevant—the Code focuses on “projected disposable income” and “disposable income.” There is no legal significance to treating those funds as “postpetition income” and, therefore, the exclusion that *McCullers* asserts that the hanging paragraph creates is really a meaningless one.
2. I think it is worthwhile for focus on the actual grammatical meaning of “except that” to harmonize it with the rest of section 541(b)(7). *Webster’s Dictionary* provides that “except” when paired with “that,” means “only” (e.g. I would go, except that it’s too far; or, I would go, only it’s too far). Considering that use of the word “only,” the conjunction “except that” means that the second phrase will explain why the first phrase is so. Applying that grammatical analysis to the “hanging paragraph,” it could be rephrased as follows: Property of the estate does not include amounts contributed to a 401(k) plan, because such amounts are not disposable income.
3. One of the thrusts of the BAPCPA amendments was to allow and protect retirement contributions. It is a goal that is consistent with the idea of a debtor’s “fresh start.” Therefore, any ambiguity in the “hanging paragraph” should be interpreted in favor

of that over-arching principle.

4. The fact that section 1322(f) specifically allows a debtor to continue making payments on a 401(k) loan but does not address the allowance of contributions to retirement plans during the plan should not be seen as evidence of legislative intent to not allow those contributions. The idea that Congress is always organized in the placement of its revisions of existing statutes is not consistent with reality. Although it would have made sense to include the “hanging paragraph” in a section regarding Chapter 13 and the calculation of disposable income, there should be some resistance to making the “hanging paragraph” inert simply because Congress placed the provision in a strange location.

It is important that practitioners continue to raise this issue with the hopes that a robust debate will yield a fair and accurate approach. What the national model plan form exhibits is a desire on the part of courts and practitioners to make uniform the operation of Chapter 13 cases throughout the country. The allowance of voluntary contributions during the life of a Chapter 13 plan is far from uniform, and the complex issues of statutory interpretation raised by that question warrant the detailed attention of courts and practitioners alike.

Income Tax Refunds in Chapter 13

The Problem:

-If income tax refunds are not considered part of a debtor's income then a debtor is encouraged to inappropriately overwithhold in order to shield money from creditors.

-On the other hand, debtors often use income tax refunds as an informal savings account and it is difficult to calculate future actual tax liability and if plan payment is based on actual liability rather than withholdings the plan may be unfeasible.

IS AN INCOME TAX REFUND PROJECTED DISPOSABLE INCOME?

Statutory Predicates:

11 U.S.C. § 1325(b)(1)(B): "If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—...the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan."

11 U.S.C. § 1325(b)(2): "For purposes of this subsection, the term 'disposable income' means current monthly income received by the debtor...less amounts reasonably necessary to be expended—for the maintenance or support of the debtor or a dependent of the debtor...."

11 U.S.C. § 101(10A): "The term 'current monthly income'—(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period [preceding the commencement of the case]...and (B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism."

Relevant Cases:

In re Forbish, 414 B.R. 400 (Bankr.N.D.Ill. 2009)(Court addresses a below median debtor and an objection to confirmation by the Trustee. An income tax refund, when received, is not *current monthly income*. Rather, a refund is evidence of an overstatement of an expense. Only a debtor's actual tax obligation is a reasonable and necessary expense – not the amount withheld.)

In re Spraggins, 386 B.R. 221, 226 (Bankr. E.D. Wis. 2008)("Tax refunds are not income, rather tax refunds are the product of overpayment of payroll taxes.")

In re LaPlana, 363 B.R. 259 (Bankr.M.D.Fla. 2007)(extensive discussion of the issues).

In re Baldwin, 2008 U.S. Dist. LEXIS 98352 (N.D.N.Y Dec. 3, 2008)

In re Stimac, 366 B.R. 889 (Bankr.E.D.Wis 2007)(Court gave above median debtors the option of paying ½ of their refund rather than the full refund in light of the difficulty of calculating a debtor's actual future tax liability.)

In re Skougard, 438 B.R.738 (Bankr.D.Utah 2010)(Debtors must contribute refunds of over \$1,000 to the plan and those who get earned income credit or child tax credits must dedicate refunds over \$2,000).

In re Michaud, 399 B.R. 365 (Bankr.D.N.H. 2008).

In re Raybon, 364 B.R. 587 (Bankr.D.S.C. 2007)(Debtor required to submit all tax refunds less \$145 credit showing on Schedule I).

IS THE ANALYSIS DIFFERENT FOR ABOVE MEDIAN AND BELOW MEDIAN DEBTORS?

Statutory Predicates:

11 U.S.C. § 1325(b)(2): “For purposes of this subsection, the term ‘disposable income’ means current monthly income received by the debtor...*less amounts reasonably necessary to be expended—for the maintenance or support of the debtor or a dependent of the debtor....*”(emphasis added)

- these expenses are typically given effect on Schedules I and J.

11 U.S.C. § 1325(b)(3): “Amounts reasonably necessary to be expended under paragraph (2)... shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income...” higher than the applicable median income.

- these standardized expenses are typically given effect on the “Means Test” form.

IS THE ANALYSIS DIFFERENT FOR REFUNDS BASED ON OVERWITHHOLDING RATHER THAN TAX CREDITS?

Relevant Cases:

In re Royal, 2008 Bankr. LEXIS 3499 (Bankr.N.D.Ill. 2008)(finding earned income tax credits are current monthly income).

IS THE ANALYSIS DIFFERENT FOR PLAN MODIFICATION RATHER THAN CONFIRMATION?

Statutory Predicates:

11 U.S.C. § 1329(a): “At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or

the holder of an allowed unsecured claim, to—(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan; (2) extend or reduce the time for such payments; (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan; or (4) reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance for the debtor”

11 U.S.C. § 1329(b)(1): “Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.

Relevant Cases:

In re Sunahara, 326 B.R. 768 (BAP 9th Cir. 2005)(holding that the disposable income test under §1325(b) is incorporated into § 1329 as part of the ‘good faith’ consideration.)

In re Forbes, 215 B.R. 183 (8th Cir. BAP 1997)(agreeing with *Sunahara* analysis).

In re Robenhorst, 2011 U.S. Dist. LEXIS 10112 (N.D.Ill. 2007)(agreeing with *Sunahara* analysis).

WHAT ABOUT INCOME TAX REFUNDS EARNED PRE-PETITION?

Statutory Predicates

11 U.S.C. § 1322(a)(1): “The plan —(1) shall provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan.”

Relevant Cases:

In re Diaz, 459 B.R. 86 (Bankr.C.D.Cal. 2011).(Income tax refund earned pre-petition is property not income and is not subject to turnover by the Chapter 13 Trustee.)

Kokoszka v. Belford, 417 U.S. 642 (1974)(citing *Segal v. Rochelle*, 382 U.S. 375 (1996)(pre-petition tax refunds are property and not income).

TAX ISSUES IN CHAPTER 13 BANKRUPTCY

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ABI Winter Leadership Conference
December, 2013

DISCHARGING INCOME TAX LIABILITIES IN CHAPTER 13

In Chapters 7, 11, and 12, the basic rules for dischargeability of taxes should be familiar to most practitioners: § 523(a)(1) excepts from discharge (A) priority taxes; (B) taxes with an unfiled return or late return filed less than 2 years prepetition (the “two-year rule”); and (C) taxes with a fraudulent return or evasion. Priority taxes are defined in § 507(a)(8),¹ and include income, excise, and non-trust payroll taxes as to which the due date of the return is less than 3 years prepetition (the “three-year rule”), income taxes assessed within 240 days prepetition (the “240-day rule”); income taxes not assessed before but assessable after the petition *other than 523(a)(1) (B or C) taxes*; and trust fund taxes. The priority time periods are subject to tolling,² the details of which are beyond the scope of this presentation.

In Chapter 13, the rules are different. Under § 1328(a)(2), the no longer so super “super-discharge” excepts only § 507(a)(8)(C) priority taxes – trust funds – and taxes non-dischargeable under 523(a)(1)(B) or (C) – unfiled returns, late returns that fail the 2-year rule, and cases of fraud or evasion. In other words, “bad actor” taxes. But if an honest return was **filed on time, the tax is dischargeable** (provided it is “provided for in the plan”).

Of course, § 1322(a)(2) requires that priority tax claims be paid in full, but without interest (assuming the taxing authority files a proof of claim).

To file or not to file...

What do you do where the taxing authority (with notice) does not file a proof of claim in a Chapter 13? Do you self-file a proof of claim for a dischargeable priority tax?

PROs: Not all cases make it to a completion § 1328(a) discharge. If the case is dismissed, converted, or receives a § 1328(b) hardship discharge, you would rather have paid the taxes than paid the credit cards. This is particularly true where the allowance or disallowance of the claim will make no difference as to income or liquidation driven plan payments.

1 Involuntary gap taxes under § 507(a)(3)/502(f) are also priority and thus subject § 523(a)(1)(A).

2 Taxing authorities are apparently beginning to take the position that tolling under *Young v. United States*, 523 U.S. 43 (2002) applies to the 2-year rule even post-BAPCPA, although there are no cases on point.

CONs: If the payout would be 100% without the tax claim, Debtor will pay less total plan payments. If the plan payments are driven by the need to pay priority taxes, and the income and liquidation tests would call for a lower payment (or shorter plan) if the taxes do not have to be paid, the Debtor benefits by not filing the claim.

Just make sure that the plan language “provides for” all priority tax claims.

Penalties

Tax penalties *other than in compensation for actual pecuniary loss related to priority taxes* (i.e., basically all penalties except trust-fund recovery penalty) are *not* priority tax debts. They are *dischargeable in chapter 13*. In chapter 7, penalties are dischargeable if the transaction or event for which the penalty is assessed is over 3 years old or relate to a dischargeable tax, 11 U.S.C. § 523(a)(7), but § 523(a)(7) is not a discharge exception under § 1328(a), so all non-compensatory loss tax penalties are dischargeable, non-priority debts in Chapter 13.

Interest

Apart from unfiled claims, the principal advantage of not excepting taxes other than “bad actor” taxes from the § 1328(a) discharge is that any interest that accrues post-petition is discharged. § 1322(a)(2) requires that the priority claim be paid in full, but not that it receive interest (compare § 1322(a)(2) (“full payment, in deferred cash payments”) with § 1129(a)(9)(C) (“regular installment payments in cash . . . of a total value, as of the effective date of the plan, equal to the allowed amount of the claim”). But if the tax is excepted from discharge under § 1328(a), interest, although not paid through the plan,³ continues to accrue and is not discharged. *See In re Monahan*, No. 12-084 (1st Cir. BAP, Sept. 19, 2013); *Bruning v. United States*, 376 U.S. 358 (1964) (same result under the Act). Under § 502(b)(2), unmatured interest is not properly part of the “claim” that has to be paid.

TAX LIENS IN CHAPTER 13

Liens survive bankruptcy but, if the tax is discharged, do not attach to after-acquired property. **IRS liens attach to exempt property, including entireties property and “non-estate” property such as 401(k) accounts and 529 plans.**

IRS liens can be stripped down to the value of the collateral under 11 U.S.C. § 506(a) and § 1322(b)(2). *See e.g. In re Rowell*, 421 BR 524 (Bankr. D. Minn. 2009). Typically, the IRS accepts the Debtor’s valuations of collateral and files the claim with appropriate bifurcation.

In *Ryan v. United States*, No. 12-3398 (7th Cir. July 8, 2013), the 7th Circuit considered whether § 506(d) *alone* would void the unsecured portion of the tax lien, and concluded, in reliance on *Dewsnup v. Timm*, 502 U.S. 410 (1992), that it would not. *Ryan*, however, does *not* stand for the

³ § 1322(b)(10) *allows* but does not require payment of post-petition interest on non-dischargeable unsecured claims *but only if* the plan already pays all other allowed claims in full.

proposition that tax liens (or any liens) cannot be avoided in Chapter 13, only that § 506(a) is not the vehicle to do it: “§ 506(d) applied as Ryan suggests would provide lien stripping without any of the safeguards set forth in §§ 1129(b), 1225, and 1325 governing the treatment of secured claims and lien rights. Collier at ¶ 506.06 [1][c]. For instance, § 1123(b)(5) permits the proponent of a plan to modify the rights of holders of secured claims “other than a claim secured only by a security interest in real property that is the debtor’s principal residence . . .,” but that provision would be entirely subsumed within an interpretation of § 506(d) that allowed the adjustment of the lien rights without any such exceptions or limitations.” Thus, the Court acknowledged that the plan *can* modify the secured claim, conditioned on completion of the plan and discharge. *See also In re Brinson*, 485 BR 890 (Bankr. N.D. Ill. 2013).

Interest on secured tax claims must be paid at the statutory rate. 11 U.S.C. § 511.

The Debtor cannot satisfy a federal tax lien by surrendering property exempted from administrative levy where the effect of the inability to levy is that the Debtor would retain the “surrendered” property. *In re White*, 487 F.3d 199 (4th Circuit 2007).

Taxes During the Chapter 13 Case

Unlike Chapter 7 and Chapter 11, a Chapter 13 filing does not create a separate taxable estate. Thus, all returns are filed by the Debtor on Form 1040 and not 1041 (trusts and estates), and all income is taxable to the Debtor, even from “property of the estate.” 26 U.S.C. §§ 1398, 1399. *See Hall v. U.S.*, 132 S. Ct. 1882, 1887 (2012).

Under § 1308, the Debtor *must* file all prepetition returns for the 4 years prior to the petition on or before the day *before* the first scheduled § 341 meeting date. *For cases early in the year, this can be difficult.* The trustee *may* hold open the meeting to allow filing within 120 days of the meeting (for past due returns), or the due date (with automatic extensions), whichever is later. The Court may also extend the deadline by order entered before the deadline expires. Upon failure to file, § 1307(e) provides for mandatory dismissal upon request of a party in interest. Filing is also a condition for confirmation, § 1325(a)(9).

The debtor must also file all tax returns coming due after the commencement of the case, subject to a penalty of dismissal or conversion. § 521(j).

Failure to pay post-petition taxes (as opposed to filing) is not per se grounds for dismissal or conversion. But the taxing authority may file a claim under § 1305(a)(1), which claim is then allowed or disallowed as if it arose immediately prepetition. § 1305 claims only apply to taxes for which the tax year ends postpetition. If the tax year ends prepetition, but the return is not yet due (i.e., case filed in January), some courts hold that the tax is subject to the usual claim bar date and discharge rules in § 502 and § 1328, *In re Joye*, 578 F.3d 1070 (9th Cir. 2009), *In re Senczyszyn*, 426 BR 250, 255 (Bankr. ED Mich. 2010), while others find that the tax becomes “payable” on the return due date, making it a post-petition § 1305 claim, thus not discharged if no claim is filed, but not subject to the bar date. *In re Ripley*, 26 F.2d 440 (5th Cir. 1991); *In re Turner*, 420 BR 711 (Bankr. ED Mich. 2009);

If no § 1305 claim is filed, the taxing authorities may be able to collect on post-petition taxes during the case. *See In re Dickey*, 64 B.R. 3 (Bankr. E.D. Va. 1985). Filing a § 1305 claim avoids that (but may require modification of the plan if there is insufficient funding), but only the tax creditor can file the § 1305 claim. Unlike prepetition claims, there is no authority for the debtor to self-file a § 1305 claim. *Id*, *In re Senczyszyn*, 426 BR 250, 255 (Bankr. ED Mich. 2010). Nor can the debtor have them treated as administrative expenses because they are incurred by the Debtor, not the estate. *In re Whall*, 391 BR 1 (Bankr. D. Mass. 2008).

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Draft - 05/13/2013

United States Bankruptcy Court for the _____ District of _____

Debtor(s): _____

Case No.: _____

Date: _____

Check if this is an amended plan

Official Form 113
Chapter 13 Plan

12/15

Part 1: Notice to Interested Parties

Check all that apply:

- The plan seeks to limit the amount of a secured claim, as set out in Part 3, Section 3.2, which may result in a partial payment or no payment at all to the secured creditor.
The plan requests the avoidance of a judicial lien or nonpossessory, nonpurchase-money security interest as set out in Part 3, Section 3.4.
The plan sets out nonstandard provisions in Part 9.

Important Notice: Your rights may be affected. Your claim may be reduced, modified, or eliminated.

You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. If you do not have an attorney, you may wish to consult one.

If you oppose the plan's treatment of your claim or any provision of this plan, you or your attorney must file an objection to confirmation at least 7 days before the hearing on confirmation, unless otherwise ordered by the Bankruptcy Court. The Bankruptcy Court may confirm this plan without further notice if no objection to confirmation is filed. See Bankruptcy Rule 3015. In addition, you must file a proof of claim—or one must be filed on your behalf—in order for you to be paid under any plan that may be confirmed.

Part 2: Plan Payments and Length of Plan

2.1 Debtor(s) will pay to the trustee \$ _____ per _____ for _____ months, and
\$ _____ per _____ for _____ months.

2.2 Payments to the trustee will be made from future earnings in the following manner:

Check all that apply:

- Debtor(s) will make payments pursuant to a payroll deduction order.
Debtor(s) will make payments directly to the trustee.

2.3 Additional payments to the trustee will be made as follows:

Check all that apply:

- Debtor(s) will turn over to the trustee:
any tax refunds received during the plan term.
any tax refunds in excess of \$ _____ received during the plan term.

On or before April 20 of the year following the filing of this case and each year thereafter, Debtor(s) will submit to the trustee a copy of the federal tax return filed for the prior year.

- Other sources of funding, including the sale of property. Describe the source, amount, and date when available:

2.4 The estimated total amount of plan payments is \$ _____.

2.5 The applicable commitment period is:
 36 months
 60 months

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Part 3: Treatment of Secured Claims

3.1 Maintenance of payments and cure of any default

None [If "none" is checked, the rest of § 3.1 need not be completed or reproduced]

The debtor(s) will maintain the contractual installment payments and cure any default in payments on the secured claims listed below. The allowed claim for any arrearage amount will be paid under the plan, with interest, if any, at the rate stated. Unless otherwise ordered by the court, (1) the amounts listed on the proof of claim control over any contrary amounts listed below as to the current installment payment and arrearage, and (2) if relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, all payments under this plan as to that collateral will cease and all claims as to that collateral will no longer be treated by the plan. The final column includes only payments disbursed by the trustee rather than by the debtor.

Name of creditor	Collateral	Current installment payment (including escrow payment)	Estimated amount of arrearage	Interest rate on arrearage (if applicable)	Monthly plan payment on arrearage or other payment arrangement	Estimated total payments by trustee
_____	_____	\$ _____	\$ _____	_____	\$ _____	\$ _____
_____	_____	Disbursed by:				
_____	_____	<input type="checkbox"/> Trustee				
_____	_____	<input type="checkbox"/> Debtor(s)				
_____	_____	\$ _____	\$ _____	_____	\$ _____	\$ _____
_____	_____	Disbursed by:				
_____	_____	<input type="checkbox"/> Trustee				
_____	_____	<input type="checkbox"/> Debtor(s)				

3.2 Request for valuation of security and claim modification

None [If checked, the rest of § 3.2 need not be completed or reproduced]

This paragraph will be effective only if the applicable box in Part 1 of this plan is checked.

The debtor(s) request that the court determine the value of the secured claims listed below, except for the claims of governmental units. For each non-governmental secured claim as to which a proof of claim has been filed in accordance with Bankruptcy Rule 3002, the debtors state that the value of the secured claim should be as stated below in the column headed "Amount of secured claim." For secured claims of governmental units, unless otherwise ordered by the court, the amounts listed in proofs of claim filed in accordance with Bankruptcy Rule 3002 control over any contrary amounts listed below. For each listed secured claim, the controlling amount of the claim will be paid in full under the plan with interest at the rate stated below.

The portion of any allowed claim that exceeds the amount of the secured claim will be treated as an unsecured claim under Part 5 of this plan. If the amount of a creditor's secured claim is listed below as having no value, the creditor's allowed claim will be treated in its entirety as an unsecured claim under Part 5 of this plan. Unless otherwise ordered by the court, the amount of the creditor's claim listed on the proof of claim controls over any contrary amounts listed under Part 5 as to the unsecured portion, if any, of the claim.

The holder of any claim listed below as having value in the column headed "Amount of secured claim" will retain the lien until the earlier of:

- (a) payment of the underlying debt determined under nonbankruptcy law, or
- (b) discharge under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor. See Bankruptcy Rule 3015.

- Debtor(s) will be eligible to receive a discharge in this case.
- Debtor(s) will not be eligible to receive a discharge in this case.

Name of creditor	Estimated amount of creditor's claim	Collateral	Value of collateral	Amount of claims senior to creditor's claim	Amount of secured claim	Interest rate	Monthly payment to creditor	Estimated total of monthly payments
_____	\$ _____	_____	\$ _____	\$ _____	\$ _____	_____	\$ _____	\$ _____
_____	\$ _____	_____	\$ _____	\$ _____	\$ _____	_____	\$ _____	\$ _____
_____	\$ _____	_____	\$ _____	\$ _____	\$ _____	_____	\$ _____	\$ _____

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3.3 Secured claims excluded from 11 U.S.C. § 506

None [If checked, the rest of § 3.3 need not be completed or reproduced]

The claims listed below were either:

- (1) incurred within 910 days before the petition date and secured by a purchase money security interest in a motor vehicle acquired for the personal use of the debtor(s), or
- (2) incurred within 1 year of the petition date and secured by a purchase money security interest in any other thing of value.

These claims will be paid in full under the plan with interest at the rate stated below. Unless otherwise ordered by the court, the claim amount listed on the proof of claim controls over any contrary amounts listed below. The final column includes only payments disbursed by trustee rather than by the debtor.

Name of creditor	Collateral	Amount of claim	Interest rate	Monthly plan payment	Estimated total payments by trustee
_____	_____	\$ _____	_____	\$ _____	\$ _____
_____	_____			Disbursed by:	
_____	_____			<input type="checkbox"/> Trustee	
				<input type="checkbox"/> Debtor(s)	
_____	_____	\$ _____	_____	\$ _____	\$ _____
_____	_____			Disbursed by:	
_____	_____			<input type="checkbox"/> Trustee	
				<input type="checkbox"/> Debtor(s)	

3.4 Lien avoidance

None [If "None" is checked, the rest of Section § 3.4 need not be completed or reproduced]

This paragraph will be effective only if the applicable box on Part 1 of this plan is checked.

The judicial liens or nonpossessory, nonpurchase-money security interests securing the claims listed below impair exemptions to which the debtor(s) would have been entitled under 11 U.S.C. § 522(b). A judicial lien or security interest securing a claim listed below will be avoided to the extent that it impairs such exemptions upon entry of the order confirming the plan. The amount of the judicial lien or security interest that is avoided will be treated as an unsecured claim in Part 5. The calculation of the amount of the judicial lien or security interest that is avoided is shown on Exhibit A, which is attached to this plan and incorporated herein by reference. The amount, if any, of the judicial lien or security interest that is not avoided will be paid in full as a secured claim under the plan. See 11 U.S.C. § 522(f) and Bankruptcy Rule 4003(d).

Name of creditor	Collateral	Amount of secured claim after avoidance	Interest rate (if applicable)	Monthly plan payment (if applicable)	Estimated total amount of secured claim
_____	_____	\$ _____	_____	\$ _____	\$ _____
_____	_____				
_____	_____	\$ _____	_____	\$ _____	\$ _____
_____	_____				

3.5 Surrender of collateral

None [if "None" is checked, the rest of § 3.5 need not be completed or reproduced]

The debtor(s) elect to surrender to the creditors listed below the personal or real property that is collateral for the claim. The debtor(s) consent to termination of the stay under 11 U.S.C. § 362(a) and § 1301 with respect to the collateral upon confirmation of the plan. Any allowed unsecured claim resulting from the disposition of the collateral will be treated in Part 5 below.

Name of creditor	Collateral
_____	_____
_____	_____

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Part 4: Treatment of Trustee's Fees and Administrative and Other Priority Claims

4.1 General

All allowed priority claims other than those treated in § 4.5 will be paid in full without interest, unless otherwise stated.

4.2 Trustee's fees

These fees are estimated to be _____% of plan payments; and during the plan term, they are estimated to total \$_____.

4.3 Attorney's fees

The balance of the fees owed to the attorney of the debtor(s) is estimated to be \$_____.

4.4 Other priority claims

None [If "None" is checked, the rest of § 4.4 need not be completed or reproduced]

The following are the debtor's estimates of the amount of such claims.

Name of creditor	Basis for priority treatment	Estimated amount of claim to be paid	Interest rate (if applicable)	Estimated total amount of payments
_____	_____	\$ _____	_____	\$ _____
_____	_____	\$ _____	_____	\$ _____

4.5 Domestic support obligations assigned to a governmental unit and paid less than full amount

None [If "None" is checked, the rest of § 4.5 need not be completed or reproduced]

The allowed priority claims listed below are based on a domestic support obligation that has been assigned to a governmental unit and will be paid less than the full amount of the claim under 11 U.S.C. § 1322(a)(4).

Name of creditor	Amount of claim to be paid	Interest rate (if applicable)	Estimated total amount of payments
_____	\$ _____	_____	\$ _____
_____	\$ _____	_____	\$ _____

Part 5: Treatment of Nonpriority Unsecured Claims

5.1 Maintenance of payments and cure of any default

None [If "None" is checked, the rest of § 5.1 need not be completed or reproduced]

The debtor(s) will maintain the contractual installment payments and cure any default in payments on the unsecured claims listed below on which the last payment is due after the final plan payment. The allowed claim for the arrearage amount will be paid under the plan.

Name of creditor	Current installment payment	Amount of arrearage to be paid	Estimated total payments by trustee
_____	\$ _____	\$ _____	\$ _____
_____	Disbursed by: <input type="checkbox"/> Trustee <input type="checkbox"/> Debtor(s)		
_____	\$ _____	\$ _____	\$ _____
_____	Disbursed by: <input type="checkbox"/> Trustee <input type="checkbox"/> Debtor(s)		

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5.2 Separately classified nonpriority unsecured claims

None [If "None" is checked, the rest of § 5.2 need not be completed or reproduced]

The nonpriority unsecured allowed claims listed below are separately classified and will be treated as follows:

Name of creditor	Basis for separate classification and treatment	Amount of claim to be paid	Interest rate (if applicable)	Estimated total amount of payments
_____	_____	\$ _____	_____	\$ _____
_____	_____	_____	_____	_____
_____	_____	\$ _____	_____	\$ _____
_____	_____	_____	_____	_____

5.3 Nonpriority unsecured claims

Allowed nonpriority unsecured claims that are not separately classified will be paid, pro rata, up to the full amount of the claims, as follows:

Check all that apply:

- the sum of \$ _____, unless a greater amount is required under another checked option;
- _____% of the total amount of these claims;
- the funds remaining after disbursements have been made to all other creditors provided for in this plan.

If the estate of the debtor(s) were liquidated under chapter 7 nonpriority unsecured claims would be paid approximately \$ _____. Payments on allowed nonpriority unsecured claims will not be less than this amount.

5.4 Interest

Interest on allowed unsecured claims, other than separately classified nonpriority unsecured claims, will (Check the applicable box):

- not be paid.
- be paid at an annual percentage rate of _____ % under 11 U.S.C. § 1325(a)(4), and is estimated to total \$ _____.

Part 6: Executory Contracts and Unexpired Leases

6.1 All executory contracts and unexpired leases are rejected, except those listed below, which are assumed and will be treated as provided for below or under another specified provision of the plan.

None to be assumed [If checked, the rest of § 6.1 need not be completed or reproduced]

The final column includes only payments disbursed by the trustee rather than by the debtor.

Name of creditor	Property description	Treatment (Refer to other plan section if applicable)	Current installment payment	Amount of arrearage to be paid	Estimated total payments by trustee
_____	_____	_____	\$ _____	\$ _____	\$ _____
_____	_____	_____	Disbursed by:		
			<input type="checkbox"/> Trustee		
			<input type="checkbox"/> Debtor(s)		
_____	_____	_____	\$ _____	\$ _____	\$ _____
_____	_____	_____	Disbursed by:		
			<input type="checkbox"/> Trustee		
			<input type="checkbox"/> Debtor(s)		

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Part 7: Order of Distribution of Trustee Payments

7.1 The trustee will make payments in the estimated amounts shown on Exhibit B, in the following order:

- a. Trustee's fees
- b. Monthly payments on secured claims
- c. _____
- d. _____
- e. _____
- f. _____
- g. _____
- h. _____

Part 8: Vesting of Property of the Estate

8.1 Property of the estate shall revert in the debtor(s) upon

Check the applicable box:

- Plan confirmation
- Closing of case
- Other: _____

Part 9: Nonstandard Plan Provisions

Under Bankruptcy Rule 3015(c), nonstandard provisions are required to be set forth below. These plan provisions will be effective only if the applicable box in Part 1 of this plan is checked.

Part 10: Signatures

The debtor's attorney (or debtor, if not represented by an attorney) certifies that all provisions of this plan are identical to the Official Form 113, except for language contained in Part 9: Nonstandard Plan Provisions.

Debtors
(Sign if not represented by an attorney)

X

Signature of debtor

Date _____
MM / DD / YYYY

X

Signature of debtor

Date _____
MM / DD / YYYY

Debtors' Attorney

X

Signature of debtor's attorney

Date _____
MM / DD / YYYY

Chapter 13 Plan Exhibits

Exhibit A Calculation of lien avoidance

A.1 The judicial lien or nonpossessory, nonpurchase-money security interest provided for in Section 3.4 is avoided to the extent listed below: *Do not complete if the plan involves no lien avoidance; if more than one lien is to be avoided, provide the information for each lien.*

Name of creditor	Collateral	Judgment lien information (such as judgment date, date of lien recording, book and page number)	Calculation of lien avoidance
			a. Amount of lien \$ _____
			b. Amount of all other liens \$ _____
			c. Value of claimed exemptions \$ _____
			d. Total: Lines a + b + c = line d \$ _____
			e. Value of debtor's interest in property \$ _____
			f. Subtract line e from line d \$ _____
			Extent of exemption impairment (Check applicable box):
			<input type="checkbox"/> Line f is equal to or greater than line a. The entire lien is avoided.
			<input type="checkbox"/> Line f is less than line a. A portion of the lien is avoided.
			Amount of lien not avoided Subtract line f from line a \$ _____

Exhibit B Estimated amounts of trustee payments

B.1 The trustee will make the following estimated payments on allowed claims in the order set forth in Section 7.1:

a. Current installment and arrearage payments on secured claims (Part 3, Section 3.1 total):	\$ _____
b. Allowed secured claims (Part 3, Section 3.2 total):	\$ _____
c. Secured claims not subject to 11 U.S.C. § 506 (Part 3, Section 3.3 total):	\$ _____
d. Judicial liens or security interests not avoided (Part 3, Section 3.4 total):	\$ _____
e. Administrative and other priority claims (Part 4 total):	\$ _____
f. Current installment payments and arrearage payments on unsecured debts (Part 5, Section 5.1 total):	\$ _____
g. Separately classified unsecured claims (Part 5, Section 5.2 total):	\$ _____
h. Nonpriority unsecured claims (Part 5, Section 5.3 total):	\$ _____
i. Interest on allowed unsecured claims (Part 5, Section 5.4 total):	\$ _____
j. Arrearage payments on executory contracts and unexpired leases (Part 6, Section 6.1 total):	\$ _____
Total of lines a through j	\$ _____

COMMITTEE NOTE

Official Form 113 is new and is the required plan form in all chapter 13 cases. See Bankruptcy Rule 3015. Alterations to the text of the form or the order of its provisions, except as indicated on the form itself, are prohibited. See Bankruptcy Rule 9009. As the form explains, spaces for responses may be expanded or collapsed as appropriate, and sections that are inapplicable do not need to be reproduced.

Part 1. This part is intended to highlight some provisions of the plan for the benefit of interested parties and the court. For that reason, if the plan includes one or more of the provisions listed in this part, the appropriate boxes must be checked. For example, if Part 9 of the plan proposes a provision not included in, or contrary to, the Official Form, then that nonstandard provision will be ineffective if the appropriate check box is not selected.

Part 2. This part states the proposed periodic plan payments, plan length, the estimated total plan payments, and sources of funding for the plan. Section 2.1 allows the debtor or debtors to propose periodic payments in other than monthly intervals. For example, if the debtor receives a paycheck every week and wishes to make plan payments accordingly, that should be indicated in § 2.1. Section 2.2 provides for the manner in which the debtor will make payments. The debtor may also make payments through a designated third party, such as an electronic funds transfer program.

Part 3. This part provides for the treatment of secured claims.

Section 3.1 provides for the treatment of claims under Code §1322(b)(5) (maintaining current payments and curing any arrearage). For the claim of a secured creditor listed in § 3.1, an estimated arrearage amount should be given. A contrary arrearage amount listed on the creditor's proof of claim, unless contested by objection or motion, will control over the amount given in the plan.

In § 3.2, the plan may propose to determine under Code § 506(a) the value of a secured claim for which a proof of claim has been filed. For example, the plan could seek to reduce the secured portion of a creditor's claim to the value of the collateral securing it. For the secured claim of a nongovernmental creditor, that determination would be binding upon confirmation of the plan. For the secured claim of a governmental unit, however, a contrary valuation listed on the creditor's proof of claim, unless contested by objection or motion, would control over the valuation given in the plan. See Bankruptcy Rule 3012. Although § 3.2 applies to secured claims for which a proof of claim has been filed in accordance with Bankruptcy Rule 3002, that rule contemplates that a debtor, the trustee, or another entity may file a proof of claim if the creditor does not do so in a timely manner. See Bankruptcy Rules 3004 and 3005. Section 3.2 will not be effective unless the appropriate check box in Part 1 is selected.

Section 3.3 deals with secured claims that may not be bifurcated into secured and unsecured portions under Code § 506(a), but it allows for an interest rate other than the contract rate to be applied to payments on such a claim.

In § 3.4, the plan may propose to avoid certain judicial liens or security interests encumbering exempt property in accordance with Code § 522(f). A separate exhibit shows the calculation of the amount of the judicial lien or

security interest that is avoided. A plan proposing avoidance in § 3.4 must be served in the manner provided by Bankruptcy Rule 7004 for service of a summons and complaint. See Bankruptcy Rule 4003. Section 3.4 will not be effective unless the appropriate check box in Part 1 is selected.

Section 3.5 provides for elections to surrender collateral and consent to termination of the stay under § 362(a) and § 1301 with respect to the collateral surrendered. Termination will be effective upon confirmation of the plan.

Part 4. This part provides for the treatment of claims entitled to priority status. In § 4.4, the plan calls for an estimated amount of each such claim. A contrary amount listed on the creditor's proof of claim, unless changed by court order in response to an objection or motion, will control over the amount given in the plan.

Part 5. This part provides for the treatment of unsecured claims that are not entitled to priority status. In § 5.3, the plan may propose to pay nonpriority unsecured claims in accordance with several options. One or more options may be selected. For example, the plan could propose simply to pay unsecured creditors any funds remaining after disbursements to other creditors, or also provide that a defined percentage of the total amount of unsecured claims will be paid.

Part 6. This part provides for executory contracts and unexpired leases. An executory contract or unexpired lease is rejected unless it is listed in this part.

Part 7. This part provides an order of distribution of payments under the plan. Other than the trustee's fees and monthly payments to secured creditors, the order of distribution is left to be completed by the debtor in keeping with the requirements of the Code. A separate exhibit lists the estimated amounts of these distributions.

Part 8. This part defines when property of the estate will revert in the debtor or debtors. One choice must be selected—upon plan confirmation, upon closing the case, or upon some other specified event. This plan provision is subject to a contrary court order under Code § 1327(b).

Part 9. This part gives the debtor or debtors the opportunity to propose provisions that are not otherwise in, or are contrary to, the Official Form. All such nonstandard provisions must be set forth in this part and nowhere else in the plan. This part will not be effective unless the appropriate check box in Part 1 is selected. See Bankruptcy Rule 3015.

Part 10. The plan must be signed by the attorney for the debtor or debtors, unless the debtor or debtors are not represented by an attorney, in which case the plan must be signed by the debtor or debtors. The signature in this part is a certification to the court that the plan's provisions are identical to the Official Form, except for any nonstandard provisions contained in Part 9.

**Proposed Bankruptcy Rule Changes
Dealing with Model Chapter 13 Plan**

The following are selected provisions of the Committee Notes for the proposed rule amendments that have been published for comment relating to the proposed model chapter 13 plan:

1. Rule 2002 - Notice in Chapter 13 Cases

- Subdivision (a)(9) is added to require at least 21 days' notice of the time for filing objections to confirmation of a chapter 13 plan.
- Subdivision (b)(3) is added to provide separately for 28 days' notice of the date of the confirmation hearing in a chapter 13 case.

2. Rule 3002 - Filing of Proofs of Claim

- Subdivision (a) is amended to clarify that a creditor, including a secured creditor, must file a proof of claim in order to have an allowed claim. The amendment also clarifies, in accordance with § 506(d), that the failure of a secured creditor to file a proof of claim does not render the creditor's lien void.
- Subdivision (c) is amended to alter the calculation of the bar date for proofs of claim in chapter 7, chapter 12, and chapter 13 cases. The amendment changes the time for filing a proof of claim in a voluntary chapter 7 case, a chapter 12 case, or a chapter 13 case from 90 days after the § 341 meeting of creditors to 60 days after the petition date. If a case is converted to chapter 12 or chapter 13, the 60-day time for filing runs from the order of conversion. In an involuntary chapter 7 case, a 90-day time for filing applies and runs from the entry of the order for relief.
- Subdivision (c)(6) is amended to expand the exception to the bar date for cases in which a creditor received insufficient notice of the time to file a proof of claim. The amendment provides that the court may extend the time to file a proof of claim if the debtor fails to file a timely list of names and addresses of creditors as required by Rule 1007(a). The amendment also clarifies that if a court grants a creditor's motion under this rule to extend the time to file a proof of claim, the extension runs from the date of the court's decision on the motion.
- Subdivision (c)(7) is added to provide a two-stage deadline for filing mortgage proofs of claim secured by an interest in the debtor's principal residence. Those proofs of claim must be filed with the appropriate Official Form mortgage attachment within 60 days of the order for relief. The claim will be timely if any additional documents evidencing the claim, as required by Rule 3001(c)(1) and (d), are filed within 120 days of the order for relief. The confirmation of a plan within the 120-day period set forth in subdivision (c)(7)(B) does not prohibit an objection to the proof of claim.

3. Rule 3007 - Objections to Claims

- Subdivision (a) is amended to provide that an objection to a claim is unnecessary if the determination of the amount of the claim is made through a chapter 12 or chapter 13 plan in accordance with Rule 3012.

4. Rule 3012 - Determination of the Amount of Secured and Priority Claims

- Subdivision (a) provides, in keeping with the former version of this rule, that a party in interest may seek a determination of the amount of a secured claim. The amended rule provides that the amount of a claim entitled to priority may also be determined by the court.
- Subdivision (b) is added to provide that a request to determine the amount of a secured claim may be made in a chapter 12 or chapter 13 plan, as well as by a motion or a claim objection. Secured claims of governmental units are not included in this subdivision and are governed by subdivision (c). The amount of a claim entitled to priority may be determined through a motion or a claim objection.
- Subdivision (c) clarifies that a determination under this rule with respect to a secured claim of a governmental unit may be made by motion or in a claim objection, but not until the governmental unit has filed a proof of claim or its time for filing a proof of claim has expired.

5. Rule 3015 - Filing, Objection to Confirmation, Effect of Confirmation

- Subdivision (c) is amended to require use of the Official Form for chapter 13 plans. The amended rule also provides that nonstandard provisions in a chapter 13 plan must be set out in the section of the Official Form specifically designated for such provisions and identified in the manner required by the Official Form.
- Subdivision (d) is amended to ensure that the trustee and creditors are served with the plan in advance of confirmation. Service may be made either at the time the plan is filed or with the notice under Rule 2002 of the hearing to consider confirmation of the plan.
- Subdivision (f) is amended to require service of an objection to confirmation at least seven days before the hearing to consider confirmation of a plan. The seven-day notice period may be altered in a particular case by the court under Rule 9006.
- Subdivision (g) is amended to provide that the amount of a secured claim under § 506(a) may be determined through a chapter 12 or chapter 13 plan in accordance with Rule 3012. That determination controls over a contrary proof of claim, without the need for a claim objection under Rule 3007, and over the schedule submitted by the debtor under § 521(a). The amount of a secured claim of a governmental unit, however, may not be determined through a chapter 12 or chapter 13 plan under Rule 3012.

6. Rule 4003 - Exemptions

- Subdivision (d) is amended to provide that a request under § 522(f) to avoid a lien or other transfer of exempt property may be made by motion or by a chapter 12 or chapter 13 plan. A plan that proposes lien avoidance in accordance with this rule must be served as provided under Rule 7004 for service of a summons and complaint. Lien avoidance not governed by this rule requires an adversary proceeding.

7. Rule 5009 - Order Declaring Lien Satisfied

- Subdivision (d) is added to provide a procedure by which a debtor in a chapter 12 or chapter 13 case may request an order declaring a lien satisfied. A debtor may need documentation for title purposes of the elimination of a second mortgage or other lien that was secured by property of the estate. Although requests for such orders are likely to be made at the time the case is being closed,

the rule does not prohibit a request at another time if the lien has been satisfied and any other requirements for entry of the order have been met.

8. Rule 7001 - Scope of Rules of Part VII

- Subdivision (2) is amended to provide that the determination of the validity, priority, or extent of a lien under Rule 3012 or Rule 4003(d) does not require an adversary proceeding. The determination of the amount of a secured claim may be sought through a chapter 12 or chapter 13 plan in accordance with Rule 3012. Thus, a debtor may propose to eliminate a wholly unsecured junior lien in a chapter 12 or chapter 13 plan without a separate adversary proceeding. Similarly, the avoidance of a lien on exempt property may be sought through a chapter 12 or chapter 13 plan in accordance with Rule 4003(d). An adversary proceeding continues to be required for lien avoidance not governed by Rule 4003(d).

9. Rule 9009 - Forms

- Subdivision (a) addresses permissible modifications to Official Forms. It requires that an Official Form be used without alteration, except when another rule or the Official Form itself permits alteration. The former language generally permitting alterations has been deleted, but the rule preserves the ability of a filer to modify an Official Form to use a typeface substantially similar to the prescribed size and style, to expand or delete the space for responses as appropriate, and to delete inapplicable items so long as the filer indicates that no response is intended. For example, when more space will be necessary to completely answer a question on an Official Form without an attachment, the answer space may be expanded. On the other hand, many Official Forms indicate on their face that certain changes are not appropriate. The Official Form chapter 13 plan, for example, requires that topics be addressed in a particular order, and that nonstandard provisions be addressed in a specified section of the plan. Any changes that contravene the instructions on the Official Form chapter 13 plan would be prohibited by this rule.
- The rule permits modification of court orders included in the Official Forms, provided that the modification does not conflict with any applicable rule or Official Form. For example, the court may add an additional provision to the Order Approving Payment of Filing Fee in Installments, which is part of Official Form 3A.

Evidentiary Privileges

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AMERICAN BANKRUPTCY INSTITUTE
25TH ANNUAL WINTER LEADERSHIP CONFERENCE:
Ranchos Palos Verdes, California
December 6, 2013

ISSUES PERTAINING TO EVIDENTIARY PRIVILEGES

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SEPTEMBER 27, 2013 DRAFT

EVIDENTIARY PRIVILEGES IN BANKRUPTCY PRACTICE**I. Source of the Privileges –The source of evidentiary privilege has been codified in Fed. R. Evid. 501.**

A. Under Federal Rule of Evidence 501, recognized privileges are established by “the common law, as interpreted by United States Courts in light of reason and experience, unless” the United States Constitution, a federal statute or rules proscribed by the United States Supreme Court provide otherwise. Fed. R. Evid. 501. Currently, there are few privileges which are recognized in federal courts. Specifically, the psychotherapist privilege, the spousal privilege, the attorney client privilege, the physician patient privilege and penitent priest are recognized in federal courts. All of these privileges are premised on the theory that there are situations where the benefit of frank and honest communication outweighs the need for its disclosure. *Jaffe v. Redmond*, 518 U.S. 1, 11 (1996) (“Our cases make clear that an asserted privilege must also serve the public ends.”); *Hunt v. Blackburn*, 128 U. S. 464, 470 (1888) (privilege “is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure”).

1. Psychotherapist Privilege: As established in *Jaffe v. Redmond*, 518 U.S. 1, 10 (1996), communications concerning counseling or therapy with a licensed psychotherapist, psychologist or social worker are privileged. *Id.* This is because the need to have honest communication with a psychologist promotes mental health and safety. *Id.* at 12-13. (“If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation.”).

2. Attorney Client Privilege: The attorney client privilege has been codified in Federal Rule of Evidence 502. The purpose of the attorney client privilege is that it “encourage[s] full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn co. v. United States*, 449 U.S. 383, 389 (1981). The attorney client privilege protects most communications between an attorney and her client so long as they relate to legal representation.

3. Spousal Privilege: Originally, the spousal privilege allowed a non-testifying spouse to preclude her spouse from testifying against her. However, the privilege has been subsequently modified to permit a testifying spouse to choose to testify against the non-testifying spouse. *See Trammel v. United States*, 445 U.S. 40, 53 (1980).

4. Physician Patient Privilege: Although there is currently no federally recognized physician patient privilege, (*see Whalen v. Roe*, 429 U.S. 589, 602n. 28 (1977)), some advocate the recognition of it. *See* Ralph Reubner & Leslie Ann Reis, *Hippocrates to Hippa: A*

Foundation for a Federal Physician-Patient Privilege, 77 TEMP. L. REV. 505, 506 (2004).

B. Pursuant to Federal Rule of Evidence 501, where state law governs the rule of the decision in a civil case, so do that state's rules concerning privilege. Because the state's laws that provide the rule of decision also govern the applicability of privilege, the governing law or choice of law can affect evidentiary issues. To the extent that these evidentiary issues are outcome determinative, they may implicate applicable the choice of law. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Hanna v. Plumer*, 380 U.S. 460 (1965).

1. Each state has established different privileges that can affect the outcome of a particular case. For example, if a person is driving drunk, hits a tree and then tells a police officer of that fact as the officer is preparing a crash report, that statement cannot be used against the person in court. *See Fla. Stat. § 316.066(4)*. This is because Florida Statute 316.066(4) provides that "any statement made . . . to a law enforcement officer for the purpose of completing a crash report . . . shall be without prejudice to the individual so reporting. Such report or statement may not be used as evidence in any trial, civil or criminal." Fla. Stat. § 316.066(4).

2. Although the Florida Crash Report privilege likely would not affect choice of law, it *could* be outcome determinative.¹ Other privileges may have greater impact on the choice of law. For example, twenty-four states, including Florida, Georgia, Colorado and Arizona, recognize an accountant-client privilege, while, others, including Alabama and New York, do not. *See Fla. Stat § 90.5055*; OCGA 43-3-32; Colo. Rev. Stat. § 13-90-107; Ariz. Rev. Stat. § 32-749. Further, some states, including California and Kentucky, require accountants to maintain confidentiality, unless subpoenaed. *See Cal. Code Regs. Tit. 16 § 54.1*; Ky. Rev. Stat. § 325.440. Other states, including Connecticut and Iowa, except court proceedings from the accountant's duty of confidentiality. *See Conn. Gen. Stat. Ch. 389, 20-281j*; Iowa Code § 542.17.²

a. Thus, where a potentially insolvent debtor who is domiciled in California gets advice from an accountant in Florida concerning her insolvency and asset transfers which she later makes in Alabama, the choice of law could affect the outcome of the proceedings. Assuming a creditor later seeks to avoid the transfer under a state's applicable Uniform Fraudulent Transfer Act, and diversity is present, the choice of law and privilege could be outcome determinative. Because whether the accountant may be required to disclose the contents of communications with the debtor will vary based on state law, and the debtor's intent could be determined by the account's testimony, the evidentiary privilege could be outcome determinative.

3. State Constitutional privileges: the constitutions of Alaska, Arizona, California, Florida, Hawaii, Idaho, Illinois, Louisiana, Michigan, Montana, South Carolina, Texas,

¹ This statute was only mentioned to serve as an attention grabber. Notwithstanding the likely inapplicability of the Florida Crash Report Privilege in federal court, because Florida Statute § 316.066(4) only applies to communications made in Florida, it is highly unlikely that it could create choice of law issues during litigation.

² It should be noted that there is a very limited accountant client privilege which is recognized in federal court. *See* 26 U.S.C. § 7525(a). The federal accountant-client privilege only applies to privileged communications as if between a tax-payer and an attorney, and may only be asserted in a noncriminal tax matter before the IRS or in federal court, if it involves the United States. 26 U.S.C. §§ 7525 (a)(1), (2).

Washington, Wisconsin, and Wyoming grant a right of privacy. The right of privacy in some states, such as California and Florida, are more expansive than the right established in others, such as Arizona and Alaska. *Compare* Cali. Const. Art. I, §§ 1, 3, 24 *and* Fla. Const. Art. I, § 23 *with* Ariz. Const. Art. 2, § 8 *and* Alaska Const. Art. 1 § 22. The constitutions of Alaska and Arizona provide that the right of privacy can be limited through the law, while Florida and California's do not permit such statutory limitations.

II. Fifth Amendment Right Against Self Incrimination.

A. Under the Fifth Amendment to the Constitution, “[n]o person . . . shall be compelled in any case to be a witness against himself[.]” *Miranda v. Arizona*, 384 U.S. 436, 442 (1966) (citing U.S. Const. amend V.). Thus, in both civil and criminal trials, no person is required to make statements that could result in her or his incrimination. *See, e.g., Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084, 1087 (5th Cir. 1979) (reversing dismissal of case because trial court made assertion of Fifth Amendment privilege costly.).

B. The Fifth Amendment privilege's protections have likewise been recognized in bankruptcy cases. *See In re Connelly*, 59 BR 421, 432 (Bankr. N.D. Ill. 1986); *Interim Investors Committee v. Jacoby*, 90 B.R. 777, 779-80 (W.D. N.C. 1988) (recognizing the applicability of the Fifth Amendment in Bankruptcy proceedings, but affirming the bankruptcy court's finding of waiver).

C. The Fifth Amendment privilege may be asserted in live testimony – such as during a deposition, an examination pursuant to Rule 2004, Federal Rules of Bankruptcy Procedure, a 11 U.S.C. § 341(a) meeting of creditors, or a 11 U.S.C. § 343 examination of the debtor. It may also be asserted during trial. *See, e.g., Interim Investors*, 90 B.R. at 779; *In re Ciotti*, 442 B.R. 412, 416 (Bankr. W.D. Penn. 2011) (“The Fifth Amendment Privilege against self-incrimination may be properly asserted by a debtor in a bankruptcy proceeding with the debtor retaining the right to receive a discharge.”) (citing *In re Nam*, 245 B.R. 216, 224n. 7 (Bankr. E.D. Pa. 2000); *In re Potter*, 88 B.R. 843, 849 (Bankr. N.D. Ill. 1988)). However, a debtor's right to assert a Fifth Amendment privilege is limited in bankruptcy proceedings. *See Scarfia v. Holiday Bank*, 129 B.R. 671, 675 (M.D. Fla. 1990).

1. To properly invoke a Fifth Amendment privilege, a witness must establish that her or his silence is justified on a question by question basis. *Burt Hill, Inc. v. Hassan*, 2009 WL 4730231, at *2 (Bankr. W.D. Penn. 2009); *In re Vignola*, 2009 WL 241281 at *1 (Bankr. E.D.N.C. 2009). The court must then investigate the legitimacy and scope of the assertion of privilege. *United States v. Goodwin*, 625 F.2d 693, 701 (5th Cir. 1980).

D. The Fifth Amendment privilege may also be asserted as it relates to the compelled production of documents. *Fisher v. United States*, 425 U.S. 391, 400 (1976); *United States v. Doe*, 465 U.S. 605 (1986). In *Dier v. Banton*, 262 U.S. 147, 43 S.Ct. 533 (1923); *In Re Fuller*, 262 U.S. 91, (1923), *Johnson v. United States*, 228 U.S. 457, 33 S.Ct. 572, 57 L.Ed. 919 (1913), the United States Supreme Court first and implicitly recognized that the Fifth Amendment privilege allows a bankrupt debtor to refuse to produce incriminating evidence against herself. However, the protection afforded by the Fifth Amendment only applies where the production of documents itself, and not their content, can result in incrimination. Once a debtor turns over such records to a third party, that privilege no longer applies. Despite the foregoing, a debtor may

properly assert his Fifth Amendment privilege in relation to the creation of schedules and other disclosures in bankruptcy cases. *Butcher v. Bailey*, 753 F.2d 465, 470 (6th Cir. 1985).

1. To properly assert his Fifth Amendment privilege on that basis, a debtor must, “at least classify documents and indicate something about why the act of production of each class of documents might be incriminating.” *Butcher v. Bailey*, 753 F.2d 465, 470 (6th Cir. 1985). A general assertion of privilege is insufficient. See *In re John Lakis, Inc.*, 228 F.Supp. 918, 920 (S.D. N.Y. 1964). Further, the assertion of privilege in relation to the production of documents is limited in bankruptcy cases, as 11 U.S.C. § 521(4) requires a debtor to surrender all property and documents to the estate.

2. A debtor, however, cannot assert a Fifth Amendment privilege as it relates to the turnover of property of the estate. See *In re Crabtree*, 39 B.R. 718, 726 (Bankr. E.D. Tenn. 1984); *In re Devereaux*, 48 B.R. 644, 646 (Bankr. S.D. Ca. 1985) (citing *In re Harris*, 221 U.S. 274, 279 (1911) (“The question is not of testimony, but of surrender, – not of compelling the bankruptcy to be a witness against himself in a criminal case that he is no longer entitled to keep.”)).

3. A debtor cannot appeal an order compelling the production of documents because such an order is not a final order for purposes of appellate jurisdiction. *Carpenter v. Mohawk Inds. Inc.*, 541 F.3d 1048 (11th Cir. 2008); *Matter of Int’l Horizons*, 689 F.2d 996, 1001n. 9 (11th Cir. 1982). However, a debtor can fail to comply with such an order, and then appeal a sentence for contempt. *Carpenter v. Mohawk Inds. Inc.*, 541 F.3d 1048 (11th Cir. 2008); *Nat’l Super Spuds, Inc. v. New York Mercantile Exchange*, 591 F.2d 174 (2d Cir. 1979); *David v. Hooker, Ltd.*, 560 F.2d 412 (9th Cir. 1977).

E. Voluntary bankruptcy proceedings can be dismissed if debtor refuses to surrender such records. This would not violate any asserted privilege. *United States v. Rylander*, 460 U.S. 752, 757 (1983) (party cannot substitute a claim of privilege for burden of production but, rather, must choose between them).

F. “The Fifth Amendment privilege is not self-executing; if not invoked it may be deemed to have been waived, including by litigation conduct short of a ‘knowing and intelligent waiver.’” *In re DG Acquisition Corp.*, 151 F.3d 75, 80 (2d Cir. 1998) (citing *Maness v. Meyers*, 419 U.S. 449, 466 (1975); *Garner v. United States*, 424 U.S. 648, 654 n. 9 (1976)) (holding that a debtor’s conduct must be construed strictly against waiver). Thus, courts will infer a waiver of the Fifth Amendment privilege only if: (1) the witness’ prior statements created a significant likelihood that the finder of fact will be left and prone to rely on the distorted view of the truth; and (2) the witness had reason to know that his prior statements could constitute a waiver. *Klein v. Harris*, 667 F.2d 274, 287 (2d Cir. 1981).

G. If a witness provides incriminating testimony at a proceeding, in most circumstances, she cannot later assert the privilege as it relates to the details of the same subject matter. *Klein v. Harris*, 667 F.2d 274, 287 (2d Cir. 1981).

H. Use immunity – § 344: 11 U.S.C. § 344 authorizes the granting of immunity pursuant to 18 U.S.C. §§ 6001-6005 in bankruptcy cases. The disclosure of private information

may be compelled if immunity removes the risk of incrimination. *Kastigar v. United States*, 406 U.S. 441 (1972). However, where no request for immunity is made under 18 U.S.C. §§ 6001-6005, a debtor may properly assert his Fifth Amendment privilege, and obtain a discharge. *Lefkowitz v. Turley*, 414 U.S. 70, 82-83 (1973).

I. Where a debtor is provided immunity, and refuses to testify thereafter, the debtor can be subject to contempt, and have his discharge denied. See *In re Martin-Trigona*, 732 F.2d 170, 174-4 (2d Cir. 1984); *O'Hagan v. Blythe*, 354 F.2d 83, 84 (2d Cir.1965); *In re Manufacturers Trading Corp.*, 194 F.2d 948, 956 (6th Cir.1952); *Espieffs v. Settle*, 14 B.R. 280, 286 (D.C.N.H.1981) (debtor may be held in contempt for failing to testify despite a grant of immunity); *In re Parr*, 13 B.R. 1010, 1015 (D.C.E.D.N.Y.1981).

J. It is well established, however, that corporations do not enjoy a Fifth Amendment privilege against self-incrimination. See *Braswell v. United States*, 487 U.S. 99, 116-17 (1988); *United States v. Kordel*, 397 U.S. 1, 8n. 9 (1970) (citing cases); *Eagle Hospital Physicians, LLC v. SRG Consulting, Inc.* 561 F.3d 1298, 1303n. 2 (11th Cir. 2009); *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1206-07 (Fed. Cir. 1987). However, individuals who would otherwise assert such a privilege cannot be compelled to testify. Accordingly, in circumstances where a corporation is required to provide testimony, it must designate and prepare an expert witness to testify on its behalf. *Marcelle v. American Nat'l Delivery, Inc.*, 2009 WL 43449985, at *2-3 (M.D. Fla. 2009); *City of Chicago, Ill. v. Wolf*, 1993 U.S. Dist. LEXIS 6810, 1993 WL 177020 (N.D. Ill. 1993); *SEC v. Mut. Benefits Corp.*, 2008 U.S. Dist. LEXIS 6178, at *15, 2008 WL 239167, at *3 (S.D. Fla. 2008); *Martinez v. Majestic Farms, Inc.*, 2008 U.S. Dist. LEXIS 6121, at *7, 2008 WL 239164, at *2 (S.D. Fla. 2008) (holding it is undisputed that a defendant corporation does not have a Fifth Amendment privilege against self-incrimination, and must provide a corporate representative for a deposition). A failure to adequately prepare such a witness could result in the imposition of sanctions. see *Black Horse Lane v. Dow Chemical Corp.*, 228 F. 3d 275, 304 (3d Cir. 2000) (“[I]f a Rule 30(b)(6) witness is unable to give useful information he is no more present for the deposition than would be a deponent who physically appears for the deposition but sleeps through it.”); see also *Resolution Trust Corp. v. Southern Union Co.*, 985 F. 2d 196 (5th Cir. 1993).

III. Attorney Client Privilege

A. The attorney client privilege applies to confidential attorney communications. Fed. R. Evid. 502(g). Confidential communications include the advice given by attorney and the facts given to an attorney that are necessary to render such advice.

B. Limitations: the attorney client privilege generally applies only to the advice of an attorney in securing legal representation, and not to physical evidence. It can only be waived by a client, and it continues after termination of an attorney client relationship. See *Kevlik v. Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984); *United States v. Wilson*, 798 F.2d 509 (1st Cir. 1986). Additionally, an attorney is required to disclose information, where a failure to disclose such information would constitute furtherance of a particular crime or fraud. *United States v. Zolin*, 491 U.S. 554, 563 (1989).

C. The attorney client privilege applies to both individuals and corporations. See *Upjohn Co. v. United States*, 449 U.S. 383 (1981). The power to waive a corporate attorney client privilege rests with the corporation's management. Thus, when the control of a corporation

passes to new management, the authority to assert and waive the corporation's attorney client privilege passes to them. *See Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 349 (1985). Accordingly, when control of a corporation passes to a debtor in possession or a trustee, the trustee has the power and authority to waive the attorney client privilege. *Id.* at 353-4. This is because "when a trustee is appointed, he assumes control of the business and the debtor [corporation's] directors are 'completely ousted.'" *Id.* (internal citations omitted.).

D. In *Re TNG Acquisition, Inc.*, a Canadian bankruptcy court found that a Chief Restructuring Officer also holds an attorney-client (or solicitor-client) privilege on behalf of the corporation that the CRO represents. It further limited the applicability of Section 164(1) of the Bankruptcy and Insolvency Act (or Canadian Bankruptcy Code), to the extent that it does not override the attorney client privilege as applied under Canadian Law.³

1. In America, however, a Chief Restructuring Officer may not have the same powers as a bankruptcy trustee. *See In re Adelpia Comm'n Corp.*, 336 B.R. 610, 668-68n. 151 (Bankr. S.D. N.Y. 2006) ("[W]hile turnaround specialists have frequently been named as *statutory* trustees, and while the court assumes (without deciding) that turnaround specialists hired by debtors as officers (such as Chief Restructuring Officer) have at least some fiduciary duties, just as ordinary corporate officers do, the Court would not expect any individuals so hired to have the powers of a board of directors, or of a trustee.").

E. *Weintraub*, also recognized that successor officers and directors may waive their attorney client privilege. *Id.* (*Weintraub*, 471 U.S. at 349). However those successors are bound by fiduciary duty, and cannot waive such privilege unless it is in the best interest of the corporation. *Medcom Holding Co. v. Baxter Travenol Labs.*, 689 F. Supp. 841, 843 (N.D. Ill. 1988). This rule also applies to successor trustees or beneficiaries. *In re Bame*, 251 B.R. 367, 374 (Bankr. D. Minn. 2000).

IV. Attorney Work Product Protection Doctrine

A. Federal Rule of Evidence 502(g)(2) defines "work-product" as tangible material (or its intangible equivalent) prepared in anticipation of litigation or trial. The work-product doctrine applies to documents prepared in anticipation of litigation. *FTC v. Grolier Inc.*, 462 U.S. 19, 25 (1983). There are three types of work product: (1) documents that embody communication between an attorney and the client; (2) documents analyzing the law, facts, trial strategy, and that reflect the attorney's mental impressions but were not provided to a client; and (3) documents that discuss a communication between an attorney and a client, the subject matter of the case, but are not themselves to or from the client.

B. Limitations: It does not apply to evidence or documents produced in the ordinary course of business. In order to obtain documents which would otherwise be protected by the work product doctrine, a party must show a substantial need for such documents, and that the party cannot obtain the evidence through other means. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947); *United States v. Nobles*, 422 U.S. 225, 236-40 (1975).

C. Waiver of the work product protection doctrine only extends to factual or non-

³ Section 164(1) of the Bankruptcy and Insolvency Act is analogous to 11 U.S.C. § 521(4).

opinion work product concerning the same subject matter as the disclosed work product. *See In re Echo Star Comm'n Corp.*, 448 F.3d 1294, 1302 (Fed. Cir. 2006). The overarching goal of a waiver is to prevent a party from using the advice he received as both a sword by waiving privilege to favorable advice, and a shield, by asserting privilege to unfavorable advice. *Fort James Corp. v. Solo Cup Co.* 412 F.3d 1340, 1349 (Fed. Cir. 2005).

D. Federal Rule of Civil Procedure 26(b)(3) provides that:

a party may obtain discovery of documents and tangible things...prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative...only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Fed. R. Civ. P. 26(b)(3). Thus, Rule 26(b)(3) extends work product protection to not only attorneys, but those persons who are retained by attorneys for the purpose of assisting them in anticipation of litigation, so long as those persons are not expected to testify.

E. While the disclosure of documents may be sufficient to waive the attorney client privilege, it does not constitute a waiver of the work product protection doctrine. *United States v. Am. Tel. and Tel. Co.*, 642 F.2d 1285, 1299-1300 (D.C. App. 1980) ("By contrast, the *work product privilege* does not exist to protect a confidential relationship, but rather *to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent.*") (citing *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)) (emphasis in original).

V. Joint Privilege

A. Because an in-house counsel for a corporation may represent both individuals and clients, at times both an individual and a corporation may hold a joint attorney client privilege. *See United States v. Gaff*, 610 F.3d 1148, 1158 (9th Cir. 2010).

B. The majority of courts which have addressed the question of whether an officer or employee may assert an individual privilege apart from his employers have adopted a multi-part test established by the Third Circuit in *In the Matter of Bevill, Bresler & Schulman Asset Mgmt. Cor.*, 805 F.2d 120, 124 (3d Cir. 1986). *See United States v. Graf*, 610 F.3d 1148 (9th Cir. 2010); *Ross v. City of Memphis*, 423 F.3d 596, 605 (6th Cir. 2004); *In re Grand Jury Subpoena*, 274 F.3d 563, 571 (1st Cir. 2001); *In re Grand Jury Proceedings*, 156 F.3d 1038, 1040-41 (10th Cir. 1998); *United States v. Int'l Bhd. of Teamsters*, 199 F.3d 210, 215 (2d Cir. 1997).

1. The *Bevill* test requires a person to show that: (1) she approached counsel for the purpose of seeking legal advice; (2) when she approached counsel, she made it clear that she was seeking legal advice in an individual capacity; (3) that the counsel found it appropriate to communicate with her in such a capacity, despite a possible conflict; (4) the conversations were

confidential; and (5) the communications did not concern a company's general affairs. *Bevill*, 805 F.2d at 123 (citing *In re Grand Jury Investigation, No. 83-30557*, 575 F.Supp. 777, 780 (N.D. Ga. 1983)).

2. An ex-employee of a corporation cannot waive the corporation's attorney client privilege, any more than an employee. See *In re Richard Roe, Inc.*, 168 F.3d 69, 72 (2d Cir. 1999); *United States v. Int'l Bhd of Teamsters*, 119 F.3d 210, 215 (2d Cir. 1997).

C. The joint privilege has also been extended to protect communications between parties who share a common interest in litigation. See *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 334, 341 (4th Cir. 2005); *United States v. Schwimmer*, 892 F.2d 237, 243-44 (2d Cir. 1989). The joint defense privilege applies so long as the communication in question was made in confidence, and the client must have reasonably understood it to be so given. *United States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989). Further, the communication must be made in the course of an ongoing common enterprise, and be intended to further the enterprise. *Eisengberg v. Gagnon*, 766 F.2d 770, 787 (3d Cir. 1985); see also *In re Fundamental Long Term Care Inc.*, 489 B.R. 451, 468 (Bankr. M.D. Fla. 2013) (holding that while a trustee and receiver are adverse in a bankruptcy proceeding, their common interest in another matter renders the joint privilege applicable as it relates to the other matter.)

1. In *In re City of Detroit, Michigan*, the City of Detroit claimed that it was entitled to a joint privilege as it related to communications with the State of Michigan. See ECF # 920 in 13-bk-153846. However, a creditor objected to its assertion of privilege and moved to compel testimony. *Id.* at 1. Specifically the creditor argued that (1) the assertion related to communications made prior to the City of Detroit's filing for bankruptcy protection; (2) some communications between the City of Detroit and the state of Michigan did not relate to their joint representation; and (3) the city and state officials waived their right to assert the privilege. *Id.* at 10-12. (quoting *High Point SARL v. Sprint Nextel Corp.*, 2012 WL 234024, at *5 (D. Kan. Jan. 25, 2012) (“[T]he key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial.”); *North Am. Rescue Prods., Inc. v. Bound Tree Medical, LLC*, 2010 WL 1873291, at *4 (S.D. Ohio May 10, 2010) (holding that a commercial interest was insufficient to establish a joint privilege); *On Business Solutions Inc. v. Hyundai Motor Am.*, 2011 WL 6957594, at *2 (N.D. Ohio 2011); *In re Megan Racine Assoc., Inc.*, 189 B.R. 562, 573 (Bankr. N.D. N.Y. 1995) (“The Parties asserting privilege must also demonstrate that each communication was made in the course of the joint-defense effort and was designed to further that effort.”)).

2. The creditor's motion was granted in part and denied in part. See ECF # 956 (“Minute Entry. Hearing Held. Motion granted in part, denied in part.”). While ordering an expedited transcript is prohibitively expensive, it is likely that the Court ruled that only those communications which were made in furtherance of the joint defense of the city and state were privileged, but that they could not assert it to the extent that the communications were not made for such purpose.

3. Where an attorney obtains confidential information in the course of a representation, which may put the attorney in a position where the confidential can be used against one client, but not the other, the attorney should withdraw from representation. *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 334, 341 (4th Cir. 2005). Further, the joint defense

privilege is inapplicable during subsequent litigation between joint clients. *FDIC v. Ogden Corp.*, 202 F.3d 454, 461 (1st Cir. 2000).

4. Verbal agreements have little effect on the application of the joint defense privilege, as only the person who made the statement may properly waive the privilege. *In re Grand Jury Subpoena*, 274 F.3d 563, 573 (1st Cir. 2001). However, under Federal Rule of Evidence 502(e), “[a]n agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court-order.”

D. Where parties seek to create a joint privilege via written agreement, the agreement may be held void as a matter of public policy. *See In re Ginn-La St. Lucie Ltd.*, 439 B.R. 801, 806 (Bankr. S.D. Fla. 2010); *see also In re Fundamental Long Term Care, Inc.*, 489 B.R. 451, 468 (Bankr. M.D. Fla. 2013). In *Ginn*, the bankruptcy court found that documents that were otherwise discoverable could not be protected under the joint privilege doctrine because of the existence of a joint defense agreement. *Id.* The basis for the court’s decision was that the joint defense agreement was contrary to the concept that joint clients may not assert the attorney client privilege against each other in subsequent adverse litigation between them, and their enforcement would “shield wrongdoers at the expense of the debtor’s creditors.” *Id.* at 805 (citing *In re MMirant Corp.*, 326 B.R. 646, 650 (Bankr. N.D. Tex. 2005); *Garner v. Wolfenbarger*, 430 F.2d 1093, 1103 (5th Cir. 1970)).

1. The court also noted that *Weintraub* is applicable to the joint defense privilege. *Id.* at 804 (citing *Weintraub*, 471 U.S. at 358). It consequently required the disclosure of documents that may have otherwise been protected as work product, while noting that “it is the attorney’s burden to rebut [a] presumption of full client access by showing substantial grounds exist to refuse work product to a former client in a represented matter.” *Id.* at 806. Like the *Ginn* Court, the court in *In re Fundamental Long Term Care, Inc.*, held that the trustee was entitled to documents which otherwise would have been protected by the work product protection doctrine. 489 B.R. at 473.

E. Limitations: same as the attorney client privilege and work product protection doctrine.