

Consumer Track

Current Developments in Consumer Bankruptcy

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CASE LAW UPDATE SEPTEMBER 2014

Presented by Stephen E. Berken

RECENT LOCAL DECISIONS

***In re Fogel*, Case No. 10-38010 ABC, Docket #58, (Bankr. D. Colo. April 1, 2014); Fed.R.Bankr.P. 1016**

The Chapter 13 debtor died within a month of confirming his plan. The debtor's widow, who was not a debtor in the case, made the payments under the plan to the Chapter 13 trustee. Three (3) years later, upon completion of those payments, an attorney entered an appearance, purportedly on behalf of the deceased debtor, and moved to waive the requirements that debtor: (1) complete the course in personal financial management; and (2) file a certificate to obtain a discharge, because debtor had died. Upon that record, and in light of Fed.R.Bankr.P. 1016, the Court dismissed this case concluding that the non-debtor widow, as either personal representative of the deceased debtor's probate estate, or as a co-obligor on any of her husband's debts, could not achieve the benefits of the stay and the discharge without filing a bankruptcy case.

***In re John Gazzo (Gasso v. Ruff and Merrick)*, Bankruptcy Case No. 12-33683-SBB, Adversary Proceeding No. 13-01356-SBB**

Debtor/Plaintiff initiated an adversary proceeding against his former spouse and her counsel for violating the automatic stay by continuing on with a domestic court hearing the day after the Debtor filed for bankruptcy relief and seeking an order from the domestic court against the Debtor post-petition. Defendants argued that the domestic court hearing and the resulting order did not violate the automatic stay because they fell under exceptions from the stay under 11 U.S.C. §§ 362(b)(1) and 362(b)(2)(A)(ii), respectively. Specifically, Defendants argued that the domestic court hearing was a hearing for criminal contempt of court and the resulting order was a modification of an order of domestic support obligation and they were both, thus, excepted from the automatic stay.

The Court however found that the nature of the domestic court hearing was not criminal nor was the resulting order a modification of a domestic support obligation, and thus was not excepted from the automatic stay. Rather the ultimate goal of the hearing was to enforce the terms of a divorce decree and otherwise compel the Debtor to pay on a debt. Additionally, the Court found that the order entered by the domestic court was not an order modifying a domestic support obligation but an award of costs and therefore was not excepted from the broad reach of the automatic stay.

The Court treated the Defendants' Motion to Dismiss as a Motion for Summary Judgment under FED. R. CIV. P. 12(d) and denied relief to the Defendants. Because the Defendants knew of the Debtor's bankruptcy and acted in a deliberate manner, the Court found that the Debtor was entitled to an award of actual damages. Additionally, the Court concluded that because the Defendants acted with a reckless disregard of the Debtor's bankruptcy filing, punitive damages

may be appropriate. The Court instructed the Debtor to file a separate application/motion for damages.

***In re Kurtz*, No. 11-35725 ABC (Bankr. D.Colo. November 26, 2013); ECF#71**

Debtor, joined in by Douglas Kiel, Chapter 13 Trustee, moved to reconsider the Court's order denying a post-confirmation motion to modify his confirmed Chapter 13 Plan. Debtor proposed in his modified plan to surrender his home and discharge any deficiency balance owed to the first mortgage holder. The Court denied Debtors' motion to reconsider holding that: (1) the Debtor is bound to the provisions of his confirmed plan; (2) Section 1329 does not contemplate the bifurcation of a secured claim not subject to bifurcation at confirmation; (3) Debtors could not seek to discharge any deficiency because the claim of the first mortgage holder was one excepted from discharge by section 1328(a)(1).

***In re Calderon*, ___ B.R. ___ (Bankr. D.Colo. 2013) ; (Bankr. Case No. 12-23843-SBB, issued October 23, 2013)**

The debtor used tools and equipment owned by him in his personal capacity in conducting his masonry business through a wholly-owned corporation. The trustee contended that debtor was not entitled to tools of the trade exemptions under Colo. Rev. Stat. § 13-54-102(1)(i) because the tools and equipment at issue were used and kept not by the debtor, but by his legally distinct corporation. The Court concluded that the mere creation of a separate legal entity does not render a debtor's claim of exemption in his tools and equipment to be improper. The Court held that the focus of the inquiry is on ownership and the nature of the use and keeping of the tools and/or equipment. The Court set forth a nonexclusive five-factor test to help determine whether under Colo. Rev. Stat. § 13-54-102(1)(i), tools and equipment are "used and kept for the purpose of carrying on any gainful occupation." Based on the parties' stipulations, the Court determined that the debtor was the proper entity who owned, maintained, used and kept the tools and equipment related to his masonry business. The Court further concluded that the tools and equipment were integral to the debtor's masonry business and to his fresh financial start. Consequently, the Court denied the trustee's objection to the debtor's claim of exemptions.

***In re Conley/Carroll*, Case No. 10-12949 ABC, Docket No. 91 (Bankr.D.Colo. January 14, 2014); 11 U.S.C. §§ 1327 and 1329**

Debtors proposed a post-confirmation modified plan to surrender a vehicle to a lender whose secured claim had been determined under section 506 and provided for in a certain amount in Debtors' confirmed plan. Debtors further proposed to recalculate the secured creditor's allowed secured claim after taking into account the amount the secured creditor would recover upon liquidation of the vehicle. The Court denied Debtors' request to approve such a modification citing to its prior opinions which denied approval of similar post-confirmation modifications. *In re Knapp*, Case No. 08-24134 ABC, Docket #51 (July 5, 2013), *In re Rentie*, Case No. 10-18997 ABC, Docket #66 (August 8, 2013), and *In re Rutt*, 07-13448 ABC, Docket #76 (September 10, 2010).

In response, Debtors filed another motion to modify wherein they proposed again to bifurcate the secured claim of the same vehicle lender. Debtors argued that the secured creditor had filed an

amended proof of claim in which it recalculated the amount of its claim and asserted a wholly unsecured claim after taking into account the amount it had received upon liquidation of the vehicle. The Debtors proposed to limit the payment to the secured creditor to the total of the amount the creditor had received upon liquidation of the collateral plus what Debtors had paid the creditor through the confirmed plan. That aggregate amount was less than the allowed secured claim provided for by the Debtors' confirmed plan. The Court again denied Debtors' motion holding Debtors were bound to their confirmed plan and that section 1329 of the Code would not permit the rebifurcation of the secured creditor's allowed secured claim.

***Blackwell Oil Co., Inc., v. Potts*, Case No. 12-23027- HRT; Adversary Proceeding No. 11-1592, Order entered November 14, 2013 (Denial of discharge under § 727(a)(5))**

Creditor moved to deny Debtor's discharge under 11 U.S.C. §§ 727(a)(3), (a)(4)(A), (a)(4)(D), and (a)(5). The Court granted the Creditor's complaint for denial of discharge under § 727(a)(5) because Debtor failed to explain satisfactorily a loss or deficiency of assets; namely, the value of Debtor's 100% interest in a corporation. The Creditor showed the corporation had over \$700,000 in unexplained cash losses for several years prior to the filing of Debtor's Chapter 7 bankruptcy petition, and Debtor then transferred the assets of the corporation for significantly less than their value prior to filing for bankruptcy. The Court concluded that the dissipation of assets, combined with the transfer, was not too remote in time to be considered under § 727(a)(5), citing, in part, *In re Lindemann*, 375 B.R. 450 (Bankr. N.D. Ill. 2007). Because the Debtor failed to satisfactorily explain the loss of assets, the Court denied his discharge under § 727(a)(5).

***Jewell v. United States*, 10th Cir., No. 13-06069, 2014 BL 118276, 4/28/14**

10TH CIRCUIT RULES IRS NOTICE WAS INVALID BECAUSE LESS THAN REQUIRED NOTICE TIME WAS GIVEN

Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. 5:12-CV-01125-C)

The Internal Revenue Service issued four summonses to banks in the Eastern and Western Districts of Oklahoma for records involving nursing homes owned by Sam Jewell. Under federal law, the IRS had to notify Jewell at least 23 days before the examination date. Because the IRS waited too long to mail the notices, Jewell received the notices less than 23 days before the records were to be examined. Alleging inadequate notice, Jewell filed petitions to quash the summonses.

The 10th Circuit held:

"Though we do not lightly create a circuit split, we are obliged to follow Supreme Court precedent, even when it might be viewed as "inequitable" or as "form over substance." In *Powell*, the Supreme Court expressed itself clearly: If the IRS does not comply with the administrative requirements of the Internal Revenue Code, its summonses are unenforceable.

"*United States v. Powell*, 379 U.S. 48, 57-58 (1964). The 23-day requirement is mandatory and an administrative requirement of the Internal Revenue Code. Thus, under *Powell*, we conclude that the district courts in the Western and Eastern Districts of Oklahoma were obligated to grant

Mr. Jewell's petitions to quash the summonses.

Conclusion

In enacting § 7609(a)(1), Congress stated that the IRS “shall” give taxpayers at least 23 days’ notice. In *Powell*, the Supreme Court required the IRS to show administrative compliance with the tax code before it can enforce a summons. In both cases, the IRS admittedly violated the tax code by failing to give Mr. Jewell 23 days’ notice. As a result, the IRS cannot make a prima facie case for enforcement of the summonses.

SUPREME COURT CASES

***Clark v. Rameker*, 134 S. Ct. 2242 (U.S. 2014)**

Case held that an inherited IRA is not exempt under Code § 522(b)(3)(C) or § 522(d)(12) because the funds in an inherited IRA are not “retirement funds” within the meaning of those provisions, each of which exempts “retirement funds to the extent those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code.” Accordingly, the court affirmed *In re Clark*, 714 F.3d 559 (7th Cir., April 23, 2013) while abrogating *In re Chilton*, 674 F.3d 486 (5th Cir., March 12, 2012) and other cases that allowed the exemption of inherited IRAs.

The reference to “retirement funds” in these provisions is properly understood, the Court said, to mean sums of money set aside for the day an individual stops working. Three legal characteristics of inherited IRAs led the Court to conclude that funds held in such accounts are not objectively set aside for the purpose of retirement. First, the holder of an inherited IRA may never invest additional money in the account. Second, holders of inherited IRAs are required to withdraw money from such accounts, no matter how many years they may be from retirement. Finally, the holder of an inherited IRA may withdraw the entire balance of the account at any time—and for any purpose—without penalty. Allowing the exemption of an inherited IRA, the Court said, would convert the Bankruptcy Code's purposes of preserving debtors' ability to meet their basic needs and ensuring that they have a “fresh start” into a “free pass.”

The case involved a “non-spousal” inherited IRA, as the debtor inherited the IRA from her mother. The Court noted that a surviving spouse has the option of rolling over the funds from a deceased spouse’s IRA into the surviving spouse’s own IRA. The Seventh Circuit’s opinion was explicitly limited to a “non-spousal” inherited IRA, and, while the Supreme Court’s opinion does not reiterate this limitation, the opinion presumably does not apply to funds inherited by a spouse and rolled over into the spouse’s own IRA, as such funds are no longer in an “inherited IRA,” which is a specific type of IRA recognized by the IRS.

CASES PENDING BEFORE THE SUPREME COURT

***In re Law*, case number 12-5196 (S.Ct. Sept. 3, 2013), 435 Fed. Appx. 697 (9th Cir. 2011).**

The issue is whether the debtors exemptions may be surcharged using section 105 based on the debtor's bad conduct. Debtor created a fraudulent mortgage in order to give the appearance of no

equity in his home. The residence eventually was sold by the trustee. The question became, who gets the \$75,000 that represented the homestead exemption for the debtor.

The lower courts used section 105 to surcharge the exemption based on the debtor's bad conduct. However, Congress specified under section 522(c) and (k) that exempt property cannot be used to pay prepetition debt service driven expenses.

PROPERTY ACQUIRED AFTER THE CHAPTER 13 CASE IS FILED

In re Flugence, 732 F.3d 428 (5th Cir. 2013).

Debtor was injured after the plan confirmation but before the confirmation of the amended plan. The debtor did not disclose the cause of action in his schedules. Because he was in a chapter 13, the circuit court held that the debtor was judicially estopped because a cause of action was estate property in there was a duty to disclose.

Issue? What property must the debtor disclose? A new sofa? Every time he gets a change in wages? A birthday gift?

Carroll v. Logan, 735 F.3d 147 (4th Cir. 2013).

The debtors became entitled to an inheritance more than 180 days after the petition date. Thus, section 541(a)(5) does not appear to control. While the asset would not have been property of the estate in chapter 7, what happens in chapter 13?

Chapter 13 trustee moved to modify the repayment plan to include the amount of the inheritance to be paid to creditors. The debtors objected that it was not property of the estate.

The court rejected the argument that the specific language of section 541(a)(5) overrode section 1306, because 1306(a) is unique to chapter 13. The court found that an increase in debtor's income should be available to creditors.

Possible solutions? Dismissal? Convert to chapter 7 if there's no issue with Section 348(a).

DISCHARGEABILITY

Lampe v. Kash, 735 F. 3d 942 (6th Cir. 2013).

Debtor listed only the creditors attorneys address in the schedules. The court held due process is not satisfied by sending notice to an attorney from a case and claim that was eight years old. A stupid decision because it does not address Section 523(a)(3) and whether it was an asset case?

In re Herman, 737 F.3d 449 (7th Cir. 2013).

Debtor listed a creditor on her schedules care of the creditors attorney. Creditor received actual notice of the case of approximately 3 weeks prior to the dischargeability deadline. 13 months later, the creditor moved to reopen the case and file an action under sections 523 and 727. The bankruptcy court held that notice to the attorney was sufficient because he was still representing the creditor. And that representation stemmed from the debt, so there was some agency relationship.

***In re Kulakowski*, 735 F.3d 1296, (11th Cir. 2013).**

The debtor wife filed chapter 7 without her husband. The presumption of abuse did not arise on the means test. However, the bankruptcy court dismissed, holding that the husband's income and expenses should be considered under the totality of circumstances test. The decision was affirmed by the District Court and the Court of Appeals. The Court of Appeals held that the means test formula does not apply to the totality of circumstances test. The court noted that the debtor and the husband had pooled their income and expenses, and much of the debtors debt had benefited the husband and their dependents.

***In re Taylor*, 737 F.3d 670, (10th Cir. 2013).**

The debtor owed an overpayment of child support to her former husband of about \$50,000. The husband filed a dischargeability complaint per sections 523(a)(2), (a)(5) and (a)(15). The bankruptcy court dismissed 523(a)(2), (a)(5), but sustained the claim under 523(a)(15). The Court of Appeals affirmed the bankruptcy court. The court held that the debt was not in the nature of support for the spouse who been paying support so was not a domestic support obligation. The court did find that the debt was nondischargeable in chapter 7 because it arose "in connection with the separation agreement or divorce decree."

TAX LIENS

***In re Romious*, 487 B.R. 883 (Bankr. N.D. Ill. 2013).**

The debtor can cure delinquent property taxes through chapter 13 plan even though the redemption period expired during the pendency of the case. The tax lien certificate purchasers argued that section 108(b) requires the debtor to pay the claimant in full by the end of the 65th day. The court, however, held that a chapter 13 debtor is permitted to cure delinquent real estate taxes over the life of the plan. That the tax purchasers have an *in rem* right against the property which gives rise to a "claim" in a bankruptcy case. The court also noted that the tax purchasers are adequately protected by the lien on the property.

AUTOMATIC STAY

***In re Weber*, 719 F.3d 72 (2d Cir. 2013).**

The credit union violated the automatic stay in a chapter 13 by refusing to return the car repossessed before the bankruptcy was filed by the debtor. The circuit court held that the Supreme Court's decision in *United States v. Whiting Pools*, 462 U.S. 198, 103 S.Ct. 2309, (1983), provided guidance as to the issues. Because the debtor retained rights in the vehicle, the credit union was obligated to turn it over per section 542. The Court further held that the creditor's actions were willful and that lack of knowledge of the law did not prevent willfulness.

SOCIAL SECURITY BENEFITS

In re Welsh, 711 F.3d 1120 (9th Cir. 2013).

Social Security benefits are not counted as disposable income in chapter 13. Thus, making plan payments as computed by the means test cannot be in "bad faith." A plan prepared completely in accordance with the detailed calculations that Congress set forth, is proposed in good faith. To hold otherwise would allow the bankruptcy court to substitute its judgment of how much and what kind of income should be dedicated to the payment of unsecured creditors for the judgment of Congress. When a chapter 13 debtor calculates his repayment plan payments exactly as the bankruptcy code and Social Security act allow him to, and thereby exclude Social Security income, that exclusion cannot constitute a lack of good faith.

Court went on to hold that payments of unsecured debts for "luxury items" cannot be considered in a good faith analysis. The debtors were paying mortgage on a \$400,000 home, three cars, and airstream trailer, into all-terrain vehicles.

"Again, in the BAPCPA, Congress chose to remove from the bankruptcy court's discretion the determination of what is or what is not 'reasonably necessary.' Is substituted a calculation allows debtors to deduct payments unsecured debts in determining disposable income. That policy choice may seem unpalatable either to some judges or to unsecured creditors. Nevertheless, that is the explicit choice the Congress is made. We are not at liberty to overrule that choice." *Id.*

Mort-Ranta v. Gorman 721 F.3d 241 (4th Cir. 2013).

Is debtor's denial of confirmation an appealable order? The Fourth Circuit decided that it is an appealable order. It found that the more pragmatic approach of those circuits that it held that the denial of confirmation can be a final order for purposes of appeal even if the case has not yet been dismissed, recognizing that this conclusion "is all but compelled by considerations of practicality."

A contrary rule could leave some debtors without any real options in formulating their plan. Assuming an interlocutory appeal is unavailable, the debtor who prefers the proposed plan seeing to appeal the denial would be forced to choose between filing an unwanted and/or involuntary plan and appealing his own plan, or dismissing his case and appealing his own dismissal. Forced to suffer that dismissal, the debtor could lose the automatic stay on a foreclosure and collection actions that takes effect upon the filing of the chapter 13 petition. He also could be precluded from filing another bankruptcy petition for six months per section 109(g).

ADDITIONAL CASES OF INTEREST

***In re Dorsey*, --- B.R. ----, 2014 WL 888917 (B.A.P.6th Cir. March 7, 2014) (unpublished table opinion)**

- **Proof of claim—Secured claim—Right to enforce note:** The Purchase and Sale Agreement was not a "transfer"; Without proper indorsement and without proof of the rights of the transferor which would enure to the transferee, the mortgage company failed to provide sufficient proof that Ky. Rev. Stat. Ann. § 355.3-203 applied; There was no proof presented to the bankruptcy court that the Mortgage could also serve as a note; It appeared that the chain of title of the Note was not properly proved and therefore the party entitled to enforce the Note was not the mortgage company. As neither a holder of the Note, Ky. Rev. Stat. Ann. § 355.1-201, nor a non-holder with the rights of a holder, it could not enforce the Note; Because a mortgage was valid and enforceable only if the underlying debt continued to be an enforceable obligation, the Mortgage was no longer enforceable under Kentucky law.
- The Panel affirmed the order of the bankruptcy court granting summary judgment to the Trustee.

***In re Sharp*, --- B.R. ----, 2014 WL 1400073 (B.A.P. 10th Cir. April 11, 2014) (case no. 13-53)**

- **Property of the estate—Exemptions—Under state law:** In order to disqualify a debtor's claimed tools of trade exemption under Colo. Rev. Stat. § 13-54-102(1)(i) (2010), the objecting party must prove by a preponderance of the evidence that the debtor's occupation is unlikely to contribute to the support of the debtor and his family in any significant way within a reasonable period of time under the specific facts of each case. Here, the Chapter 7 Trustee failed to meet that burden; Despite its application of a slightly different legal test, the bankruptcy court's fact findings supported debtor's tools of trade exemption under the standard the Panel adopted here. Those facts established that the business was likely to contribute to debtor's support, and even to provide all of his support, within a reasonable amount of time.
- The bankruptcy court's denial of the Chapter 7 Trustee's objection, and allowance of the claimed objection, was affirmed.

***In re Skiles*, 504 B.R. 871 (Bankr. N.D. Ohio 2014)**

- **Means test—Household size:** In order to determine the size of debtor's household for purposes of 11 U.S.C.S. § 1325(b)(4), the court adopted the "economic unit" definition, under which household was defined as those individuals that debtor financially supported and those who financially supported debtor; Court adopted a rebuttable presumption that if an individual was listed as a dependent on debtor's or debtor's non-filing spouse's most recent income tax return, that individual was presumed to be a member of debtor's household; Debtor's household consisted of four members, even if he had rebutted the presumption, as the court held that a child that lived with debtor only part-time should be

counted based on the percentage of time spent with debtor; Debtor's current monthly income was above the applicable median and thus, his commitment period had to be 60 months.

- The court denied confirmation of the debtor's Chapter 13 plan.

***In re Nobriga*, 2014 WL 25725 (Bankr. N.D. Cal. Jan. 2, 2014) (case no. 11-12469)**

- **Violation of discharge injunction—Damages—Attorney's fees:** Attorney's fees incurred defending an award for a violation of the discharge injunction are actual damages for which the debtor should be compensated.

***In re Uhlig*, 504 B.R. 916 (Bankr. E.D. Wis. 2014)**

- **Chapter 13—Confirmation of plan—Calculation of projected disposable income:** A bankruptcy plan proposed by above-median income Chapter 13 debtors, which required the debtors to pay the Chapter 13 trustee \$15,590 for the benefit of unsecured creditors, met the requirements of 11 U.S.C.S. § 1325(b)(1)(B) and could be confirmed; Any increase in the cash surrender value of a whole life insurance policy the debtors realized over the life of their plan was not part of their projected disposable income and did not have to be paid to the trustee as an additional dividend to be paid to unsecured creditors; Above-median income Chapter 13 debtors were entitled to take the standard deductions allowed under the National and Local Standards promulgated by the IRS, and the debtors were allowed to keep any savings they realized by spending less than the Standards allowed, and could spend that money, save it, or invest it in a whole life insurance policy.
- The court stated that it would enter an order which overruled the trustee's objection to confirmation of the debtors' plan.

***Dale v. Maney (In re Dale)*, 505 B.R. 8 (B.A.P. 9th Cir. 2014)**

- **Property of the estate—In Chapter 13 case:** Did the bankruptcy court (BC) err as a matter of law in determining that an inheritance received by a chapter 13 debtor more than 180 days after the petition date, but before a plan was confirmed and before the chapter 13 case was closed, dismissed, or converted was an asset of the bankruptcy estate? The statutes' plain language manifests Congress's intent to expand the estate for Chapter 13 purposes by capturing the types, or "kind," of property described in 11 U.S.C.S. § 541 (such as bequests, devises, and inheritances), but not the 180-day temporal restriction, 11 U.S.C.S. § 1306(a); This is because the kind of property is a distinct concept from the time at which the debtor's interest in the property was acquired. And on its face, § 1306(a) incorporates only the kind of property described in § 541 into its expanded temporal framework; The BC did not err.
- The bankruptcy court's determination was affirmed.
- Opinion agrees with *Carroll v. Logan*, 735 F.3d 147 (4th Cir. 2013).

***In re McAllister*, 510 B.R. 409 (Bankr. N.D. Ga. 2014)**

- **Chapter 13—Modification of confirmed plan:** Life insurance proceeds received by debtor after confirmation of his Chapter 13 plan were not property of the estate, as 11 U.S.C.S. § 1306(a)(1) did not override the specific date restriction in 11 U.S.C.S. § 541(a)(5); Projected disposable income test of 11 U.S.C.S. § 1325(b), even if applicable to a proposed modification under 11 U.S.C.S. § 1329, provided no basis for requiring debtor to use proceeds from excluded property to pay more to creditors than the original confirmed plan required, as the proceeds were not received during six months prior to filing the case; Trustee’s modification did not comply with the mandatory requirements of 11 U.S.C.S. § 1329 under Eleventh Circuit law, as a modification could not require the use of proceeds from non-estate or exempt property.
- The court approved the debtor's modification to the confirmed plan and disapproved the Chapter 13 trustee's modification.

***Target Nat'l Bank v. Nelson (In re Nelson)*, 503 B.R. 466 (Bankr. C.D. Cal. Dec. 11, 2013)**

- Sanctions were warranted under Fed. R. Bankr. P. 9011 where there was no evidence that could reasonably support that count of a complaint seeking nondischargeability under 11 U.S.C.S. § 523(a)(2)(C)(i)(I), as a law firm did not provide any admissible evidence substantiating that goods purchased by debtor on her charge account within the 90-day presumption period were luxury goods; No evidence reasonably supported that count of the complaint seeking nondischargeability under § 523(a)(2)(A) where, inter alia, the charges did not exceed debtor’s credit limit, debtor was employed at the time she incurred each charge, and she did not make a sudden change in buying habits; Law firm failed to conduct an objectively reasonable investigation into the facts and circumstances surrounding its allegations; Fed. R. Bankr. P. 9011 did not have a good faith exception.
- The court jointly and severally sanctioned the law firm the sum of \$5,000. In addition, the attorney was required to immediately report the sanction to the state bar and to various other entities.

***In re McGough*, 737 F.3d 1268 (10th Cir., Dec. 16, 2013)**

- **Avoidable transfers—Constructively fraudulent transfer—Charitable contribution defense:** Reversing *In re McGough*, 467 B.R. 220 (10th Cir. B.A.P., March 14, 2012), which had affirmed *In re McGough*, 456 B.R. 682 (Bankr. D. Colo., July 7, 2011), the Court of Appeals held that, where the Chapter 7 debtors’ charitable contributions exceeded the 15% of gross annual income allowed under Code § 548(a)(2)(A), the trustee could recover the entire amount of the charitable contributions as constructively fraudulent transfers under § 548(a)(1)(B); the trustee’s recovery was not limited to the amount by which the debtors’ annual contributions exceeded the 15% limit. The court said it agreed with the only other case to address this issue, *In re Zohdi*, 234 B.R. 371 (Bankr. M.D. La. 1999).

Comment: The bankruptcy court held that the debtors' annual contributions were to be considered in the aggregate, rather than individually, in applying Code § 548(a)(2)(A), and the debtors did not appeal this decision. See also *Universal Church v. Geltzer*, 463 F.3d 218 (2nd Cir. 2006) (the debtor's annual contributions are aggregated in applying the 15% limitation found in § 548(a)(2)(A)).

***In re De Cunae*, 2013 WL 6389205 (Bankr. S.D. Tex. Dec. 6, 2013)**

- **Consumer debts:** A U.S. Trustee ("UST") did not meet his burden of proving that a Chapter 7 debtor's case should be dismissed under 11 U.S.C.S. § 707(b) because debts the debtor owed were primarily "consumer debts," as that term was defined in 11 U.S.C.S. § 101(8); Although the debtor owed \$251,058 in student loan debt he incurred to attend dental school, and the parties agreed that he used \$30,126 of that amount to pay his living expenses, only the amount he used to pay his living expenses qualified as "consumer debt," and when the balance of what he owed on his student loans was removed from the category of "consumer debt," less than half the amount of debt he owed was consumer debt.
- The court stated that it would enter a separate order which denied the UST's motion to dismiss the debtor's case.

***In re Perez*, 535 Fed. Appx. 731 (10th Cir., Oct. 9, 2013)**

- **Appellate procedure—Standing to appeal:** The Chapter 7 debtor lacked standing to appeal the bankruptcy court's decision granting the Chapter 7 trustee \$46,377.58 in compensation and expenses where, even if compensation were denied, the debtor's estate would remain insolvent, as the estate held \$573,558.80 and the total in allowable claims was in excess of that amount.

***In re Staker*, --- Fed. Appx. ---, 2013 WL 6609660 (10th Cir., Dec. 17, 2013)**

- **Property of the estate:** The default judgments the Chapter 7 debtors had obtained prepetition in state court litigation seeking to invalidate deeds of trust on their real property were property of the debtors' bankruptcy estates, and the Chapter 7 trustee had authority to settle the deed of trust holders' subsequent motions to vacate the default judgments. Consequently, the debtors lacked standing to challenge the bankruptcy court's approval of the settlement and remand of the matters to the state courts. While the debtors claimed exemptions in the property, their claimed exemptions were irrelevant to the issue of standing in relation to the state-court judgments.

***In re Taylor*, 737 F.3d 670 (10th Cir., Dec. 9, 2013)**

- **Dischargeability of debt—Domestic support obligation under Code § 523(a)(5):** Affirming *In re Taylor*, 478 B.R. 419 (10th Cir. B.A.P., Sept. 5, 2012), which had affirmed *In re Taylor*, 455 B.R. 799 (Bankr. D. N.M., May 5, 2011), the Court of Appeals held that a judgment debt that the Chapter 7 debtor incurred as a result of her former

husband's overpayment of spousal support was not in the nature of a domestic support obligation and therefore was not nondischargeable under Code § 523(a)(5).

- **Dischargeability of debt—Marital debt under Code § 523(a)(15):** However, the judgment debt that the Chapter 7 debtor incurred as a result of her former husband's overpayment of spousal support was “incurred by the debtor in the course of a divorce or in connection with a separation agreement, divorce decree or other order of a court of record,” and thus the debt was excepted from discharge under Code § 523(a)(15).

***In re UTE Mesa Lot 1, LLC*, 736 F.3d 947 (10th Cir., Nov. 25, 2013)**

- **Avoidable transfers—Transfer of interest of debtor in property:** Under Colorado law, a lis pendens does not constitute a lien against real property. Accordingly, a creditor's filing a notice of lis pendens in Colorado was not a preferential transfer, since the lis pendens was not a “transfer of an interest of the debtor in property” under Code § 547(b). Although a lis pendens might render title unmarketable under Colorado law, the owner still retained the right to convey that property.

***In re Karch*, 499 B.R. 903 (10th Cir. B.A.P., Oct. 15, 2013)**

- **Dischargeability of debt—For defalcation by fiduciary under Code § 523(a)(4):** Reversing *In re Karch*, 2012 WL 5947866 (Bankr. D. Colo., Nov. 28, 2012), the Bankruptcy Appellate Panel held that *Bullock v. BankChampaign, N.A.*, 133 S.Ct. 1754, 185 L.Ed.2d 922 (May 13, 2013) abrogated *In re Storie*, 216 B.R. 283 (10th Cir. B.A.P. 1997), which held that a finding of “mental culpability” is not necessary to a determination of nondischargeability under Code § 523(a)(4) for “defalcation” by a fiduciary. After *Bullock*, in order to hold a debt nondischargeable under § 523(a)(4) for defalcation by a fiduciary, a bankruptcy court must find that the debtor acted with wrongful intent, or, at a minimum, with a conscious disregard of his or her fiduciary duties.

***In re Loomis*, Case No. 13-17 (10th Cir. B.A.P., Oct. 15, 2013)**

- **Appellate procedure—Notice of appeal—Timeliness:** When an extension of time to appeal is requested after the 14-day appeal period has run, Bankruptcy Rule 8002(c)(2) permits a bankruptcy court to grant relief only upon a movant's showing of excusable neglect. However, Bankruptcy Rule 9022(a) provides that “[l]ack of notice of the entry [of a judgment] does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 8002.” In other words, when a motion for extension is filed after the 14-day appeal period, the bankruptcy court's discretion is circumscribed. Time to appeal may be extended only when the movant demonstrates excusable neglect, and equating lack of notice (or delayed notice) of the judgment to be appealed with excusable neglect would render Rule 9022(a) meaningless. Therefore, courts have held that lack of notice or delayed notice alone does not constitute excusable neglect.

Brumfiel v. U.S. Bank, 2013 WL 5495543 (D. Colo., Oct. 2, 2013)

- **Chapter 7—Prosecution of prepetition cause of action:** Because claims for injunctive relief have no monetary value, a Chapter 7 debtor has standing to prosecute an undisclosed prepetition claim for injunctive relief. *Barger v. City of Cartersville, Ga.*, 348 F.3d 1289 (11th Cir. 2003).

In re McPherson, 2013 WL 6657599 (D. Colo., Dec. 17, 2013), appeal filed, Case No. 14-1038 (10th Cir., filed Feb. 3, 2014)

- **Chapter 13—Modification of confirmed plan:** Because reclassifying a secured claim as unsecured is not one of the modifications of a confirmed Chapter 13 plan permitted under Code § 1329(a), the Chapter 13 debtors could not, after the confirmation of a plan that treated both the senior and the junior mortgages on their home as secured claims, seek to strip the junior mortgage lien as wholly unsupported by value in the collateral.

Sinju v. Express Recovery Services, Inc., 2013 WL 6621120 (D. Utah, Dec. 16, 2013)

- **Judicial estoppel—Elements:** A court typically considers three factors in deciding whether to apply the doctrine of judicial estoppel: (1) a party's subsequent position must be “clearly inconsistent” with its former position; (2) whether the party succeeded in persuading a court to accept that party's former position, “so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled”; and (3) if the party seeking to assert an inconsistent position would gain an unfair advantage in the litigation if not estopped. *Eastman v. Union Pac. R. Co.*, 493 F.3d 1151 (10th Cir. 2007) (quoting *New Hampshire v. Maine*, 532 U.S. 742 (2001)).
- **Judicial estoppel—Application under circumstances:** The Chapter 7 debtor was judicially estopped from prosecuting FDCPA litigation that she commenced prepetition where the debtor failed to disclose the cause of action in her bankruptcy schedules and the court relied on the debtor’s misrepresentation in granting her a discharge, even though the debtor subsequently amended her schedules to disclose the claim.

In re Miller, 666 F.3d 1255 (10th Cir., Feb. 1, 2012)

- **Relief from stay—Standing:** While the Bankruptcy Code does not define the term “party in interest” for the purpose of seeking relief from stay under Code § 362(d), courts have concluded that, in order to invoke the court's power, a party must be either a creditor or a debtor of the bankruptcy estate. See, e.g., *In re Comcoach Corp.*, 698 F.2d 571 (2d Cir. 1983).
- **Relief from stay—Standing—Effect of preclusion doctrines:** Reversing *In re Miller*, 2011 WL 1807015 (10th Cir. B.A.P., May 12, 2011), the Court of Appeals held that a state-court determination that the Chapter 13 debtors’ purported mortgage creditor had standing to seek an order authorizing the sale of the debtors’ residence under the deed of trust securing the debtors’ mortgage loan did not preclude the debtors from challenging

the creditor's standing to seek relief from stay in the debtors' bankruptcy case. The *Rooker–Feldman* doctrine did not preclude the debtors' challenge because attempts merely to relitigate an issue determined in a state case are properly analyzed under principles of issue or claim preclusion rather than *Rooker–Feldman*. “[I]ncorporation of preclusion principles into *Rooker–Feldman* risks turning that limited doctrine into a uniform federal rule governing the preclusive effect of state-court judgments, contrary to the Full Faith and Credit Act.” *Lance v. Dennis*, 546 U.S. 459, 466, 126 S.Ct. 1198, 163 L.Ed.2d 1059 (2006). And the state court order did not have issue preclusive effect under state law because it was not a final order. According to the Colorado Court of Appeals, authorization-of-sale proceedings “are not adversarial in nature, are not final, and generally no appeal may be taken to review the resulting orders.”

***In re Lamphere*, 422 Fed. Appx. 741 (10th Cir., May 4, 2011)**

- **Preclusive effect of state-court judgment:** The preclusive effect of a state court judgment in a subsequent federal lawsuit generally is determined by the full faith and credit statute, 28 U.S.C. § 1738. This statute directs a federal court to refer to the preclusion law of the state in which the judgment was rendered. *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985).
- **Preclusive effect of state-court judgment—New Jersey law:** Under New Jersey law, a party asserting preclusion under the doctrine of collateral estoppel must establish five elements: (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding. *First Union Nat'l Bank v. Penn Salem Marina, Inc.*, 190 N.J. 342, 921 A.2d 417 (2007).
- **Preclusive effect of state-court judgment—New Jersey law:** Under New Jersey law, the entry of a default judgment generally means that the underlying issues were not actually litigated and determined, so that collateral estoppel does not apply in a subsequent proceeding. This rule applied here, where the debtor filed an answer and counterclaims and participated in the state-court action until the discovery phase, at which point the debtor discontinued participation.

***In re Manning*, 2012 WL 2328236 (Bankr. D. Colo., June 19, 2012)**

- **Dischargeability of debt—Unlisted debt:** In a no-asset Chapter 7 case, a dischargeable debt is discharged, despite § 523(a)(3)(A), even if the creditor is not scheduled by the debtor. However, under § 523(a)(3)(B), a debt that is nondischargeable under Code § 523(a)(2), (4), or (6) is not discharged, even though the creditor failed to file a nondischargeability complaint as required under § 523(c), where the debtor failed to schedule the creditor and the creditor did not have knowledge of the debtor's case in time to permit “timely filing of a proof of claim and timely request for a determination of dischargeability of such debt.”

- **Dischargeability of debt—Jurisdiction of state court to determine:** Only a bankruptcy court has jurisdiction to determine whether a debt is nondischargeable under Code § 523(a)(2), (4), or (6). However, disagreeing with *In re Padilla*, 84 B.R. 194 (Bankr. D. Colo. 1987), the court ruled that a state court has concurrent jurisdiction, with the bankruptcy court, to determine whether a debt is nondischargeable under § 523(a)(3)(B) because it is “of a kind specified in” Code § 523(a)(2), (4), or (6) and the creditor did not have knowledge of the debtor’s case in time to permit “timely filing of a proof of claim and timely request for a determination of dischargeability of such debt.”
- **Chapter 7—Scope of discharge:** A postpetition debt is not discharged in a Chapter 7 case.
- **Violation of discharge injunction:** Because a state court has concurrent jurisdiction, with the bankruptcy court, to determine whether a debt is nondischargeable under Code § 523(a)(3)(B), a creditor’s filing a state-court action against a Chapter 7 debtor, following the debtor’s discharge, to determine whether a debt is nondischargeable under § 523(a)(3)(B) does not violate the discharge injunction.

***In re Henderson*, 2012 WL 2049991 (Bankr. D. Colo., June 6, 2012)**

- **Chapter 7—Conversion by debtor—To Chapter 13:** In the Tenth Circuit, a Chapter 7 debtor may convert the case to Chapter 13 after receiving a discharge.
- **Chapter 7—Effect of discharge:** A Chapter 7 debtor’s conversion to Chapter 13 following the issuance of a discharge does not have the effect of revoking the discharge order. *In re Sieg*, 120 B.R. 533 (Bankr. D. N.D. 1990). Nor does the subsequent dismissal of the case. *In re Bevan*, 2011 WL 2161737 (Bankr. N.D. Cal., May 31, 2011) (“[t]he cases in which a Chapter 7 debtor's case was dismissed post-discharge uniformly hold that the dismissal had no automatic effect on the discharge”).
- **Chapter 13—Eligibility for discharge:** Under Code § 1328(f), the Chapter 13 debtors were not eligible for a discharge in a case filed on September 19, 2011, where they had received a Chapter 7 discharge in a case filed on September 15, 2009. The result was not affected by the fact that the debtors’ earlier case had been dismissed after the debtors had converted it to Chapter 13. While Code § 349(a) provides that, unless the court orders otherwise, the dismissal of a case “does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g),” this applies only to pre-discharge dismissals. *In re Baylies*, 114 B.R. 324 (Bankr. D. D.C. 1990); *In re Bishop*, 74 B.R. 677 (Bankr. M.D. Ga. 1987).

***In re Sedillo*, 476 B.R. 619 (Bankr. D. Colo., June 5, 2012)**

- **Property of the estate—Exemptions—Under state law:** Although a debtor may claim a motor vehicle as exempt under the tool of the trade exemption in Colo. Rev. Stat. § 13–54–102(1)(i), rather than using the standard motor vehicle exemption, so long as the

vehicle qualified for the exemption, here the debtor could not claim a “tool of the trade” exemption for a motor vehicle used to transport foster children to necessary everyday activities, as foster parenting could not be classified as the “gainful occupation” required under the exemption statute. The plain meaning of the word “gainful” was profitable (or at least capable of being profitable), while the plain meaning of the word “occupation” was principal work or business. The debtor testified that she served as a foster parent to provide children with a normal home, not to earn a profit, and the debtor received reimbursement funds, not compensation, for her role as a foster parent. Since there was an alternative available in the standard motor vehicle exemption, there was no reason to expand “gainful occupation” to include parenting so that debtors could shield motor vehicles used conventionally for personal use from creditors.

***In re Durwick, LLC*, 2012 WL 2046877 (Bankr. D. Colo., June 1, 2012)**

- **Avoidable transfers—Postpetition transfer:** Where the public trustee foreclosure sale of the Chapter 11 debtor’s real property had been completed prior to the debtor’s bankruptcy filing, the postpetition vesting of title in the holder of a certificate of purchase or a certificate of redemption was not a “transfer of property of the estate” that could be avoided under Code § 549(a). Because, under current Colorado law, a property owner had no post-foreclosure sale redemption rights from a public trustee foreclosure sale, a post-bankruptcy vesting of title could not be a postpetition transfer foreclosing the debtor’s equity of redemption. Moreover, a “transfer” involved a “disposing of or parting with” an interest in property, and the mere passage of time was not a transfer.

***In re Bertola*, 2012 WL 1945426 (Bankr. D. Colo., May 30, 2012), appeal filed, Case No. 12-45 (10th Cir. B.A.P., filed June 14, 2012)**

- **Property of the estate—Exemptions—Under state law:** A portion of the proceeds of the sale of the Chapter 7 debtor’s homestead did not lose its status as “proceeds” of the sale, and remained exempt under Colo. Rev. Stat. § 38–41–207, where the debtor deposited that portion of the proceeds in a separate brokerage account and used it to purchase stock. Under the plain language of the statute, the only requirement to obtain the exemption (during the two-year period for which it extends) is the maintenance of the proceeds in a manner “separate and apart from other moneys so that the same may be always identified.” The court distinguished *In re White*, 377 B.R. 633 (Bankr. D. Ariz. 2007), in which a debtor who engaged in “day trading in risky investments” with the proceeds of the sale of the debtor’s homestead was found to have abandoned the exemption.

***In re Nordin*, 2012 WL 1614742 (Bankr. D. Colo., May 9, 2012), appeal filed, Case No. 12-41 (10th Cir. B.A.P., filed May 24, 2012)**

- **Chapter 7—Conversion by debtor—To Chapter 13:** A Chapter 7 debtor may convert the case to Chapter 13 after receiving a discharge. *In re Young*, 237 F.3d 1168 (10th Cir. 2001); *Matter of Martin*, 880 F.2d 857 (5th Cir. 1989) (“[a]n exhaustive review of the legislative history reveals nothing which would indicate that a post-discharge motion to convert should be treated differently from any other”), abrogated on other grounds by

Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007); *In re Pakuris*, 262 B.R. 330 (Bankr. E.D. Pa. 2001); *In re Mosby*, 244 B.R. 79 (Bankr. E.D. Va. 2000). But see *In re Marcakis*, 254 B.R. 77 (Bankr. E.D. N.Y. 2000) ("[t]o convert this case to a Chapter 13 at this time would be a futile act, and not in the best interest of creditors and in furtherance of the public policy underlying Chapter 13").

- **Chapter 7—Conversion by debtor—To Chapter 13:** The court would set aside its order granting the Chapter 7 debtor's motion, following his discharge, to convert his case to Chapter 13. Under the totality of the circumstances, the debtor was proceeding in bad faith, as he had displayed a "fast and loose" attitude as to what property should be disclosed to and discussed with his attorney and his Chapter 7 trustee, and his Chapter 7 discharge meant that he could essentially default on any proposed Chapter 13 plan without consequence, because his prepetition debts had already been discharged.

***In re Renteria*, 2012 WL 1439104 (Bankr. D. Colo., April 26, 2012)**

- **Chapter 13—Confirmation of plan—Treatment of unsecured claims—Unfair discrimination—Student loan debt:** While discrimination may be allowable for long-term debt pursuant to Code § 1322(b)(5), the discrimination must not be unfair under § 1322(b)(1). Here, the below-median Chapter 13 debtors' proposed plan, which paid a student loan creditor \$550 monthly outside the plan, and paid other unsecured creditors \$186 (the amount of the debtors' projected disposable income after the deduction of the student loan payment), unfairly discriminated in favor of the student loan creditor. The general unsecured creditors would receive only a 1% dividend under the plan, but they would receive a 12% dividend if the additional \$550 were available to be paid into the plan. This was a significant difference, even considering that the student loan debt of \$51,817.51 would be added back into the total of general unsecured claims.

***In re Reynolds*, 470 B.R. 138 (Bankr. D. Colo., April 9, 2012), reconsideration denied, 2012 WL 3133489 (July 31, 2012)**

- **Contested matters:** A claim objection is a contested matter governed by Bankruptcy Rule 9014.
- **Contested matters:** Bankruptcy Rule 9014 provides that Bankruptcy Rule 7055 applies in contested matters. Rule 7055 adopts Fed. R. Civ. P. 55 as the standard for granting default judgments.
- **Defaults and default judgments:** Before granting judgments or entering orders on motions after a party's default, the court examines the legal basis for the relief requested. A party's default is no justification for a court to enter an order for relief that is not permitted under the law.
- **Amendment of Bankruptcy Rule:** As a general matter, unless a contrary congressional intent is shown, statutes are generally applied prospectively only and not retroactively to pending matters. But changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity. This bankruptcy case was filed

on August 31, 2011, a few months before the revisions to Rule 3001. The proofs of claim at issue were also filed prior to the December 1, 2011, effective date of the revisions. However, it was the motions to disallow the claims that effectively initiated this contested matter. Those motions were filed following the effective date of the new Rule 3001, on January 19, 2012. Therefore, the court would apply the revised Rule 3001 to the debtors' claim objections.

- Proof of claim—Unsecured claim—Allowance of claim:** The Tenth Circuit's decision in *In re Kirkland*, 572 F.3d 838 (10th Cir. 2009) must be read as establishing a rule that adds a creditor's failure to attach documents to its proof of claim as an independent ground for denial of the claim as a matter of law. Since the *Kirkland* cases relied heavily on Bankruptcy Rule 3001, and Rule 3001 was subsequently revised to specifically address the issue of what penalty a court may assess toward a creditor who fails to comply with the documentation requirements in Rule 3001(c), the court believed it was required to follow the revised Rule 3001 with respect to that issue. To the extent that *Kirkland's* holding is inconsistent with language added to Rule 3001 since *Kirkland* was decided, the court believed it must rely on the revised Rule 3001.
- Proof of claim—Unsecured claim—Allowance of claim:** New Bankruptcy Rule 3001(c)(2)(D) provides that “[i]f the holder of a claim fails to provide any information required by this subdivision (c), the court may, after notice and hearing, take either or both of the following actions: (i) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or (ii) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.” The intent of the rule is clear that the courts are limited to penalizing a creditor's noncompliance with Rule 3001(c) only by taking one or both of the measures set out in Rule 3001(c)(2)(D)(i) and (ii). Those are the exclusive remedies; neither provision includes disallowance of the claim as a permissible remedy. While subsection (ii) allows a court to “award other appropriate relief,” claim disallowance falls far outside the ambit of any permissible interpretation of the scope of a court's discretion under this provision.
- Proof of claim—Unsecured claim—Allowance of claim:** Where the Chapter 13 debtors' motions to disallow certain unsecured claims stated no substantive objection under Code § 502(b) to the claims, and the court could not disallow the claims on the ground of the creditors' failure to attach the required documentation, the motions would be denied.
- Judicial estoppel; Proof of claim—Unsecured claim—Allowance of claim:** Moreover, the debtors were judicially estopped from objecting to the claims by their listing each of the claims as undisputed in their schedules. The debtors' current denial of liability on the five claims was “clearly inconsistent” with their scheduling of the same debts at the time they filed their bankruptcy petition. The debtors gained an advantage by advocating a position earlier in the case that was inconsistent with the position they now took. The debtors gained the distinct advantage of discharging those debts that were listed in their schedules and were either provided for under their Chapter 13 plan or disallowed. They now sought to retain the privilege of discharging each of the debts by seeking their

disallowance on a purely procedural ground. The debtors had created precisely the situation that the doctrine of judicial estoppel was intended to address. For the Court to bless that practice diminished the integrity of the court.

- **Proof of claim—Unsecured claim—Allowance of claim:** The practice of lodging procedural objections to claims a debtor acknowledges are due and owing leads to results that are antithetical to the Bankruptcy Code's equitable distribution scheme. Here the Chapter 13 debtors attempted to make an end run around a key provision of BAPCPA. For better or worse, a major change wrought by BAPCPA was to require above-median income debtors in Chapter 13 to pay a minimum amount of their disposable income over five years to their unsecured creditors or to pay 100% of unsecured claims. By filing blanket objections to claims on the ground of lack of documentation, if enough creditors fail to respond, the aggregate amount of unsecured claims may be significantly reduced so that the debtors can pay 100% of allowed claims without paying out the BAPCPA minimum payment over the life of the plan. Of course, that is perfectly legitimate when debtors are stating substantive grounds for objection to the claims, but the debtors here had not made a substantive argument that disallowance of the claims was justified. Indeed, they had stated under oath that they owed each of the five debts. The debtors would not be permitted to obtain a discharge of these debts by listing them in their bankruptcy schedules and, in the same proceeding, repudiate the very same debts to avoid providing for them in their Chapter 13 plan.

Comment: This decision is wrong. As the Tenth Circuit stated in *In re Kirkland*, 572 F.3d 838 (10th Cir. 2009)—which was not based simply on Rule 3001—the creditor has the burden of proof on a proof of claim, and “[h]ad the bankruptcy court allowed [the creditor’s] claim despite [the creditor’s] failure to provide either supporting evidence or an explanation for its failure to provide supporting evidence, the burden would have improperly rested with the Trustee to disprove an unsubstantiated claim.” Three of the five claims at issue in this case had been assigned by the original creditors, and there was no proof of effective assignments. The court simply disagrees with the outcome of a process for the allowance of claims clearly established under the Bankruptcy Code and Rules, and its invocation of judicial estoppel has little, if any, precedent. If a creditor wants to get paid in a bankruptcy case, all it has to do is file a proof of claim in conformity with the Bankruptcy Rules. A creditor that can’t be bothered to do that—or to respond to the debtor’s objection, based on the creditor’s lack of compliance with the rules—has forfeited its right to be paid. Any other conclusion would render the rules meaningless. Creditors often make rational business decisions that the small sum potentially available in a bankruptcy case is not worth the expense of filing a proper claim. Rewarding such a creditor by paying the claim anyway would confer an unwarranted windfall on the creditor, at the expense of the bankruptcy process itself.

***In re Inghilterra*, 2012 WL 1137008 (Bankr. D. Colo., April 4, 2012)**

- **Consumer debts:** Where the Chapter 7 debtors refinanced the mortgage on their residence for two purposes—to obtain \$25,000 in cash they needed to fund the debtor wife’s business, and to refinance the original mortgage on the property—\$25,000 of the debt was nonconsumer debt, but the remainder was consumer debt, even though the

debtors later decided to rent out the house. The language of Code § 101(8), defining “consumer debt,” plainly directs a court to evaluate the purpose of the debt at the time it was incurred.

- **Means test—Current monthly income:** The “demo pay” that the Chapter 7 debtor husband, an automobile salesman, received from his employer for driving a demonstration vehicle was included in the debtors’ current monthly income, even though it was more than offset by a “demo deduction” also applied to the husband’s paycheck. There was nothing absurd about allowing “demo pay” to be treated as income for purposes of determining the debtors’ eligibility to file under Chapter 7. The debtors had chosen to accept the benefit of using a “demo vehicle.” In so doing, they had also chosen to accept the consequence of incurring an expense that exceeded the National Standard for transportation ownership costs. Debtors in Chapter 7 were, by definition, of limited means and without ability to repay their creditors. As Congress apparently intended, if a debtor could afford more than the standard expenses, it most likely suggested that the debtor did, in fact, have the ability to repay creditors to some extent and should not be proceeding in Chapter 7.
- **Means test—Expenses—Secured debt expense:** The Chapter 7 debtors could deduct, as a secured debt expense, the monthly mortgage payment on a house they intended to surrender. The means test utilizes a debtor’s income, along with a “rigid and inflexible set of expense standards,” to provide a “snapshot” of a debtor’s actual income and expenses as of the petition date. Excluding the payment on the property would undercut the court’s ability to view an accurate “snapshot” of the debtors’ expenses at the time of their petition.
- **Means test—Special circumstances:** The Chapter 7 debtor wife’s pregnancy on the petition date was a special circumstance, and the debtors could deduct expenses based on the number of children they would have following the delivery of the wife’s baby. There was no reasonable alternative to incurring expenses for the debtors’ fourth child, who needed to be clothed, fed, diapered, and cared for, and it was appropriate to adjust the debtors’ expenses to reflect those of a six-person household.

In re Crawford, 2012 WL 930281 (Bankr. D. Colo., March 19, 2012)

- **Relief from stay—Merits—Under Code § 362(d)(1):** Cause did not exist for relief from stay under Code § 362(d)(1) in a Chapter 13 case, where the mortgage creditor’s claim of \$480,000 was oversecured by collateral worth between \$850,000 and \$1,200,000.
- **Chapter 13—Confirmation of plan—Treatment of secured claims:** Code § 1322(b)(8) allows a court to confirm a Chapter 13 plan in which the debtor proposes to pay off a secured claim within a reasonable amount of time through the sale of real property, although the debtor will be making no payments on either principal or arrearages until the sale. A Chapter 13 plan that provides for a sale of property to cure arrearages and provide for the payment of principal, interest, and any other amounts due under a note or deed of trust does not per se modify secured creditors’ rights; such a plan merely delays immediate payment to creditors in consideration for what is often

accelerated full payment. *In re Erickson*, 176 B.R. 753 (Bankr. E.D. Pa. 1995). Though debtors certainly have the option of providing for regular payments in Chapter 13 plans, they are not required to do so under § 1322(b)(5), which is permissive rather than mandatory. Where a debtor has ample resources to pay a claim, but those resources are tied up in real property encumbered by a creditor's security interest, § 1322(b)(8) allows the debtor to pay the claim through the sale of the real property. The court acknowledged that there are a number of cases that hold to the contrary. See *In re Proudfoot*, 144 B.R. 876 (9th Cir. B.A.P. 1992) (per curiam); *In re Gavia*, 24 B.R. 573 (9th Cir. B.A.P. 1982) (per curiam); *In re Newton*, 161 B.R. 207 (Bankr. D. Minn. 1993).

- **Chapter 13—Confirmation of plan—Feasibility:** In evaluating the feasibility of cure-by-sale Chapter 13 plans under Code § 1325(a)(6), courts have considered evidence related to (a) the amount of the creditor's claim; (b) the state of the market for the subject asset; (c) current sale prospects; (d) the existence and maintenance of any equity cushion; (e) the terms of the debtor's listing agreement, including the listing price for the subject asset and plans for marketing it; and (f) whether or not the plan included a default or “drop dead” remedy either to relieve the mortgagee from the automatic stay or to convert the case to another chapter if the sale did not close by the end of the proposed cure period. Concluding that the debtor's plan was “close to ready for confirmation,” the court said that, before the plan could be confirmed, the debtor needed to include a default provision that addressed what would happen if the property did not sell within the plan period. Specifically, the debtor should include a provision allowing the Chapter 13 trustee to liquidate the real estate through a court-approved process, or a provision requiring the debtor to convert her case to Chapter 7 if the property did not sell within a specified time.

In re Mansfield, 2012 WL 877105 (Bankr. D. Colo., March 15, 2012)

- **Means test—Expenses:** Under the means test, the above-median Chapter 13 debtor could not deduct a \$250 monthly expense for home maintenance and repairs. The debtor could not deduct an amount greater than the standard deduction for non-mortgage housing-related expenses of \$472 because, under Internal Revenue Manual 5.15.1.9, this standard deduction already includes “necessary maintenance and repair.” Additionally, *Ransom v. FIA Card Serv., N.A.*, — U.S. —, 131 S.Ct. 716, 178 L.Ed.2d 603 (2010) stated that expenses that fall within the National and Local Standards categories are “capped” at the amount set forth in the IRS tables.
- **Means test—Expenses:** The debtor could not deduct a \$250 monthly expense for home maintenance and repairs under Code § 707(b)(2)(A)(ii)(V) because that provision is limited to additional home energy costs.
- **Means test—Expenses:** The debtor could not deduct a \$250 monthly expense for home maintenance and repairs as an “Other Necessary Expense” because the allowable categories of expenses are limited to those specified in the Financial Analysis Handbook of the Internal Revenue Manual, and “home maintenance” is not one of the specified categories.

- **Means test—Special circumstances:** The Chapter 13 debtor had not made a sufficient showing that the \$250 monthly she wished to deduct for home maintenance and repairs qualified as a special circumstance. The debtor, who lived in a house that was built in 1984, had not provided any evidence that it required immediate repairs in order to provide basic shelter. While the debtor offered a report of Blue Ribbon Home Warranty, Inc. that estimated that 1–3% of a home's value was a reasonable amount for any homeowner to budget for home maintenance, her argument only highlighted the fact that the claimed expense was one that was common to virtually anyone owning a home. While the condition of the debtor's home might decline over the life of her Chapter 13 plan, she had not demonstrated that the present condition of her home was such that she had a “special” need for an additional allowance for home maintenance.

***In re Bernhardt*, 2012 WL 646150 (Bankr. D. Colo., Feb. 28, 2012)**

- **Use of appearance attorney:** While it is not per se improper to use the assistance of an employee or a fellow attorney to “cover” when an attorney cannot attend a meeting, Code § 504 provides, with some narrow exceptions, that a person receiving compensation under Code § 330(a) may not share, or agree to share, that compensation with another person. Bankruptcy Rule 2016(b) also requires every attorney for a debtor, whether or not he or she applies for compensation, to file a statement under Code § 329 and indicate whether the attorney has shared or agreed to share compensation with any other entity.
- **Use of appearance attorney:** Moreover, under the Colorado Rules of Professional Conduct, if any lawyer other than the lawyer engaged by the client is used, the client must consent to the use of the additional lawyer after full disclosure of the fees to be charged, and any division of fees between lawyers must be accompanied with the written consent of both lawyers, following informed consent of the client. Although circumstances may arise which permit counsel in bankruptcy cases to enter an agreement with debtors under which counsel will not appear at the meeting of creditors, in the absence of such an agreement, failure to attend the meeting may create cause for disgorgement of fees. See *In re Merriam*, 250 B.R. 724 (Bankr. D. Colo. 2000); *In re Babies*, 315 B.R. 785 (Bankr. N.D. Ga. 2004).
- **Chapter 13—Disgorgement of attorney’s fees or other sanctions:** In a case in which the U.S. Trustee asserted that a debtors’ attorney followed a template in requesting fees in Chapter 13 cases rather than filing fee applications that reflected the actual time he devoted to each case, the court— (page)

—Held that, in one case, the evidence warranted the imposition of sanctions, through relief under Fed. R. Civ. P. 60(b) from the order allowing fees, requiring the attorney to disgorge the entire fee he received. The attorney sought and was allowed fees of \$185 for traveling to Denver for a hearing, \$138.75 for travel from Denver following the hearing, and \$108.50 for travel expenses related to the hearing, yet the docket revealed that the attorney had attended the hearing telephonically. The application also contained an entry for downloading and reviewing the trustee's minutes from the meeting of creditors, a procedure that was followed in Wyoming, where the attorney also practiced, not in Colorado.

—Held that a \$500 sanction would be imposed under Code § 105(a) for each of the nine cases in which the attorney had engaged a non-employee appearance attorney to attend the meeting of creditors without the debtor’s consent.

—Ordered the attorney to comply with Rule 2016 and local court rules in all future cases or face the possibility of disgorgement of all fees in those cases.

***In re Brown*, 2012 WL 384886 (Bankr. D. Colo., Feb. 6, 2012)**

- **Proof of claim—Unsecured claim—Allowance of claim:** Once a claim objection is filed, a claim will be disallowed if the claimant does not either produce documents to support its claim or explain its failure to provide supporting documents, regardless of whether the claim amount was also scheduled by the debtor. *In re Kirkland*, 572 F.3d 838 (10th Cir. 2009); *In re Harrison*, 987 F.2d 677 (10th Cir. 1993)
- **Proof of claim—Unsecured claim—Allowance of claim:** Applying this standard, the court sustained the debtors’ objection to several proofs of claim that tracked the amount of the claim from a stated “previous balance” but did not show how the claim reached that amount in the first place.

***In re Hobbs*, 2012 WL 137506 (Bankr. D. Colo., Jan. 18, 2012)**

- **Violation of discharge injunction:** While the debtor’s personal liability for her guarantee of her company’s lease of commercial space was discharged in her Chapter 7 case, the lessor’s subsequent state court litigation against the debtor, asserting that she fraudulently transferred the assets of her company and that she was the alter ego of her company, did not violate the discharge injunction, as all of the debtor’s conduct allegedly giving rise to the lessor’s causes of action occurred after the debtor filed her bankruptcy petition.

***In re Maxey*, 2012 WL 115566 (Bankr. D. Colo., Jan. 13, 2012)**

- **Dischargeability of debt—Timeliness of complaint:** Commenting that the only published opinion in the district on the issue, *In re Nobel*, 54 B.R. 458 (Bankr. D. Colo. 1985), was nearly 20 years old, the court granted the creditor an extension of time in which to file a nondischargeability complaint.

***In re Lyons*, Case No. 1:11-bk-30589 (Bankr. D. Colo., Jan. 10, 2012), appeal dismissed, Case No. 12-15 (10th Cir. B.A.P., June 29, 2012)**

- **Means test—Expenses—Vehicle ownership expense:** A debtor may not claim a motor vehicle ownership expense deduction under the means test where the loan secured by the vehicle is not a purchase-money debt.

***In re Loeffler*, 2011 WL 6736066 (Bankr. D. Colo., Dec. 21, 2011)**

- **Avoidable transfers—Avoidance by debtor:** There is a split of authority on the question of whether a Chapter 13 debtor has the authority under the Bankruptcy Code to

pursue recoveries under §§ 544, 547 and 548 for the benefit of the bankruptcy estate. However, § 1303 enumerates specific powers that a Chapter 13 debtor may exercise, exclusive of the Chapter 13 trustee. The exercise of the power to recover money and property under §§544, 547 and 548 is absent from that list. In contrast, §§ 1107 and 1203 plainly do grant those powers to debtors in Chapter 11 and Chapter 12 cases. The court cannot interpret that absence of authority in § 1303 as a mere oversight by Congress and cannot find those omitted powers to be possessed by Chapter 13 debtors by implication.

- **Chapter 13—Confirmation of plan—Treatment of unsecured claims—Best interests of creditors test:** Because a Chapter 13 debtor does not have the authority to exercise the trustee’s Chapter 5 avoidance powers, the debtor does not have to include the potential recovery in an avoidance proceeding in the debtor’s calculation under the best interests of creditors test in Code § 1325(a)(4). The debtor’s plan need do no more than provide that the net proceeds of any such recovery shall be paid out to creditors. See *In re Johnson*, 26 B.R. 381 (Bankr. D. Colo. 1982).
- **Chapter 13—Confirmation of plan—Good faith:** The Chapter 13 debtor’s executing an agreement, shortly before filing her bankruptcy petition, waiving her right to receive monthly payments under a contract for the sale of her business entered into three and a half years earlier did not demonstrate a lack of good faith for the purpose of Code § 1325(a)(3) where the debtor was financially unsophisticated and it was her bankruptcy counsel who suggested the waiver, under which the debtor agreed to become an employee of the business and to be paid as such.

***In re Miller*, 2011 WL 6736070 (Bankr. D. Colo., Dec. 20, 2011)**

- **Automatic stay—Exception for police and regulatory power:** The other party’s filing of a motion seeking the imposition of sanctions on the debtor under 28 U.S.C. § 1927 in their ongoing federal court litigation, after the debtor filed her bankruptcy petition in the present court, came within the exception to the automatic stay in Code § 362(b)(4) for the “the commencement or continuation of an action or proceeding by a governmental unit ... to enforce such governmental unit’s ... police and regulatory power,” as the sanctions would be imposed by a governmental unit, the court in which the litigation was pending. See *Alpern v. Lieb*, 11 F.3d 689 (7th Cir. 1993); *In re Berg*, 198 B.R. 557 (9th Cir. B.A.P. 1996); *Maritan v. Todd*, 203 B.R. 740 (N.D. Okla. 1996).

***In re Gentry*, 463 B.R. 526 (Bankr. D. Colo., Dec. 19, 2011)**

- **Means test—Current monthly income—Exclusion of Social Security benefits:** Unemployment compensation is not excluded from current monthly income as a benefit “received under the Social Security Act.”

***In re Gonzales*, 2011 WL 6340023 (Bankr. D. Colo., Dec. 19, 2011)**

- **Property of the estate—Avoidance of lien impairing exemption:** Generally, under Colorado law a judgment or judicial lien only attaches to a debtor’s net equity after

deduction of the homestead exemption amount. In effect, in the absence of equity beyond the homestead exemption, a judgment lien never attaches to the property.

***In re Miller*, 2011 WL 6217342 (Bankr. D. Colo., Dec. 14, 2011)**

- **Violation of stay:** While courts are split on the issue, the court held that the better view is that a secured creditor's refusal to release, upon a debtor's filing of a bankruptcy petition, property of the debtor properly seized prepetition, to the potential detriment of the creditor's lien rights in the property, does not violate the automatic stay. The court applied this principle to a creditor who had garnished funds of the debtor prepetition, as under Colorado law the creditor acquired lien rights in the garnished funds.

***In re Balck*, 2011 WL 6130418 (Bankr. D. Colo., Dec. 8, 2011)**

- **Property of the estate—Avoidance of lien impairing exemption:** “Tools of the trade” in Code § 522(f)(1)(B)(iii) is defined under federal law. The Tenth Circuit Court of Appeals has applied a “use” test, which focuses on the necessity of an item to the individual debtor's particular business or employment, in defining “tools of trade.” In order for items to come within the operation of the statute, a debtor must show that “they are necessary and are personally used for the purpose of carrying on his trade or business.” See *In re Heape*, 886 F.2d 280 (10th Cir. 1989). A vehicle may qualify as a tool of trade if it meets this test. However, a vehicle used only for commuting purposes generally is not considered a tool of trade. See *In re King*, 451 B.R. 884 (Bankr. N.D. Iowa 2011).
- **Property of the estate—Avoidance of lien impairing exemption:** The court did not have to decide whether a creditor who failed to object to a debtor's claim of exemption is precluded from raising the alleged invalidity of the exemption as a defense to a lien avoidance action under Code § 522(f). Compare *In re Indvik*, 118 B.R. 993 (Bankr. N.D. Iowa 1990) (creditor is precluded from challenging exemption) with *In re Morgan*, 149 B.R. 147 (9th Cir. B.A.P. 1993) (creditor is not precluded from challenging exemption).
- **Avoidable transfers—Avoidance by debtor:** A Chapter 13 debtor may not assert the trustee's transfer avoidance powers in Chapter 5. See *In re Hansen*, 332 B.R. 8 (10th Cir. B.A.P. 2005).

***In re Bonney*, 2011 WL 5922949 (Bankr. D. Colo., Nov. 28, 2011)**

- **Chapter 13—Modification of confirmed plan:** Code § 1329 does not allow a Chapter 13 debtor to modify the debtor's plan so as to alter a secured creditor's claim. See *In re Nolan*, 232 F.3d 528 (6th Cir. 2000). Thus, here, the debtors could not modify their plan so as to reduce the interest rate paid on a secured creditor's claim.

In re Kloberdanz, 2011 WL 5854692 (Bankr. D. Colo., Nov. 21, 2011), appeal dismissed, Case No. 12-2 (10th Cir. B.A.P., Sept. 19, 2012)

- **Chapter 7—Abandonment of property of estate:** While the Chapter 7 debtor listed real property in Missouri in her schedules, she did not identify any personal property inside the structure on the property; accordingly, the closing of the debtor’s case did not abandon the personal property.
- **Chapter 7—Abandonment of property of estate—Revocation of abandonment:** While the closing of the debtor’s case abandoned real property in Missouri listed on her schedules, revocation of the technical abandonment under Fed. R. Civ. P 60(b)(3) was warranted due to the debtor’s misrepresentation, in her schedules, that the property was fully encumbered; in fact, the liens on the property had not been perfected and apparently had been filed so as to give the appearance that there was no unencumbered value in the property for the Chapter 7 trustee to administer.

In re Martino, 2011 WL 5856327 (Bankr. D. Colo., Nov. 17, 2011)

- **Examination of party:** Discovery, rather than an examination under Bankruptcy Rule 2004, should be used to obtain information relevant to issues being litigated in an adversary proceeding.

In re Hoopes, 2011 WL 5545765 (Bankr. D. Colo., Nov 14, 2011)

- **Jurisdiction—As Article I court:** *Stern v. Marshall*, --- U.S. ---, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011) did not preclude the court from adjudicating the creditors’ claim that a debt arising under the state mechanic’s lien statute was nondischargeable under Code § 523(a)(4). See generally *Mercury Companies, Inc. v. FNF Sec. Acquisition, Inc.*, --- F.Supp.2d ---, 2011 WL 5127613 (D. Colo., Oct. 31, 2011) (“the Supreme Court’s holding in *Stern* ... was explicitly narrow”).

In re Coates, 2011 WL 5419676 (Bankr. D. Colo., Nov. 7, 2011)

- **Means test—Expenses:** Employing the “dependent” approach, which required consideration of the reasons a debtor provided support to a claimed dependent, and the reasons the claimed dependent relied on the debtor, the court concluded that the Chapter 7 debtor’s mother was not a dependent for the purpose of determining the debtor’s allowable expenses under the means test, while the debtor’s 22-year-old daughter was a dependent. The debtor’s mother, who had lived with the debtor for three or four months in order to recuperate following a fall, paid her own taxes and for her medical care and was not the debtor’s dependent for tax purposes. The debtor’s daughter, however, did not work outside the home; rather, her full-time occupation was to provide care for the debtor’s mother.
- **Chapter 7—Determination of abuse—Under totality of the circumstances:** Granting the debtor a Chapter 7 discharge would be an abuse, under the totality of the

circumstances, where she would be able to pay her unsecured creditors a dividend of 14.02%, or approximately \$12,228, under a Chapter 13 plan.

***In re Diaz*, 462 B.R. 804 (Bankr. D. Colo., Oct. 24, 2011)**

- **Chapter 13—Form plans:** Agreeing with *In re Butcher*, 459 B.R. 115 (Bankr. D. Colo., Sept. 20, 2011), and disagreeing with *In re Gordon*, Case No. 1:10-bk-13885 (Bankr. D. Colo., March 25, 2011), the court held that the district’s Chapter 13 form plan, which requires the debtor to file a modified plan to “provide for allowed priority and allowed secured claims which were not filed and/or liquidated at the time of confirmation,” is not in conflict with the Bankruptcy Code. The form plan, the court said, reflects a preference in this district to use the claims filing and challenge process, rather than the Chapter 13 plan confirmation process, for determining the amount of a secured creditor’s claim. These parallel procedures did not eliminate any substantive rights. Rather, they set forth a means of dealing with claims that provided all parties with predictability and continuity, while at the same time giving due effect to the statutes and rules passed by Congress.

***In re Blakely*, 2011 WL 4458830 (Bankr. D. Colo., Sept. 23, 2011)**

- **Property of the estate—Exclusion of spendthrift trust:** The Chapter 13 debtor’s father’s will did not create a spendthrift trust to hold the property devised to the debtor in the will, although the will contained a spendthrift provision, as the will created a trust only if a beneficiary was under the age of 21 or under a disability at the time of the father’s death, and neither was true of the debtor.

***In re Butcher*, 459 B.R. 115 (Bankr. D. Colo., Sept. 20, 2011)**

- **Chapter 13—Confirmation of plan—Other objections:** Disagreeing with *In re Gordon*, Case No. 1:10-bk-13885 (Bankr. D. Colo., March 25, 2011), the court held that the court had authority to include in its form Chapter 13 plan a provision requiring the debtor to “file and serve upon all parties in interest a modified plan which will provide for allowed priority and allowed secured claims which were not filed and/or liquidated at the time of confirmation.” The district’s bankruptcy judges promulgated the form plan pursuant to the court’s rule-making authority under 28 U.S.C. § 2071 and Bankruptcy Rule 9029, and the challenged provision was necessary to protect the rights of creditors who timely filed claims after the confirmation of a Chapter 13 plan. The challenged provision also gives effect to Code § 502(a), which provides that a timely-filed claim is deemed allowed in the absence of an objection from a party in interest.

***In re Shepard*, 2011 WL 4704246 (Bankr. D. Colo., Sept. 16, 2011)**

- **Chapter 7—Reaffirmation agreement—Role of debtor’s attorney:** The court could not approve a reaffirmation agreement that was not signed by the Chapter 7 debtors’ attorney, where the debtors were represented by the attorney during the course of negotiating the reaffirmation agreement, even though the attorney had subsequently withdrawn from representing the debtors.

In re Miller, 2011 WL 4018267 (Bankr. D. Colo., Sept. 8, 2011), appeal dismissed, Case No. 11-106 (10th Cir. B.A.P., Jan. 18, 2012)

- **Property of the estate—Exemptions—Under state law:** The debtors could not exempt an Internet domain name as a tool of the trade under Colo. Rev. Stat. § 13-54-102(1)(i), which allows the exemption of items “used and kept for the purpose of carrying on any gainful occupation,” as, although the debtors owned the domain name, it was used by a corporation of which the debtors were the sole incorporators. It was the corporation, not the debtors, that “used and kept” the domain name.

In re Wogoman, 2011 WL 3652281 (Bankr. D. Colo., August 19, 2011), *aff’d*, 475 B.R. 239 (10th Cir. B.A.P., July 3, 2012)

- **Dischargeability of debt—Tax debt:** The debtors’ federal income tax debt for the 2001 tax year, which was based upon an examination and assessment by the IRS in 2005, was nondischargeable even though the debtors subsequently filed a signed tax return.

In re Liehr, 2011 WL 3606903 (Bankr. D. Colo., August 12, 2011)

- **Proof of claim—Filing as informal proof of claim:** The equities did not favor recognizing the unsecured creditor’s objection to the Chapter 13 debtor’s proposed plan as an informal proof of claim that the creditor’s subsequent, untimely formal proof of claim could amend, where the creditor failed to request allowance of the late-filed claim when it was filed and failed to object to confirmation of an amended Chapter 13 plan specifically stating that only timely-filed, allowed claims would be paid.

In re Jennings, 2011 WL 3421322 (Bankr. D. Colo., August 4, 2011)

- **Dischargeability of debt—Student loan debt:** The allegations of an adversary complaint alleging undue hardship were legally insufficient to meet the test for discharge of a HEAL loan, as, in order for a HEAL loan to be discharged, the debtor bears the burden of demonstrating that, under the totality of the circumstances, it would be “unconscionable” to deny the discharge. *In re Woody*, 494 F.3d 939 (10th Cir. 2007). The Tenth Circuit defines “unconscionable” as that which is excessive, exorbitant, outside the limits of what is reasonable or acceptable, shockingly unfair, harsh, unjust, or outrageous. This test is to be applied on a case-by-case basis and no one factor is determinative.

In re Castro, 2011 WL 3205789 (Bankr. D. Colo., July 27, 2011)

- **Chapter 7—Conversion by debtor—To Chapter 13:** The court denied the Chapter 7 debtors’ motion to convert to Chapter 13, both because they lacked regular income and thus were ineligible for Chapter 13 relief and because of their bad faith in transferring a partial interest in their residence to a third party for the purpose of complicating the mortgage holder’s attempt to foreclose the mortgage.

In re Lane, 2011 WL 3205782 (Bankr. D. Colo., July 26, 2011)

- **Chapter 7—Conversion by debtor—To Chapter 13:** The Chapter 7 debtors did not act in bad faith, and they would be permitted to convert to Chapter 13. While they wished to convert in order to retain real property in which the debtor wife held a partial ownership interest, conversion for this purpose was not in bad faith, and the debtors had disclosed the asset.

In re Contino, 2011 WL 2940829 (Bankr. D. Colo., July 20, 2011)

- **Existence of stay—Extension under Code § 362(c)(3):** Under the preponderance of the evidence standard, the debtors’ case was not filed in good faith as to one creditor, and the stay would not be extended under Code § 362(c)(3) as to that creditor, where both the debtors’ current case and their prior case were filed just one day prior to scheduled proceedings in a mechanics lien foreclosure action initiated by the creditor, and the debtor wife’s animosity toward that creditor was palpable during her cross-examination. As to the debtor husband, he may not have been the primary actor in the dispute, but he was no stranger to it, and the court did not have evidence before it from which it could find that the husband had acted in good faith with respect to the creditor.

In re Allen, 2011 WL 2940645 (Bankr. D. Colo., July 18, 2011)

- **Proof of claim—Secured claim—Right to enforce note:** Wells Fargo Bank had the right to enforce a note from the debtor to World Savings Bank, although the note had not been validly endorsed, where Wachovia Bank acquired all of the mortgage assets of World Savings Bank, and Wachovia Bank subsequently merged into Wells Fargo Bank. Each transaction amounted to a “transfer” of the note under Colo. Rev. Stat. § 4–3–203(a), which states that “[a]n instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.” While neither Wachovia Bank nor Wells Fargo Bank was a “holder” of the note, as the note had not been negotiated to them, each was a “a nonholder in possession of the instrument who has the rights of a holder” entitled to enforce the note under Colo. Rev. Stat. § 4-3-301.

In re McGough, 456 B.R. 682 (Bankr. D. Colo., July 7, 2011), *aff’d*, 467 B.R. 220 (10th Cir. B.A.P., March 14, 2012), appeal filed, Case No. 12-1142 (10th Cir., filed April 13, 2012)

- **Avoidable transfers—Charitable contributions:** Construing Code § 548(a)(2)(A), which, as amended by the Religious Liberty and Charitable Donation Protection Act of 1997, provides that a “transfer of a charitable contribution to a qualified religious or charitable entity or organization” shall not be considered a fraudulent transfer avoidable under § 548 if “the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made,” the court ruled that (1) the inclusion of Social Security benefits in “gross annual income” should be evaluated under the standard employed by the Internal Revenue Service, under which Social Security benefits are included in gross annual income only if the debtor's modified adjusted gross income for the taxable year plus one-half of Social

Security benefits received during the taxable year exceeds the base amount of \$32,000; (2) transfers should be examined on an aggregate basis; and (3) if a debtor's donations exceed the 15% threshold, only the excess transfer is subject to avoidance.

***In re Byrd*, 2011 WL 2604765 (Bankr. D. Colo., June 30, 2011)**

- **Valuation of property—Motor vehicle:** The court valued the debtor's 2007 Chevrolet Silverado at \$21,000, based on a NADA “book value” of \$22,000, less \$1,000 for excess mileage.

***In re Shepard*, 453 B.R. 416 (Bankr. D. Colo., June 8, 2011)**

- **Chapter 7—Reaffirmation agreement—Role of debtor's attorney:** Where a debtor who has entered into a reaffirmation agreement is represented by an attorney, but the attorney has not signed the affidavit required by Code § 524(c)(3), the court considers the debtor to be represented by an attorney “during the course of negotiating” the reaffirmation agreement. This construction is influenced by the ethical standards imposed upon attorneys when they undertake client representation. When representing a Chapter 7 debtor, something as fundamental as whether a debtor should agree to be obligated to pay a debt which is otherwise dischargeable cannot be excluded from that representation.

***In re Viveros*, 456 B.R. 525 (Bankr. D. Colo., June 7, 2011)**

- **Property of the estate—Turnover:** While there is no statutory time limit for a trustee to file a motion to compel turnover, the equitable doctrine of laches may apply. The party asserting laches as a defensive bar must establish (1) an inexcusable delay in bringing the action and (2) prejudice. Here, the trustee's delay in waiting four months after the meeting of creditors to file a turnover motion was not inexcusable.
- **Property of the estate—Turnover:** The debtor's brother was the equitable owner of a motor vehicle titled in the debtor's name, where the brother made the down payment on the vehicle, had made all subsequent payments on the vehicle loan, had maintained insurance on the vehicle in his name, and had been in possession of the vehicle in California since it was purchased in the debtor's name due to the debtor's superior credit. See *In re Garberding*, 338 B.R. 463 (Bankr. D. Colo. 2005). Accordingly, the vehicle was not property of the debtor's bankruptcy estate, and the trustee was not entitled to turnover of the vehicle.

***In re Schmitt*, 2011 WL 2132829 (Bankr. D. Colo., May 27, 2011)**

- **Meeting of creditors—Scheduling:** The continuance of the meeting of creditors for approximately four months, until the debtor wife, who was in the Army, would be back in Colorado was not an abuse of the Chapter 7 trustee's discretion. The court accordingly denied the debtors' motion to replace the trustee with one who would be willing to allow the wife to appear telephonically at an earlier meeting.

In re Nicholson, 2011 WL 1789965 (Bankr. D. Colo., May 10, 2011)

- **Chapter 7—Eligibility for discharge:** The eight-year look-back period of Code § 727(a)(8) runs from the filing date of the petition in the prior case to the filing date of the petition in the current case, even where one of the cases was originally filed under Chapter 13.

In re Elliot, 448 B.R. 843 (Bankr. D. Colo., May 10, 2011)

- **Property of the estate—Exemptions—Under state law:** The debtor could exempt surplus proceeds paid to the debtor following a nonjudicial public trustee sale under Colo. Rev. Stat. § 38–41–207, which allows the exemption of “[t]he proceeds from the [sale of a homestead] by the owner, or the proceeds from [the sale of a homestead under levy and execution] paid to the owner of the property or person entitled to the homestead . . . for a period of two years after such sale if the person entitled to such exemption keeps the exempted proceeds separate and apart from other moneys so that the same may always be identified.” While the statute is silent on the matter of nonjudicial public trustee sales, the statute includes involuntary execution sales as well as voluntary “sales by owners,” and there was little reason to believe that, in so extending homestead rights to surplus proceeds on voluntary *or* involuntary disposition of a Colorado homestead, the Colorado General Assembly intended to exclude surplus proceeds following sale under a collateral security instrument.
- **Property of the estate—Exemptions—Under state law:** The debtor’s failure to reinvest the proceeds into a new homestead did not preclude the exemption, as the status of property as exempt was determined on the petition date. [The two-year reinvestment period had not expired at the time of the court’s decision.]

In re Waterman, 447 B.R. 324 (Bankr. D. Colo., April 7, 2011), *aff’d*, 2012 WL 872623 (D. Colo., March 13, 2012)

- **Chapter 13—Stripping unsecured lien—Effect of debtor’s ineligibility for discharge:** Finding the analysis in *In re Tran*, 431 B.R. 230 (Bankr. N.D. Cal. 2010) persuasive, and therefore disagreeing with *In re Mendoza*, 2010 WL 736834 (Bankr. D. Colo., Jan. 21, 2010), the court held that a Chapter 13 debtor who completes the payments called for under the debtor’s plan may strip off a wholly-unsecured lien even though the debtor is ineligible to receive a discharge due to a prior Chapter 7 discharge. The court said that this conclusion was consistent with the result in *Johnson v. Home State Bank*, 501 U.S. 78, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991), in which the Supreme Court held that a debtor’s prior Chapter 7 case did not preclude subsequent relief under Chapter 13.

In re Gordon, Case No. 1:10-bk-13885 (Bankr. D. Colo., March 25, 2011), *rev’d*, --- B.R. ---, 2012 WL 1020643 (D. Colo., March 27, 2012), appeal filed, Case No. 12-1140 (10th Cir., filed April 12, 2012)

- **Chapter 13—Confirmation of plan—Other objections:** The bankruptcy court lacked the authority to include in its form Chapter 13 plan a provision requiring the debtor to “file and

serve upon all parties in interest a modified plan which will provide for allowed priority and allowed secured claims which were not filed and/or liquidated at the time of confirmation.” The provision amounted to a bankruptcy court order to modify a confirmed Chapter 13 plan, but the court did not have authority under Code § 1329(a) to order a post-confirmation plan modification *sua sponte*.

- **Chapter 13—Confirmation of plan—Other objections; Chapter 13—Confirmation of plan—Effect on secured claim:** The Chapter 13 debtors could add, to the district’s form Chapter 13 plan, non-standard language providing that the plan’s treatment of claims was binding on creditors if the plan was confirmed and the creditor failed to object, even if the creditor had not yet filed a proof of claim and the time for doing so had not yet expired. The plan confirmation process and the claims adjudication process served as alternative methods for resolving disputed claims. If procedural requirements were satisfied, both processes afforded a creditor with due process that its rights were being affected. The plan confirmation process required service of process on any secured creditor whose rights would be affected by the plan, and the plan needed to contain a clear description of how the debtor proposed to allow and treat a particular creditor’s claim. The court noted that it had previously rejected a more generic version of the non-standard language that purported to void any liens on personal property, other than a car, if the creditor’s lien was not specifically referenced in the plan. See *In re Jackson*, 2009 WL 5943245 (Bankr. D. Colo., August 31, 2009).

***In re Evans*, 464 B.R. 429 (Bankr. D. Colo., March 23, 2011)**

- **Property of the estate:** For the purpose of Code § 541(a)(6), which excludes postpetition “earnings” from the property of the estate, income received by an owner of a closely-held company must be apportioned between earnings resulting from the individual services of the debtor and distributions reflecting the enterprise value of the business; the latter are not “earnings” under § 541(a)(6). See *In re Prince*, 85 F.3d 314 (7th Cir. 1996); *In re FitzSimmons*, 725 F.2d 1208 (9th Cir. 1984); *In re Sholdra*, 270 B.R. 64 (Bankr. N.D. Tex. 2001); *In re Angobaldo*, 160 B.R. 140 (Bankr. N.D. Cal. 1993); *In re Cooley*, 87 B.R. 432 (Bankr. S.D. Tex. 1988).
- **Property of the estate:** Here, where the Chapter 7 trustee, who had the burden of proof, did not attempt in any way to allocate the debtor’s income from a closely-held company between that attributable to the debtor’s services and that representing the enterprise value of the business, the court had no choice but to rule in the debtor’s favor that the entirety of the income constituted “earnings” for the purpose of § 541(a)(6). The debtor, who supervised the company’s bakery business, which operated 365 days per year, for 17 years, received both wages and distributions, and the trustee did not dispute the testimony by the debtor and another company officer that they considered the distributions to be part of the debtor’s compensation. Nor did the trustee dispute the debtor’s evidence as to the salary of similarly-situated professionals, or present any evidence or argue that a portion of the debtor’s distributions should be attributable to the services of the 150 individuals employed by the company.

- **Property of the estate—Turnover:** The trustee has the burden of proof on a turnover motion.

In re Wilson, 454 B.R. 155 (Bankr. D. Colo., Feb. 25, 2011)

- **Means test—Expenses—Housing expense:** *Ransom v. FIA Card Services, N.A.*, — U.S. —, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011), which that a Chapter 13 debtor is not entitled to take the IRS local vehicle ownership expense deduction for a vehicle the debtor owns free and clear of any encumbrance, applies in Chapter 7 cases and to the IRS standard “mortgage/rent” expense. Thus, the debtor, who lived with his girlfriend and did not pay any rent, was not entitled to claim the expense.

In re Moore, 446 B.R. 458 (Bankr. D. Colo., Jan. 26, 2011)

- **Means test—Expenses:** Where the Chapter 13 trustee asserted that the debtor’s monthly tax expense was \$1,734.76, but the trustee did not provide the details of how she arrived at that number, the court would allow the debtor to use the monthly figure of \$2,269 that she listed on her Form 22C.
- **Chapter 13—Confirmation of plan—Calculation of projected disposable income:** Where, during the six-month lookback period, the debtor received a one-time \$50,000 bonus for enlisting in the Army, this was an occurrence for which an adjustment was appropriate under *Hamilton v. Lanning*, --- U.S. ----, 130 S.Ct. 2464, 2478, 177 L.Ed.2d 23 (2010).
- **Chapter 13—Confirmation of plan—Calculation of projected disposable income:** The Supreme Court's discussion in *Lanning* contains no suggestion that courts are free to abandon BAPCPA's statutory framework for calculating projected disposable income for above-median-income debtors when they account for changed circumstances. To the contrary, the most natural reading of its holding is that, within that established framework, courts shall take certain changes into account. Statutorily, that means disposable income must be calculated in accordance with Code § 1325(b)(2) and § 707(b)(2) while accounting for those changes. As a procedural matter, the most transparent method of demonstrating compliance with these sections is by filing an amended Form 22C that reflects the debtor's changed circumstances as of the confirmation hearing date. The changes circumstances are not analyzed as “special circumstances,” which must comply with the requirements stated in Code § 707(b)(2)(B).

In re Hardcastle, 2011 WL 537862 (Bankr. D. Colo., Jan. 21, 2011)

- **Avoidable transfers—Avoidance by debtor:** It is settled law within the Tenth Circuit that Chapter 13 debtors do not have standing to bring avoidance actions under Code § 544. See *In re Hansen*, 332 B.R. 8 (10th Cir. B.A.P. 2005).

***In re King*, 2010 WL 4363173 (Bankr. D. Colo., Oct. 27, 2010)**

- **Chapter 13—Plan Term:** Agreeing with *In re Wing*, 2010 WL 3522260 (Bankr. D. Colo. 2010) (Judge Romero) and *In re Brown*, 396 B.R. 551 (Bankr. D. Colo. 2008) (Judge Campbell), and disagreeing with *In re Williams*, 394 B.R. 550 (Bankr. D. Colo. 2008) (Judge Brown), the court held that a Chapter 13 debtor’s “applicable commitment period” establishes the debtor’s plan term, unless the debtor is able to pay his or her unsecured creditors in full over a shorter period.

***In re Cordova*, 439 B.R. 756 (Bankr. D. Colo., Oct. 18, 2010)**

- **Nondischargeable Debts—Domestic Support Obligation:** A debt owed by the debtor to a child and family investigator appointed by the court in a dissolution of marriage action was not a domestic support obligation under Code § 101(14A) because the investigator was not the debtor’s “spouse, former spouse, or child of the debtor or such child’s parent, legal guardian, or responsible relative” as required in § 101(14A)(A)(i).

***In re King*, 2010 WL 3851434 (Bankr. D. Colo., Sept. 24, 2010)**

- **Jurisdiction:** The court lacked “related to” jurisdiction over the Chapter 7 debtor’s claims for violations of the federal Fair Debt Collection Practices Act and the Colorado Consumer Protection Act, which were based on postpetition actions taken by the creditors. The claims were not property of the debtor’s Chapter 7 estate, and the resolution of the claims could not “conceivably have any effect on the estate being administered in bankruptcy.” See *In re Gardner*, 913 F.2d 1515 (10th Cir. 1990).

***In re Beaudin*, 2010 WL 3748735 (Bankr. D. Colo., Sept. 21, 2010)**

- Sympathizing with both the debtor and the Chapter 7 trustee, the court acknowledged that, when a debtor’s conversion of nonexempt assets into exempt assets is involved, it is very difficult for practitioners to know when to challenge an exemption and when to advise a client to take advantage of prebankruptcy planning. And, unfortunately, the court continued, the applicable tests require a court to determine when a debtor’s conduct has been so overreaching and egregious as to render that debtor a “hog” rather than a “pig.”
- Ultimately, the court concluded that the debtor’s use of \$3,179 in nonexempt funds to establish an IRA on the eve of bankruptcy was not a transfer made with actual intent to defraud creditors, and therefore his claim of exemption should be allowed.

***In re Rutt*, 457 B.R. 97 (Bankr. D. Colo., Sept. 10, 2010)**

- Stating that Code § 1329(a)(1) could not be read so expansively as to permit a modification of a secured *claim* provided for in a confirmed plan, the court concluded that the provision should be read more restrictively to permit only an adjustment to *payments* on such claims. Therefore, the Chapter 13 debtor could not modify his confirmed plan so as to strip off a junior mortgage lien that, due to the depreciation in value of the debtor’s residence, was no longer supported by value in the collateral. The

court also cited *In re Cruz*, 253 B.R. 638 (Bankr. D. N.J. 2000) for the proposition that “[s]ince the amount and status of a claim is fixed at confirmation, and § 1329 does not permit revaluation of collateral or reclassification of claims post-confirmation, the parties are bound by the amount of a secured claim under § 1327 and the amount of the claim must be paid in full.”

***In re Wing*, 435 B.R. 705 (Bankr. D. Colo., Sept. 9, 2010)**

- Agreeing with *In re Brown*, 396 B.R. 551 (Bankr. D. Colo. 2008) (decision by Bankruptcy Judge A. Bruce Campbell), and disagreeing with *In re Williams*, 394 B.R. 550 (Bankr. D. Colo. 2008) (decision by Bankruptcy Judge Elizabeth E. Brown), the court held that a Chapter 13 debtor’s “applicable commitment period” establishes the required term of the debtor’s plan, unless the plan provides for full payment of unsecured creditors over a shorter period of time, for debtors with both positive and negative projected disposable income.

***In re Wilcox*, 438 B.R. 428 (Bankr. D. Colo., Sept. 7, 2010)**

- The Chapter 13 debtors’ plan did not violate the anti-modification clause of Code § 1322(b)(2), although the plan paid a residential mortgage creditor’s claim at a reduced amount, where the plan provision reflected a compromise previously reached between the debtors and the creditor. The plan did not modify the creditor’s claim; rather, it recited the terms of the parties’ separate modification agreement in the same way that another plan might recite the terms of an unmodified mortgage.

***In re Grein*, 435 B.R. 695 (Bankr. D. Colo., August 9, 2010)**

- Citing *In re Pisculli*, 426 B.R. 52 (E.D. N.Y., March 18, 2010); *In re Laflamme*, 397 B.R. 194 (Bankr. D. N.H. 2008); and *In re Fobber*, 256 B.R. 268 (Bankr. E.D. Tenn. 2000), the court held that, despite the literal terms of Code § 348(f)(1)(A), the nonexempt portions of the debtors’ accounts receivable and the equity in their automobile were property of the debtor’s Chapter 7 bankruptcy estate, following the conversion of the debtors’ case from Chapter 13, although neither the assets, nor the proceeds of the disposition of the assets, were in the debtors’ possession on the date of conversion. Code § 348(f)(1)(A) states that, except where the conversion is in bad faith, when a case under Chapter 13 is converted to a case under another chapter, “property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion.” Although there were no allegations of fraud by the debtors, the court reasoned that the literal application of § 348(f)(1)(A) would produce absurd results and permit debtors to engage in carte blanche fraud, because a debtor could convert from Chapter 7 to Chapter 13, dispose of estate assets, and then reconvert to Chapter 7 with impunity.
- Although the nonexempt portions of the debtors’ accounts receivable and the equity in their automobile were property of the debtors’ Chapter 7 bankruptcy estate, following the conversion of the debtors’ case from Chapter 13, the debtors were not required to turn over

these assets, or their value, to the Chapter 7 trustee for distribution to unsecured creditors, as the debtors had paid more than that amount to unsecured creditors under their plan while their case was proceeding under Chapter 13.

***In re Jenkins*, 434 B.R. 604 (Bankr. D. Colo., July 6, 2010)**

- **Nondischargeable Debts—Timeliness—Laches:** While there is no time limit under Bankruptcy Rule 4007(b) for a creditor to file a nondischargeability complaint under Code § 523(a)(3)(B), the doctrine of laches is available as a defense. See *In re Beaty*, 306 F.3d 914 (9th Cir. 2002). The defense of laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. Here, while the creditors' six-month delay in filing a nondischargeability complaint after they learned of the debtor's Chapter 7 bankruptcy filing was unreasonable, the debtor did not establish that he was prejudiced by the delay.

***In re Kirksey*, 433 B.R. 46 (Bankr. D. Colo., June 24, 2010)**

- The Chapter 7 debtor, who wanted to reopen his case so he could seek revocation of his discharge in order to repay the creditors whose debts were discharged, did not show good cause for reopening his case because there was no authority for setting aside his discharge. Code § 727(d) did not permit revocation of the discharge under these circumstances, nor did Fed. R. Civ. P. 60(b)(5).

***In re Davis*, 430 B.R. 902 (Bankr. D. Colo., June 21, 2010)**

- In an adversary proceeding to recover damages for a creditor's filing of a proof of claim containing the Chapter 13 debtor's Social Security number, driver's license number, and date of birth without redaction, the court rather summarily rejected all of the debtor's claims, which asserted (1) "objection to claim"; (2) "violation of the standard of care set by the Gramm-Leach-Bliley Act, 15 U.S.C. Subchapter I, § 6801-6809"; (3) "contempt of court and violation of federal district court and bankruptcy court orders and policies against disclosure of personal identifiers and personal data"; (4) "contempt of court and violation of rule of Federal Rule of Bankruptcy Procedure 9037 failure to redact nonpublic information"; and (5) invasion of privacy and intentional or negligent infliction of emotional distress."

***In re Sanchez*, 2010 WL 2163536 (Bankr. D. Colo., May 26, 2010)**

- A Chapter 13 debtor may not deduct the expense of repaying a secured debt if the debtor intends to either surrender the collateral for the debt or strip the lien securing the debt.

***In re Olguin*, 429 B.R. 346 (Bankr. D. Colo., April 29, 2010)**

- The \$1,967 per month that one debtors' grandparents, who lived with the debtors, contributed to the household was included in the calculation of the debtors' current monthly income under Code § 101(10A) as "any amount paid by any entity other than the debtor ... on a regular basis for the household expenses of the debtor or the debtor's

dependents,” although the grandparents’ contribution was from their Social Security benefits. The exclusion of Social Security benefits from current monthly income refers only to benefits received by the debtors.

***In re Herrera*, 2010 WL 1539956 (Bankr. D. Colo., April 16, 2010)**

- In two cases in which a motion for relief from stay was filed in the name of Washington Mutual Bank, F.A., a now-defunct financial institution, and in which the debtors asserted that the creditor had been unwilling to provide them with their payment information or accept their payments, the court issued an order for JPMorgan Chase Bank—which, according to the FDIC “Bank Find” website, was the active successor institution to WAMU—to show cause why the court should not hold the creditor in violation of Bankruptcy Rule 9011 for filing papers asserting the debtors’ failure to pay, when in fact the debtors were attempting to make payments that the creditor refused to accept. The court also ordered, in bold print, that “any person with information regarding similar practices of the Lender or of comparable conduct by others similarly situated may submit such information within twenty days from the date of the Lender’s response.”

***In re Martinez*, 2010 WL 1539841 (Bankr. D. Colo., April 16, 2010)**

- In two cases in which a motion for relief from stay was filed in the name of Washington Mutual Bank, F.A., a now-defunct financial institution, and in which the debtors asserted that the creditor had been unwilling to provide them with their payment information or accept their payments, the court issued an order for JPMorgan Chase Bank—which, according to the FDIC “Bank Find” website, was the active successor institution to WAMU—to show cause why the court should not hold the creditor in violation of Bankruptcy Rule 9011 for filing papers asserting the debtors’ failure to pay, when in fact the debtors were attempting to make payments that the creditor refused to accept. The court also ordered, in bold print, that “any person with information regarding similar practices of the Lender or of comparable conduct by others similarly situated may submit such information within twenty days from the date of the Lender’s response.”

***In re Pearson*, 428 B.R. 533 (Bankr. D. Colo., April 16, 2010)**

- Receding from *In re Saal*, 338 B.R. 501 (Bankr. D. Colo. 2006), the court held that, under Code § 522(f)(1), a debtor may avoid a judicial lien only to the extent called for under the statutory formula. Previously, in *In re Saal*, the court had allowed the entire lien to be avoided if it impaired the debtor’s exemption in part, on the theory that the mere existence of a judicial lien impaired a homestead exemption because it constituted a cloud on the debtor’s title.

***In re Gemelli*, Case No. 1:08-bk-26801 (Bankr. D. Colo., March 31, 2010), affirmed on other grounds, 2011 WL 2292203 (D. Colo., June 8, 2011)**

- Where it was not clear from the Chapter 13 debtors’ schedules whether they were liable on the mortgage on their residential property, or whether the debtor husband’s father was the party liable on the mortgage, with the debtors owing an unsecured debt to the father for the

mortgage payments, the debtors did not establish their eligibility for Chapter 13. The mortgage debt was \$380,000, and, if this represented an unsecured debt to the husband's father, the debtors' unsecured debts would exceed the \$336,000 limit for Chapter 13 eligibility. The debtors' Schedule A stated that the property was "owned jointly with father; however, debtors are not liable on any mortgages." In contrast, the debtors' Schedule H listed the father as a co-debtor on the mortgage debt. The debtors' Form 22C listed \$1,435 as monthly mortgage or rental expense, and their Schedule J lists \$2,550 in monthly rent or home mortgage payment.

***In re Fuller*, 2010 WL 1463150 (Bankr. D. Colo., March 11, 2010)**

- Declaring that the court in *In re Perkins*, 381 B.R. 530 (Bankr. S.D. Ill. 2007) had done a complete and thoughtful analysis of this very question, the court held that, when one of the joint Chapter 13 debtors died during the pendency of the case, the discharge could nevertheless extend to both debtors.

***In re Mendoza*, 2010 WL 736834 (Bankr. D. Colo., Jan. 21, 2010)**

- A Chapter 13 debtor may not strip a wholly-unsecured junior lien without receiving a discharge. Thus, a debtor ineligible for discharge under Code § 1328(f)(1) may not strip such a lien.

***In re Jones*, Case No. 1:09-bk-19406 (Bankr. D. Colo., Dec. 8, 2009), appeal dismissed, Case No. 1:09-cv-02996-JLK (D. Colo., July 8, 2010)**

- In calculating projected disposable income, an above-median Chapter 13 debtor may not deduct monthly mortgage payments on a home the debtor has surrendered prior to plan confirmation.

***In re McCarthy*, 421 B.R. 550 (Bankr. D. Colo., Nov. 30, 2009)**

- The conduct of a bank's loan officer, in calling the Chapter 7 debtor and demanding that he "reaffirm" his unsecured personal guarantee of a loan to the debtor's company, constituted a willful violation of the automatic stay, where the reaffirmation request was accompanied by a threat to close the business operated by the debtor's company, and the business represented the debtor's primary source of income. This threat pushed the call over the line from mere reaffirmation solicitation to a coercive act to collect on a prepetition debt. Moreover, a letter from the bank to the debtor, threatening to pursue the debtor "individually" on the debt owed by the debtor's company, violated the stay. As to actual damages, the court said it would award the debtor reasonable attorney's fees in the absence of proof of other damages. The court also awarded \$1,000 in punitive damages.

***In re Ziegler*, 2009 WL 5943248 (Bankr. D. Colo., Nov. 16, 2009)**

- Although the debtors had cut back on many expenses and did not appear to be living an extravagant lifestyle, there was no evidence that they filed their petition in bad faith, and the income and expenses listed on their schedules were not materially incorrect, granting

the debtors a Chapter 7 discharge would be an abuse under the totality of the circumstances, where the debtors contributed \$1,100 per month toward their adult son's college tuition and continued to make contributions to their 401(k) accounts and pay back loans from those accounts.

***In re Landgrebe*, 2009 WL 3253933 (Bankr. D. Colo., Sept. 23, 2009)**

- While the refundable portion of the child tax credit is property of the estate, the nonrefundable portion is not.
- While the refundable portion of the debtor's child tax credit is exempt under Colo. Rev. Stat. § 13-54-102-(1)(o), which exempts "[t]he full amount of any federal or state income tax refund attributed to an earned income tax credit or a child tax credit," the nonrefundable portion is not.

***In re Sharp*, 415 B.R. 803 (Bankr. D. Colo., Sept. 23, 2009)**

- Where a Chapter 13 debtor has actual income beyond that shown in the debtor's calculation of projected disposable income, it is not unfair discrimination among unsecured creditors for the debtor's plan to pay a student loan creditor pro rata with other unsecured creditors with the debtor's PDI while the debtor makes additional payments to the student loan creditor outside the plan using the debtor's available income.

***In re Liehr*, Case No. 1:08-bk-21528 (Bankr. D. Colo., Sept. 22, 2009), rev'd, 439 B.R. 179 (10th Cir. B.A.P., Nov. 4, 2010)**

- In calculating projected disposable income, an above-median Chapter 13 debtor is allowed to deduct monthly mortgage payments on a home that the debtor intends to surrender under the plan.

***In re Jackson*, 2009 WL 5943245 (Bankr. D. Colo., August 31, 2009)**

- A generic "scream or die" Chapter 13 plan provision that avoided all liens on personal property, other than a vehicle, if the creditor filed a claim but failed to object to confirmation of the plan was invalid on due process grounds because the provision did not identify any specific collateral or creditors.
- However, the special provisions in the debtor's proposed Chapter 13 plan relating to the debtor's mortgage creditor, which permitted the debtor to serve a motion to deem the prepetition arrears cured and a separate motion to deem the mortgage current, were permissible and served a useful purpose.

***In re DeSousa*, Case No. 1:08-bk-23170 (Bankr. D. Colo., August 10, 2009)**

- Concluding that the decision in *In re Ford*, 574 F.3d 1279 (10th Cir., August 3, 2009) controlled, despite the fact that *Ford* applied the Kansas enactment of the Uniform Commercial Code, the court held that, under Colorado law, negative equity payoff financed as part of the

purchase of a 910 vehicle is secured by a purchase money security interest in the vehicle for the purpose of the hanging paragraph of Code § 1325(a).

***In re Odom*, 406 B.R. 911 (Bankr. D. Colo., June 23, 2009)**

- In yet another case that illustrates how completely lawless many courts have been when it comes to interpreting Code § 1325(b) and “projected disposable income,” the court took it upon itself to restrict the broad rule announced in *In re Lanning*, 545 F.3d 1269 (10th Cir. Nov 13, 2008) to the facts of that case and invoke a competing interpretation here because, in the court’s view, doing so was more in line with what Congress intended.

***In re Segura*, 2009 WL 416847 (Bankr. D. Colo., Jan. 9, 2009)**

- There is a split of authority regarding the issue of whether postpetition income ceases to be property of the bankruptcy estate upon confirmation of a Chapter 13 plan. The court believed the “estate termination approach,” which holds the confirmation order terminates the estate, revesting all property of the estate in the debtor, was the correct interpretation.
- A Chapter 13 plan provision requiring the lender “to apply the payments received from the trustee on the prepetition arrearages, if any, only to such arrearages” and “to apply the direct mortgage payments, if any, paid by the trustee or by the debtor(s) to the month in which they were made under the plan or directly by the debtor(s), whether such payments are immediately applied to the loan or placed into some type of suspense account” was valid insofar as it required the lender to credit cure payments to prepetition arrearages and postpetition mortgage payments to postpetition obligations, as, to this extent, the provision merely fulfilled the limited modification allowed by Code § 1322(b)(5). However, the provision was invalid insofar as it required the lender to account for these postpetition payments as if the account was current postpetition, even if it was not.
- A plan provision requiring the lender “to deem the prepetition arrearages as contractually cured by confirmation” was invalid, as the loan could only be determined to be “contractually current” after all prepetition arrearages had been paid as provided in the plan.
- Plan language requiring the lender to obtain court approval of postpetition fees and costs might impose a hardship on the lender, and would certainly impose an administrative burden on the court and the Chapter 13 trustee, and hence was inappropriate.
- A plan provision requiring the lender “to notify the trustee, the debtor(s) and the attorney for the debtor(s) of any change in the taxes and insurance that would either increase or reduce the escrow portion of the monthly mortgage payment” constituted a reasonable procedure to aid case administration and was permitted, so long as the provision was limited in time until the Chapter 13 discharge was secured.

- The admonition for the lender “otherwise to comply with 11 U.S.C. § 524(i)” was surplusage that should be excluded, as it merely vaguely instructed the lender to do something it was already mandated to do.
- The estate is not, and should not be, a safe harbor in which debtors may moor their property, including earnings, for protection from postpetition creditors. As a result, the court cannot and will not confirm a plan in which the estate holds assets greater than those necessary to carry out the provisions of the proposed plan.

***In re Nelson*, 408 B.R. 394 (Bankr. D. Colo., Dec. 23, 2008)**

- A Chapter 13 plan provision stating that “creditors seeking fees for legal services, servicing fees or similar fees or charges . . . performed after the filing of the case . . . must apply to the court for approval of said fees” would not be approved because it (1) improperly shifted the burden to the creditor to make application for approval of fees and charges and (2) placed no time limitation on the court’s jurisdiction to adjudicate issues regarding fees and charges. However, a provision requiring notice of postpetition fees and charges would not run afoul of Code § 1322(b)(2).
- Until a local or national rule is developed, the court is satisfied with a provision that merely states that mortgage fees incurred during the case are subject to bankruptcy court review prior to the closing of the case. The details of the process may be best addressed by an overall—hopefully consensual—fee review process.
- Confirmation of a plan cannot cause a mortgage loan account that is not otherwise current to become current. However, such a provision is acceptable with the qualifying language that the provision is contingent upon the debtor’s actually curing the arrearage in accordance with the plan.
- To require the creditor, upon plan confirmation, to treat the account as if the prepetition arrearage had been brought current for the purposes of accounting for postpetition payments was consistent with Code § 1322(b)(5) and is acceptable.
- The court will not approve language requiring a payment to be applied in the month the payment is made. That directly contradicts the language of the deed of trust controlling the application of payments and does impermissibly modify the creditor’s rights under § 1322(b)(2). The lender must treat the loan as current for the purpose of accounting for postpetition payments but, with that qualification, the lender has the contractual right to follow the application of payments provision as outlined in the deed of trust as to postpetition payments received from the debtors.
- In a case where only the debtor is responsible for making ongoing payments, only the debtor need receive timely notice of interest and escrow changes that affect the amount of that payment. Timely notice of such changes requires notice far enough in advance of a payment change to allow a debtor to make the new payment in the proper amount when it falls due.

- A plan provision stating that the mortgage arrearage figure appearing in the plan was the debtor's best estimate of the arrearage amount and, failing an objection, would be binding on the creditor was consistent with Code § 1327.
- A plan provision stating that customary notices such as payment changes, payment addresses, and escrow balances may be sent directly to the debtor, and that confirmation of the plan operated as the debtor's consent to receive such notices, was consistent with a local general order.

***In re Burrier*, 399 B.R. 258 (Bankr. D. Colo., Dec. 22, 2008), order vacated, 403 B.R. 714 (April 8, 2009)**

- Where the mortgage lender sought relief from stay on the ground that the debtor had not complied with the stipulation reached by the parties following the lender's previous motion for relief from stay, the question before the court was not whether relief from the automatic stay should be granted under Code § 362, but whether the stipulation was valid and enforceable.
- The debtors established that their performance under the parties' stipulation was impossible, as the stipulation called for the debtors to present "front and back copies" of the checks for the four mortgage payments that they claimed to have made—and that the lender denied receiving—but the mortgage lender apparently processed checks electronically, so that the checks written to the lender by the debtors were not returned by the lender to the debtors' bank.
- The debtors established that the parties entered into the stipulation under a mutual mistake concerning a material fact, namely, the availability of cancelled checks. The stipulation was therefore subject to rescission.
- Although the lender's representative testified unambiguously that the lender never received the debtors' four disputed mortgage payments, the debtors' introduction of bank statements showing four payments to "WFHM," and four corresponding check carbons, was persuasive evidence that the debtors made the four payments to Wells Fargo.

***In re Arrigo*, 399 B.R. 700 (Bankr. D. Colo., Dec. 4, 2008)**

- Where the evidence indicated the only changes in circumstances from the petition date to the confirmation date were the debtor husband's loss of overtime and the debtor wife's slight reduction in annual income, these changes were not "substantial," such as would warrant deviation from the debtors' Form 22C in calculating the debtors' projected disposable income.
- The court declined to find "lack of good faith" where the debtors were following the requirements of the law, specifically Code § 1325, and proposing a plan conforming to the information contained on their Form 22C.
- The burden of proof to obtain confirmation is on the proponent of the plan.

***In re McCauley*, 398 B.R. 41 (Bankr. D. Colo., Nov. 20, 2008)**

- For the purpose of the hanging paragraph of Code § 1325(a), an auto lender's PMSI does not extend to the financed negative equity in the buyer's trade-in vehicle.

CONSUMER BANKRUPTCY CASES
EVERY PRACTITIONER SHOULD KNOW

***Long v. Bullard*, 117 U.S. 617 (1886)**

The case stands for the general proposition that the bankruptcy discharge only affects a debtor's *in personam liability* for a particular debt, and that any *in rem* interest against collateral associated with the debt is not affected by the discharge.

***Local Loan Co. v. Hunt*, 292 U.S. 234 (1934)**

Hunt borrowed money from the Local Loan Company and securitized it through an assignment of his future wages, an act which created a lien under state law. Hunt thereafter filed for bankruptcy and received a discharge; the finance company sought to enforce the assignment of wages post-discharge. Based upon the "clear and unmistakable policy" of bankruptcy law, the Court refused to enforce the lien, and in doing so arguably offered the most judicially significant statement of consumer bankruptcy law in history:

"One of the primary purposes of the Bankruptcy Act is to 'relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes' This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."

***Butner v. United States*, 440 U.S. 48 (1979)**

"Property interest are created and defined by state law. Unless some federal interest requires a different result, there is no reason for why such interests should be analyzed differently simply because an interested party involved in a bankruptcy proceeding."

***U.S. v. Whiting Pools, Inc.*, 462 U.S. 198 (1983)**

The case stands for the proposition that the IRS is no better than any other creditor and has to file the bankruptcy laws similar to other creditors. The issues involved i) what is property of the estate; ii) is under-secured property also property of the estate; and iii) is property that the IRS has seized pre-petition, property of the estate.

The Court held that the IRS must return the property of the debtor that it seized pre-petition even though the property is in the possession of the IRS and is under-secured. In this case, one of the IRS's arguments was that it was exempt from the Bankruptcy Code's provision that related to other secured creditors.

***In re Dewsnap*, 502 U.S. 410 (1992)**

A debtor's suit to "strip down" a creditor's lien on the debtor's property to equal the property's fair market value and declare the remainder dischargeable was dismissed because the creditor's claim had been "allowed" and was "secured." *Dewsnap* is often referred to as the reason why section 506 of the Code is not available to strip down undersecured liens in the context of chapter 7. Nevertheless, such strip downs are available in Chapter 13 because of the existence of section 1322(b)(2).

The Progeny of Dewsnap

***Nobleman v. American Savings Bank*, 508 U.S. 324 (1993)**

The "anti-modification" provision as contained in section 1322(b)(2) prevents the use of § 506(a) to "strip down" the lien of a mortgage to its value with regard to real estate when the creditor's claim is secured only by a lien on the debtor's principal residence. Subsequent cases have held that a wholly unsecured mortgage may be stripped down.

***In re Griffey*, 335 B.R. 166 (B.A.P. 10th Cir. 2005)**

The BAP reversed the bankruptcy court and held that the antimodification clause of § 1322(b)(2) does not apply to the holder of a wholly unsecured claim. The court noted that the creditor/bank "is thus the holder of an 'unsecured claim,' pure and simple — and if the words of § 1322(b) mean what they plainly say, the rights of a creditor holding such a claim 'may' be modified by the debtors' Chapter 13 plan."

***Woolsey v. CitiBank, N.A. (In re Woolsey)*, 696 F.3d 1266 (10th Cir. 2012)**

In their Chapter 13 bankruptcy case, the Woolseys attempted to avoid a wholly unsecured second mortgage on their home utilizing § 506(d) of the Code. Because of the construction problem engendered by *Dewsnap v. Timm*, 502 U.S. 410 (1992) in the definition of a "secured claim" in §§ 506(a) and (d), the Woolseys essentially argued that the court should interpret the term "secured claim" in § 506(d) differently depending on whether the case fell under Chapter 7 or Chapter 13. That is, for Chapter 7 cases, the Woolseys argued that *Dewsnap* should control, namely, that any claim secured by property is protected from removal, even if backed by no value. But in the Chapter 13 context, however, the Woolseys argued that a creditor should be required to prove some value in the collateral and if not, the lien may be stripped. While the court acknowledged the attractiveness of the Woolseys argument particularly in light of the policy behind Chapter 13 bankruptcy, it declined to stray from *Dewsnap* and ascribe multiple meanings to a single statutory provision. As the court stated: "*Dewsnap* may be a gnarled bramble blocking what should be an open path. But it is one only the Supreme Court and Congress have the power to clear away." *Significantly*, the Woolseys did not raise the

issue on appeal whether § 1322(b)(2) enables debtors to strip off a wholly unsecured mortgage, and they specifically declined to have this issue decided by the court when giving the opportunity to do so through supplemental briefing. Consequently, the court did not address the issue of whether § 1322(b)(2) allows debtors to strip off a wholly unsecured mortgage irrespective of § 506(d) of the Code. In dicta, nonetheless, the Tenth Circuit referred to this secondary attach as a “potentially promising argument” for future debtors.

***Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007)**

Section 706(a) in part provides that the “debtor may convert a case under this chapter to case under chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case is not been converted In spite of the plain language of the statute, the Supreme Court held that the debtor has no “absolute right” to convert a Chapter 7 case to Chapter 13. The Court held that nothing in the text of either section 706 or 1307(c) limited the authority of a court to take appropriate action in response to fraudulent conduct by the atypical litigant who demonstrated that he was not entitled to relief available to the typical debtor. The broad authority granted to bankruptcy judges per section 105(a) was adequate to authorize an immediate denial of a motion to convert per section 706(a).

Dissent:

The dissent Justices disagreed with the Court’s construction of § 706(a) for several reasons. First, in comparing the statutory language of § 706(a) with the language of §§ 1112(a), 1208(a) and 1307(a), the dissent concluded that § 706(a) does not provide any discretion for a bankruptcy judge to deny conversion to Chapter 13 so long as the case had not been previously converted to Chapter 7 and the debtor satisfies § 706(d). Second, the dissent argued that Chapter 13 has its own set of mechanisms for dealing with debtors that engage in pre-petition fraudulent conduct, such as conversion from Chapter 13, the denial of the debtor’s plan for lack of good faith, and the denial of a discharge; thus, the dissent maintained, § 706(a) is not needed to act as a prophylactic shield for Chapter 13. Third, the dissent argued that the court’s implicit holding, namely, that a “bad faith” Chapter 7 debtor is not eligible for Chapter 13 relief, essentially eviscerates the chapter-specific eligibility requirements found in § 109 of the Bankruptcy Code.

***Till v. SCS Credit Corp.*, 541 U.S. 465 (2004)**

This involved a Chapter 13 case where the parties could not agree on the cram down interest rate. In a plurality opinion, the Supreme Court ruled that the “formula approach” should be used and specifically, starting with a relatively risk-free rate such as the prime rate and then add the appropriate risk adjustment. Generally, the risk factor is between 1% to 3% on top of the prevailing rate.

Courts have applied *Till*’s formula rate approach in the Chapter 11 context, including for individual Chapter 11 cases. See, e.g., *In re L.B. Bryant*, 439 B.R. 724 (Bankr. E.D. Ark. 2010) (adopting *Till* in an individual Chapter 11 case); *Wells Fargo Bank, N.A. v. Texas Grand Prairie Hotel Realty, L.L.C. (In re Texas Grand Prairie Hotel Realty, L.L.C.)*, 710 F.3d 324, 333 (5th Cir. 2013) (noting that the “vast majority” of bankruptcy courts follow *Till* in determining a

cramdown rate of interest in Chapter 11). However, the use of the cramdown interest rate of *Till* in the Chapter 11 context is not a foregone conclusion. That is, some courts have held that a prerequisite to applying the *Till* formula approach in Chapter 11 is a finding that no “efficient market” exists for the cramdown loan, based on footnote 14 in *Till*. See, e.g., *General Electric Credit Equities, Inc. v. Brice Road Developments, LLC (In re Brice Road Developments, LLC)*, 392 B.R. 274, 280 (B.A.P. 6th Cir. 2008) (stating that in a Chapter 11 case where an efficient market exists, the market interest rate should be applied; but where no efficient market exists, the formula approach to interest rates endorsed by the Supreme Court in *Till* should be applied).

***Grogan v. Garner*, 498 U.S. 279 (1991)**

The issue was what standard of evidence should be used by the bankruptcy courts in considering whether a debt was a result of “actual fraud” under section 523(a). The Supreme Court concluded that the standard of evidence should be by a preponderance of the evidence and not clear and convincing.

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

A Chapter 13 debtor typically is required to commit “projected disposable income” to the repayment of creditors over 3 to 5 years under a repayment plan in accordance with § 1325(b)(1). In calculating the amount of projected disposable income required, some courts took a mechanical approach by averaging the debtor’s monthly income during a 6-month look-back period, generally preceding the date of the filing of the bankruptcy petition. Other courts used a forward-looking approach which adopts the mechanical approach as a starting point and, in unusual cases, takes “into account other known or virtually certain information about the debtor’s future income or expenses.” The Court adopted the forward-looking approach to measure a debtor’s CMI for the means test.

Writing for a majority of eight Justices, Justice Alito authored an opinion holding “that when a bankruptcy court calculates a debtor’s projected disposable income, the court may account for changes in the debtor’s income or expenses that are known or virtually certain at the time of confirmation.” According to the Court, the forward-looking approach is supported by the ordinary meaning of the term “projected.” Moreover, and as the Court further noted, in a legislative context Congress rarely has used the word “projected” to refer to simple multiplication. Rather, in the Bankruptcy Code, when Congress wants to mandate simple multiplication, it uses the term “multiply.” In further support of its holding, the Court held that the forward-looking approach continues the pre-2005 amendment approach used by the courts to determine projected disposable income in which courts exercised judicial discretion to account for known or virtually certain changes in the debtor’s income. Absent a clear indication that Congress intended to change pre-2005 amendment practice, the Court declined to interpret the Code so as to effectively erode past practice

***United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)**

The question before the Court was whether the Bankruptcy Court’s order confirming the debtor’s plan was void for the purpose of Federal Rule of Civil Procedure Rule 60(b)(4). Rule 60(b)(4) permits a court to relieve a party from a final order or judgment if that order or judgment is void.

United argued that the order confirming the plan was void for two reasons. First, United claimed that it was denied due process because it had not been served with a summons and complaint in an adversary proceeding to determine undue hardship. Second, United argued that the confirmation order was void because the Bankruptcy Court lacked statutory authority to confirm Espinosa's plan absent a finding of undue hardship.

The Supreme Court held that because United had actual notice of the court's error and failed to object to the plan or timely appeal the order confirming the plan, the order remained enforceable. United had received notice of Espinosa's intent to discharge his student loan debt twice: when it received a copy of Espinosa's plan after his Chapter 13 filing, and when the trustee sent notice after confirmation. The Court found that the two notices received by United satisfied United's due process rights because due process requires notice reasonably calculated to apprise interested parties of the pending action and afford them an opportunity to present their objections.

***In re Parker*, 313 F.3d 1267 (10th Cir. 2002)**

Unscheduled debt in no-asset, no-bar date Chapter 7 case is discharged despite lack of notice to the creditor and it is not necessary to reopen the case to list the debt. Adopting the mechanical approach, the Tenth Circuit held that equitable principles, including the debtor's intent in failing to schedule debt, are irrelevant to the bankruptcy court's decision to reopen a case in which there are no assets and no bar date to file claims. Note that this will not help a debtor who fails to notify a creditor who holds a claim of the sort described in sections 523(a)(2), (4) or (6). Also of importance to practitioners the Court adopted the "conduct theory" in determining the date on which a claim arose, that is, date of claim is determined by date of the conduct giving rise to the claim.

***Marine Midland Business Loans, Inc. v. Carey*, 938 F.2d 1073 (10th Cir. 1991)**

The conversion of non-exempt property for the purpose of placing it out of the reach of creditors, without more, will not deprive the debtor of the exemption to which he would otherwise be entitled. But after quoting the legislative history – to the effect that converting nonexempt property into exempt property before filing bankruptcy is not fraudulent to creditors – the Tenth Circuit then goes on to warn that simple exemption planning can be found fraudulent (resulting in denial of discharge under section 727(a)(2)) when tested under the classic badges of fraud, such as whether the conversion was concealed or disclosed, whether the conversion took place "immediately before the filing of the petition," and the monetary value of the assets converted.

For a more nuanced approach to the application of the badges of fraud to bankruptcy exemption planning, check out *Murphey v. Crater (In re Crater)*, 286 B.R. 756 (Bankr. D. Ariz. 2002).

Also, recall the famous companion cases of *Hansen v. First National Bank in Brookings*, 848 F.2d 866 (8th Cir. 1988) and *Norwest Bank Nebraska, N.A. v. Tveten*, 848 F.2d 871 (8th Cir. 1988) decided on the same day by the same court but reaching contrasting conclusions on exemption planning. In *Hansen*, the Eighth Circuit Court of Appeals found no evidence of fraudulent intent where the debtors (who were farmers) sold personal property worth \$31,000 on the eve of bankruptcy to their relatives for fair market value and used to sale proceeds to

purchase exempt life insurance policies and to pre-pay their mortgage. In *Tveten*, however, the Eighth Circuit denied the debtor (a physician) his discharge after he converted \$700,000 worth of non-exempt property into exempt property (a life insurance policy) on the eve of bankruptcy while seeking to discharge \$19M in debt. The purported difference in the two results was the degree of the exemptions taken; that is, the exemptions in *Hansen* were statutorily capped at a reasonable amount while the debtor in *Tveten* utilized his statutory exemption with an unlimited cap.

***Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987)**

In perhaps the seminal case regarding the “undue hardship” standard for the dischargeability of student loans under § 523(a)(8), the Second Circuit Court of Appeals adopted the following three-part test that a debtor must satisfy to demonstrate “undue hardship”: i) the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for herself and her dependents if forced to repay the loans; ii) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and iii) the debtor has made good faith efforts to repay the loans. In its decision, the Second Circuit noted certain factors that may cause the standard to be met, namely, whether: the debtor has a disability, is elderly, has dependents, or has evidence of a “total foreclosure of job prospects in [his or] or area of training.”

The Progeny of Brunner

While the *Brunner* standard for dischargeability of student loans remain good law, some courts have utilized the § 105 equitable power to grant partial discharges of student loan debt. *See, e.g., Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433, 439 (6th Cir. 1988) (“where undue hardship does not exist, but where facts and circumstances require intervention in the financial burden on the debtor, an all-or-nothing treatment thwarts the purpose of the Bankruptcy Act”). Other courts will afford partial discharges of student loan debt under § 105 of the Bankruptcy Code only so long as the portion of debt being discharged satisfies the requirements of § 523(a)(8). *See, e.g., Saxman v. Educational Credit Management Corp. (In re Saxman)*, 325 F.3d 1168 (9th Cir. 2003); *Miller v. Pennsylvania Higher Education Assistance Agency (In re Miller)*, 377 F.3d 616 (6th Cir. 2004) (holding same).

On another issue involving student loan debt, at least one court has permitted the separate classification of such debt in a Chapter 13 plan (despite the prohibition on unfair discrimination contained in § 1322(b)(1)) where the failure of the debtor to remain current on her student loans would be cause for the revocation of her professional license under state law. Such a prospect would jeopardize her ability to earn income sufficient to support a dividend to other unsecured creditors; accordingly, the court found that the separate classification would serve as a benefit to the estate. *See In re Kalfayan*, 415 B.R. 907 (Bankr. S.D. Fla. 2009).

Current Developments in Consumer Bankruptcy

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22nd ANNUAL SOUTHWEST BANKRUPTCY CONFERENCE

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New Proof-of-Claim and Disclosure Rules

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On December 1, 2011, new provisions of Bankruptcy Rule 3001, and new Bankruptcy Rule 3002.1 became effective. On December 1, 2012 new provisions of Rule 3001 became effective for debts based on open-end or revolving consumer credit agreement. New Official Forms have been promulgated as well. This paper summarizes the new rules pertaining to mortgage lenders, unsecured creditors and debt buyers, and discusses some of the opinions that have been issued which analyze the new rules.

A. Requirements for Original Proof of Claim – Mortgages and Other Secured Debt

When a claim or security interest is based on a writing, the original or duplicate **shall** be filed with the claim. Fed. R. Bankr. P. 3001(c)(1).

Use new Official Form B10.

Actual writing must be attached - a “summary” of the documents is insufficient without copies of the actual documents being attached as well. Official Form 10 2011 Committee Note.

A proof of claim in an individual debtor case must attach an itemized statement of interest, fees, expenses or other charges. Fed. R. Bankr. P. 3001(c)(2)(A).

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If a security interest is claimed in the individual debtor's property, the creditor must file a statement of the cure amount. Fed. R. Bankr. P. 3001(c)(2)(B).

If a security interest is claimed in the individual debtor's principal residence, the creditor must provide this information using new Official Form B 10A (Attachment A). Fed. R. Bankr. R. 3001(c)(2)(C).

If a security interest is claimed in the individual debtor's principal residence, and an escrow account has been established, the creditor must attach to the proof of claim an escrow account statement "prepared as of the petition date in a form consistent with applicable nonbankruptcy law." Fed. R. Bank. P. 3001(c)(2)(C).

No separate Official Form for this statement.

Penalties for Failure to Comply

If the creditor fails to provide any information required by Rule 3001(c), after notice and hearing, the court may take "either or both of the following actions":

- "preclude the claimant from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless"

- "award other appropriate relief, including reasonable expenses and attorneys' fees for the failure"

See Fed. R. Bankr. P. 3001(c)(2)(D).

See In re Harris, 492 B.R. 225 (Bankr. S.D. Tex. 2013)(describes court's thoughts on how objectors should object to claims under new rule and obtain fee shifting).

B. Requirements for Proof of Claim – Credit Cards and Debt Buyer Claims 3001(c)(3)

Unsecured claims based on an open-end or revolving credit agreements must file a statement with the proof of claim with all of the following information:

- (i) the name of the entity from whom the creditor purchased the account;
- (ii) the name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account;
- (iii) the date of an account holder's last transaction;
- (iv) the date of the last payment on the account; and
- (v) the date on which the account was charged to profit and loss.

Rule 3001(c)(3)(A).

On request of party in interest, the holder of a claim based on an open-end or revolving consumer credit agreement shall, within 30 days after the request is sent, provide the requesting party a copy of the writing specified in paragraph (1) of this subsection. Rule 3001(c)(3)(B).

Penalties for Failure to Comply

If the creditor fails to provide any information required by Rule 3001(c), after notice and hearing, the court may take “**either or both** of the following actions”:

- “preclude the claimant from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the

court determines that the failure was substantially justified or is harmless”

- “award other appropriate relief, including reasonable expenses and attorneys’ fees for the failure”

See Fed. R. Civ. P. 3001(c)(2)(D).

Few cases have interpreted the new Rule 3001(c)(3) that became effective on December 1, 2012. The courts generally have held that if the claimant provides most of the information required, the claim retains its *prima facie* validity, and the objector must come forward with *evidence* to establish that the assignee lacks standing or otherwise cannot enforce the debt. See, e.g., *Matter of Berardi*, 2013 WL 6096227 (Bankr. D.N.J. November 20, 2013)(slip opinion)(not for publication), *In re Crutchfield*, 492 B.R. 60 (Bankr. M.D. Ga. 2013).

Courts also are giving creditors “another bite at the apple” when they fail to comply with Rule 3001(c)(3). *In re Goeller*, 2013 WL 3064594 (Bankr. E.D. Va. 2013)(slip opinion)(court refused to default creditors which did not respond to claims objections or comply with Rule 3001(c)(2)(D). Evidentiary hearing needed because notice given by debtor did not meet the “notice and hearing” requirement of Rule 3001(D), and debtor would have to submit evidence to support claim objections.)

Courts expect the objector to write and request the writing as set forth in Rule 3001(c)(3)(B). See *Berardi* and *Crutchfield*.

Possible Procedures to Object to Debt Buyer’s Claim²

(1) Review Proof of Claim:

- Are all five pieces of information provided?

² These procedures were suggested Miriam Goott at a presentation at the 10th Annual Consumer Bankruptcy Practice held on July 24-25, 2014 in Galveston Texas. Goott, “9-Step Process to Objecting to Debt Buyers’ Proof of Claims and Fee Shifting.” Miriam Goott, Walker & Patterson, P.C., 4815 Dacoma, Houston, TX 77092.

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- Is there an easier objection, such as statute of limitations?
- (2) Send certified letter to the Debt Buyer (address on proof of claim and any attorney who has filed a notice of appearance on behalf of debt buyer). Ask for original writing and assignment.
- (3) Meet with client; discuss goals and fees.
- (4) If Debt Buyer does not provide the documents, call the Debt Buyer at the number on the proof of claim, ask for the documents, and keep good notes. If Debt Buyer still does not provide documents:
- (5) Call the Debt Buyer and ask if it will agree to a telephonic 2004 exam. If not:
- (6) Notice 2004 exam. Read Local Rules! Local rules for 2004 exams differ dramatically.
- (7) Call in for 2004 exam. If Debt Buyer does not call in:
- Record call.
 - Ask questions you intended to ask:
 1. State name for record.
 2. State that call being recorded.
 3. State, "If Debt Buyer would have complied with the 2004 exam notice and appeared, I would have asked the following:
 - i. Isn't it true that you had no authority to sign the POC filed in the Debtor's bankruptcy case?

- ii. Isn't it true that you had no authority to file the POC in Debtor's bankruptcy case?

- iii. Isn't it true that the debt owed by Debtor to Bank A (Account No. xxxxxxx) was not assigned to you?

(8) File motion for sanctions because the debt buyer failed to appear. Seek negative inference and attorneys' fees.

(9) File claim objection. Ask for fees. Serve claim objection and get a hearing.

Note – Reasonable attorneys' fees may be awarded only for the attorneys' fees that "were caused" by the creditor's failure to send the documents when requested. *See In re Dunlap*, 2013 WL 5497047 (Bankr. D. Colo. October 3, 2013)(although fees "were caused" by creditor's POC failures, no fees awarded because fees "unreasonable as a matter of law" where objections to claims only yielded \$.50 to other creditors). *See In re Harris*, 492 B.R. 225 (Bankr. S.D. Tex. 2013)(award attorneys' fees "caused" by the failure, but courts have always had other powers and procedures to award fees where appropriate).

C. Notice and Disclosure Requirements Under New Rule 3002.1

Applies only in chapter 13 case to claims secured by the debtor's principal residence and provided for under § 1322(b)(5) of the debtor's plan. Fed. R. Bankr. P. 3002.1(a).

a. Notice of Payment Changes

Creditor **shall** give 21 day advance notice to the debtor, debtor's counsel and the trustee of any payment change, including changes that result from an interest rate or escrow account adjustment. Fed. R. Bankr. P. 3002.1(b).

- Use new Official Form B 10S1 (Supplement 1). *See* Fed. R. Bankr. P. 3002.1(d).

- The notice does not have Rule 3001(f) *prima facie* validity. *See* Fed. R. Bankr. P. 3002.1(d).

b. Notice of Postpetition Fees, Expenses and Charges

Creditors **shall** file and serve on the debtor, debtor’s counsel and the trustee a notice itemizing all fees, expenses or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or the debtor’s principal residence. Fed. R. Bankr. P. 3002.1(c).

- The notice **shall** be served within 180 days after fee was “incurred.” Fed. R. Bankr. P. 3002.1(c).

- Use new Official Form B 10S2 (Supplement 2). *See* Fed. R. Bankr. P. 3002.1(d).

- The notice does not have Rule 3001(f) *prima facie* validity. *See* Fed. R. Bankr. P. 3002.1(d).

Debtor or trustee has one year after service of the notice to challenge the fee by filing a “**motion.**” Fed. R. Bankr. P. 3002.1(e).

If the debtor or trustee files such a motion, after notice and hearing, the court then determines whether payment of the fee is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5). Fed. R. Bankr. P. 3002.1(e)

c. Notice of Final Cure Payment

(1) Trustee's Obligations

Within 30 days “after the debtor completes all payments under the plan,” the trustee **shall**:

- file and serve a “**notice**” stating that the debtor has paid in full the amount “required to cure any default on the claim.” Fed. R. Bankr. P. 3001(f).

- the notice must tell the creditor that it has an obligation to file and serve a response pursuant to Rule 3002.1(g). Fed. R. Bankr. P. 3002.1(f).

If the trustee does not file the notice of final cure required by Rule 3002.1(f), the debtor may file and serve the notice. Fed. R. Bankr. P. 3002.1(f).

(2) Creditor's Obligations

Within 21 days of the trustee serving its notice of final cure, the creditor **shall** file and serve a **statement**:

- indicating whether the creditor agrees that the debtor has paid in full the amount required to cure the default on the claim, **and**

- indicating whether the debtor “is otherwise current on all payments consistent with § 1322(b)(5),” **and**

- itemizing “the required cure or postpetition amounts, if any, the holder contends remain unpaid as of the date of the statement.”

Fed. R. Bankr. P. 3002.1(g).

The “**statement**” is filed as a “**supplement**” to the creditor’s proof of claim. Fed. R. Bankr. P. 3002.1(g).

Such statement/POC supplement is not given Rule 3001(f) *prima facie* validity. Fed. R. Bankr. P. 3002.1(g).

No Official Form for this statement/POC supplement.

(3) Response to the Creditor’s Statement/POC Supplement

Within 21 days of creditor filing the statement/POC supplement required by Rule 3002.1(g), the debtor or the trustee may file a “**motion**” challenging the creditor’s statement/POC supplement. Fed. R. Bankr. P. 3002.1(h).

If the debtor or trustee files such a motion, after notice and hearing, the court shall “determine whether the debtor has cured the default and paid all required post-petition amounts.” Fed. R. Bankr. P. 3002.1(h).

As set forth in the Committee Notes:

Subdivision (h) [Rule 3002.1(h)] provides a procedure for the judicial resolution of any disputes that may arise about payment of a claim secured by the debtor’s principal residence. Within 21 days after the service of the [creditor’s] statement under [Rule 3002.1(g)], the trustee or debtor may move for a determination by the court of whether any default has been cured and whether any other non-current obligations remain outstanding.

d. Penalties for Failure to Comply

If the creditor fails to provide any information required by Rule 3002.1(b), 3002.1(c) or 3002.1(d), the court may, after notice and hearing, take “**either or both** of the following actions:”

- “preclude the claimant from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless”

- “award other appropriate relief, including reasonable expenses and attorneys’ fees caused by the failure”

See Fed. R. Bankr. P. 3002.1(i).

After the case is closed, if the creditor seeks to recover amounts that should have been, but were not, disclosed under Rule 3002.1, the debtor may move to reopen the case “in order to seek sanctions against the holder of the claim under subdivision (i) [Rule 3002.1(i)].” *See* Committee Note to Rule 3002.1(i).

D. Sampling of Home Mortgage Cases Interpreting Rule 3002.1

1. No fees for creditors for filing the new required notices and responses.

In general, courts have held that creditors cannot charge debtors attorneys' fees for filing a notice of payment change, a notice of post-petition fees and expenses, or a response to the trustee's notice of final cure. *In re Carr*, 468 B.R. 806 (Bankr. E.D. Va. 2012 (no fees for response to final cure notice); *In re Adams*, 2012 WL 1570054 (Bank. E.D.N.C. May 3, 2012)(no fees for preparation of the notice of mortgage payment change form); *In re Roife*, 2013 WL 6185025 (Bankr. S.D. Tex. 2013)(slip opinion)(no fees for preparing notice of payment change or notice of post-petition fees).

2. Rule 3002.1(h) does not preclude debtor from later challenging creditor's claims and actions in the bankruptcy.

In re Bodrick, 498 B.R. 793 (Bankr. N.D. Ohio 2013). The 21-day rule in 3002.1 (h) was intended to provide a debtor with a procedure to seek a determination of the status of his mortgage prior to closing the case. It does not limit any other court from making a determination of the post-petition status of a mortgage at a later date and in different forum. Court denies motion to dismiss adversary proceeding in case against mortgage lender alleging violations of the stay and Rule 3002.1 in adversary proceeding filed after debtor re-opened bankruptcy case.

3. Courts have discretion with respect to 3002.1(i) penalties.

In re Tollios, 491 B.R. 886 (Bankr. N.D. Ill. 2013). Creditor failed to file notice of increase in mortgage payment, and then increased debtors' mortgage payment anyway after it paid taxes that debtors were supposed to pay. Court stated that it would not prevent mortgage lender from presenting evidence of the taxes in a future proceeding and did not award debtors their fees for their motion for sanctions. Debtors knew they had to pay the taxes.

In re Kreidler, 494 B.R. 201 (Bankr. M.D. Pa. 2013). In two cases, creditors filed responses to final cure notices, stating that post-petition fees were owed. Debtors filed motions pursuant to 3002.1(h). Creditors failed to appear at hearing and court ruled that creditors had failed to establish their claims for the post-petition payments, and that debtors' mortgages were current. Court did not award attorneys' fees because the creditors did not fail to provide the information required by 3002.1(g).

In re Owens, 2014 WL 184781 (Bankr. W.D.N.C. 2014)(slip opinion). Mortgage lender mailed notices to the debtors of post-petition fees, but failed to comply with Rule 3002.1 in the 180-day time period with respect to same. Debtors filed motion to disallow the fees. Mortgage lender argued, among others, that it did not have to comply with the rule, as mortgage lender did not really deem the fees to be recoverable, and would waive the fees if the debtors actually got a discharge. Court rejected that argument and disallowed mortgage lender's post-petition fees and charges. Court refused to award debtors their attorneys' fees because case was a matter of first impression. Court stated that it would consider awarding fees in the future if mortgage lender failed to comply in future.

4. The court still has powers pursuant to Rule 9011, 11 U.S.C. §105 and its inherent powers to remedy abuse of the 3002.1 process, even if the mortgage lender's actions technically comply with Rule 3002.1

The wording of Rule 3002.1 is fairly narrow. Thus, it may not apply directly to the mortgage lenders' conduct. For example, a mortgage lender may file a notice of post-petition fees and expenses for an expense it did not actually incur, or for an unreasonable fee. Thus, the lender supplied the information, but the debtor still has to right the wrong.

Rule 3002.1(i) is a remedy, but not the only remedy, and the Court can award attorneys' fees for lender abuse to the debtor pursuant to its inherent powers, its Section 105(a) powers, Rule 9011, and 28 U.S.C. § 1927. *See, e.g. Pompa v. Wells Fargo Home Mortgage, Inc. (In re Pompa)*, 2012 WL 2571156 (Bankruptcy S.D. Tex. June 29, 2012); *In re Harris*, 492 B.R. 225 (Bankr. S.D. Tex. 2013)(court discussing powers in both cases).

5. Rule 3002.1 applies whether the debtor is making the monthly mortgage payments or the Chapter 13 is making the monthly mortgage payments.

This is the majority rule. *See, e.g., In re Roife*, 2013 WL 6185025 (Bankr. S.D. Tex. 2013) (slip opinion)(debtor is making plan payments even if debtor is paying the monthly mortgage payments directly to the mortgage lender). *But see, In re Garduno*, 2012 WL 2402789 (Bankr. S.D. Fla. June 26, 2012); *In re Merino*, 2012 WL 2891112 (Bankr. M.D. Fla. July 16, 2012)(Rule 3002.1 does not apply to mortgage claims where the debtor pays the post-petition monthly mortgage payment directly to the creditor, or "outside the plan.")

The new Bankruptcy Rules are meant to remedy the practices of mortgage lenders which, in the past, have thwarted and often destroyed debtors' rights to cure their mortgage deficiency and be current on their mortgage upon emergence from bankruptcy.

As noted in the Judicial Conference Report of the Rules Committee:

Proposed new Rule 3002.1 implements § 1322(b)(5) of the Bankruptcy Code, which permits a chapter 13 debtor to cure a default and maintain payments of a home mortgage over the course of the debtor's plan. The rule is intended to provide the mortgagor-debtor information necessary to determine the exact amount needed to cure any pre-petition arrearage and the amount of the post-petition payments. If the latter amount changes over time because of changing interest rates, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of any change in payment must be conveyed to the debtor and trustee. Numerous consumer bankruptcy lawyers, trustees, and judges have reported that debtors often do not learn until after completing a chapter 13 plan that the mortgage payments have changed. In particular, debtors do not learn that fees, expenses, or other charges have been imposed during the life of the plan. As a result, debtors may face renewed foreclosure proceedings immediately after emerging from bankruptcy. Timely notice of such changes will permit the debtor and trustee to adjust post-petition mortgage payments and, if appropriate, challenge the validity of fees, expenses, or other charges assessed during the bankruptcy.

Report of the Judicial Conference, Committee on Rules of Practice and Procedures, p. 13.³

Indeed, the Committee Note to new Rule 3002.1 provides:

This rule is new. It is added to aid in the implementation of § 1322(b)(5), which permits a chapter 13 debtor to cure a default and maintain payments on a home mortgage over the course of the debtor's plan. *It applies regardless of whether the trustee or the debtor is the disbursing agent for postpetition mortgage payments.*

Advisory Committee Note to Bankruptcy Rule 3002.1 (emphasis added). This sentence was specifically added to the Committee Note after several commentators stated that the Rule 3002.1 appeared to be appropriate for "conduit" districts only. The committee added the sentence specifically to clarify that Rule 3002.1 "applies in all districts, regardless of whether ongoing mortgage payments are made directly by the debtor or by the chapter 13 trustee." See Report of the Advisory Committee on Bankruptcy Rules, May 27, 2010 (revised June 14, 2010), p. 14 and Rules [Appendix B-45](#) and [B-48](#).

³ See footnote 2, *infra*.

6. **Rule 3002.1 may apply when debtor surrenders house or where creditor has obtained relief from stay.**

In re Kraska, 2012 WL 1267993 (Bankr. N.D. Ohio April 13, 2012) (slip opinion)(Rule 3002.1 applies where debtor surrenders house; discusses purposes of new rules and attaches an excerpt from the Report of the Judicial Conference).⁴ *In re Holman*, 2013 WL 1100705 (Bankr. E.D. Ky. March 13, 2013)(Rule 3002.1 still applies when stay has been lifted. Court discusses purposes of Rule 3002.1). *But see, In re Thonga*, 480 B.R. 317 (Rule 3002.1 does not apply where stay terminated and creditor withdrew its proof of claim).

⁴ The Report of the Judicial Conference, Committee on Rules of Practice and Procedure can be found on the link to “Report” on the webpage at: <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/PublishedRules/JudConReportSept10.aspx>.

The Report of the Advisory Committee on Bankruptcy Rules, May 27, 2010 (Revised June 14, 2010) can be found on the link to “Appendix B” on that same webpage.

Proof Of Claim - Check List

Bankr. R. 3001

Proof of Claim

- (a) A proof of claim is a written statement setting forth a creditors claim. It shall conform substantially to Official Form 10.
- (b) Claim shall be executed by the creditor or the creditors authorized agent.
- (c) **SUPPORTING INFORMATION:**
 - (1) Is the claim based on a writing? If so, the POC must attach a copy of the underlying agreement. If it is unavailable or lost, it must attach a statement explaining so.
 - (2) (A) Any claim which includes interest, fees, expenses and other charges shall include an itemized statement with the POC.
 - (2) (B) If there is a security interest claimed in the debtor's property, POC shall include a statement of the amount to cure the arrears as of the petition date.
 - (2) (C) If there is a security interest in the debtor's principal residence, creditor shall complete the Official Form with the POC. If there exists an escrow account, creditor shall provide an escrow account statement with amounts as of the petition date. The statement shall approximate the form required by RESPA. The statement shall accompany the POC.
 - (2) (D) **PENALTIES:** If the creditor fails to provide any information described in (c), court may (after notice), either/or: (i) prevent creditor from introducing any evidence at contested hearing or trial, unless court deems non-compliance is excusable or harmless, and/or (ii) award other appropriate relief, including attorney's fees.
- (3) **OPEN-END CREDIT OR REVOLVING CONSUMER CREDIT:**
 - (A) If based on open-end or revolving (other than secured by debtor's home) statement shall be filed providing the following:
 - (i) name of the entity from whom the creditor purchased the account
 - (ii) name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account;
 - (iii) the date of an account holder's last transaction;

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- (iv) the date of the last payment on the account; and
- (v) the date on which the account was charged to profit and loss.
- (B) On written request by a party in interest, the holder of a claim based on an open-end or revolving consumer credit agreement shall, within 30 days after the request is sent, provide the requesting party a copy of the writing specified in paragraph (1) [i.e., (c)(1) of this subdivision.
- (d) **EVIDENCE OF PERFECTION OF SECURITY INTEREST.** If a security interest in property of the debtor is claimed, evidence of perfection shall accompany POC.
- (e) **TRANSFERRED CLAIM:**
 - (1) Transfer of claim **other than** for security **before** the POC is filed.
POC may only be filed by transferee.
 - (2) Transfer of claim **other than** for security **after** POC filed.
Evidence of the transfer shall be filed by the transferee.
 - (3) Transfer of claim **for** security **before** POC filed
Either the transferor or the transferee or both may file a proof of claim.
 - (4) Transfer of claim **for** security **after** POC.
Evidence of the terms of the transfer shall be filed by the transferee.
 - (5) Service of objection or motion. A copy of objection filed pursuant to paragraph 2 or 4 (above) or a motion filed pursuant to paragraphs 3 or 4, together with notice and hearing, shall be mailed to transfer or transferee, whichever is appropriate, giving 30 days' notice prior to the hearing.
- (f) **EVIDENTIARY EFFECT:** A POC executed and filed in accordance with these rules constitutes *prima facie* evidence of the validity and the amount of the claim.
- (g) Not applicable.

POC Checklist

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Exemption Issues

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I. Inherited IRA: *Clark v. Rameker*, 134 S. Ct. 2242 (U.S. 2014): An inherited IRA is not exempt under 11 U.S.C. §§ 522(b)(3)(C) or 522(d)(12) because the funds in an inherited IRA are not “retirement funds” within the meaning of those provisions. For further discussion see Case Law Section, page 4.

II. Fair Market Value or 100%:

A. In re Massey, 465 B.R. 720 (B.A.P. 1st Cir. 2012): Debtor may not exempt an asset in the amount of “FMV”. The Trustee’s objection to the FMV exemption was sustained. The asset remained property of the estate, subject to sale and paying Debtor’s exemption. Debtors do not have “unfettered authorization...to exempt assets in-kind.”

B. In re Luckham, 464 B.R. 67 (Bankr. D. Mass. 2012): Debtors may not exempt “100% of Equity” nor “100% of FMV”. Where the exemption statute provides a limited-interest exemption, only a defined monetary interest in the property is removed from the bankruptcy estate, not 100% of its value. A 100% claimed exemption does not give sufficient notice to interested parties.

C. In re Messer, 2012 WL 762828 (B.A.P. 9th Cir. Mar. 9, 2012): Debtor may not exempt “100% FMV” in a vehicle when the statute has an applicable cap.

III. Appreciation Value in Oil and Gas Lease Royalties: *In re Orton*, 687 F.3d 612 (3d Cir. 2012): Debtor was limited to the dollar amount claimed exempt, even though the exempted amount was below the permissible dollar cap of the wildcard exemption and the value of the asset had increased. Listing a “full” or “100%” exemption amount would have put the trustee on notice of a higher claimed exemption.

IV. Avoidance creating equity: *In re Messina*, 687 F.3d 74 (3d Cir. 2012): Debtors are not entitled to exempt equity created by a trustee avoidance action, even if the exemption was claimed and the trustee didn’t object. The avoidance recovery is a separate asset to be exempted. Debtors’ interests are determined as of the date of filing.

V. Health Savings Account: *In re Leitch*, 494 B.R. 918 (B.A.P. 8th Cir. 2013): Debtor’s HAS is not excluded from property of the estate. It is not a health insurance plan.

VI. Retirement Plans: *In re Daley*, 459 B.R. 270 (Bankr. E.D. Tenn. 2011): Debtor’s IRA was not necessarily exempt as a retirement account because of an IRS favorable letter. The letter merely created a rebuttable presumption of a IRA’s tax exemption. A lien on the account may disqualify the account from being exempt.

Bankruptcy Law Challenges Facing “The Formerly In Love”

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¹ This article is a modified version of an earlier article created by Lawrence Hirsch and Iva Hirsch of Parker Schwartz PLLC for a panel discussion at the February, 2014, Arizona State Bar Bankruptcy Section seminar. The panel was comprised of Lawrence Hirsch, Iva Hirsch, the Honorable Eddward P. Ballinger, Jr., and the Honorable Jay Polk. These materials are reprinted here with the express permission of Lawrence Hirsch and Iva Hirsch.

I. INTRODUCTION

This article provides an overview of the most frequent issues arising at the intersection of the Bankruptcy Code and Family law – from what constitutes property of the estate, to what exemptions may be claimed, to the application of the automatic stay, to the dischargeability of domestic support obligations versus property settlements, to judgment liens and lien avoidance issues.

II. PROPERTY OF THE ESTATE

The Bankruptcy Code provides that property of the estate includes “all legal and equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a). There are exceptions found in section 541(b) and (c)(2). However, the inquiry into what is property of the estate does not end there. In a Chapter 13 proceeding and in an individual Chapter 11 proceeding, the debtor’s post-petition income is also property of the estate. *See* 11 U.S.C. §1307(a)(2) and 1115(a)(2). In a Chapter 7 it is not.

What constitutes property of the estate also hinges on whether only one spouse files for bankruptcy or both and the underlying character of the property. At least in much of the West (and Wisconsin), the bankruptcy estate includes not only a filing debtor’s separate property, but also the property belonging to his/her marital community. Questions often arise (in and out of the bankruptcy context) as to whether a creditor may seek recovery against the debtor’s sole and separate property, the entire community’s property or only half of the community property. If the debt is a community debt, then the creditor has a claim against not only the sole and separate property of the debtor but also the community property of the debtor and the debtor’s non-filing spouse. *See Amos v. Swagerty*, 2010 WL 2977591 (Ariz. App.); *see also In re Maready*, 122 B.R. 378 (9th Cir. BAP 1991).

Further, certain property may initially be property of the estate but later exit the estate when the debtor claims an exemption, the trustee abandons the property as burdensome or of inconsequential value to the estate, the debtor redeems the property, or the trustee or debtor in possession sells assets. With respect to exemptions, the Bankruptcy Code provides a debtor with a choice between federal bankruptcy law exemptions and state law exemptions. 11 U.S.C. § 522(d). Congress has allowed states to opt out of the federal exemptions and restrict debtors to state law exemptions. Arizona, California, Nevada, and Utah are opt-out states. New Mexico allows the debtor to choose between the federal and state exemptions.

By way of example, Arizona provides a homestead exemption to “[a]ny person the age of eighteen or over, married or single, who resides within the state . . . not exceeding one hundred fifty thousand dollars in value.” Arizona Revised Statute (“A.R.S.”) § 22-1101. The homestead is a single \$150,000 exemption whether one spouse files bankruptcy or both file. Issues arise when only one spouse files for bankruptcy initially and claims the homestead exemption. The other spouse cannot later file for bankruptcy and claim the same exemption. *See Burman v. Homan (In re Homan)*, 112 B.R. 356 (9th Cir. BAP 1989); *In re Bartlett*, 24 B.R. 605 (9th Cir. BAP 1982). This holds true even if the parties have filed for divorce and no dissolution decree has been entered.

This leads to the additional question of how does one divide the homestead exemption in a divorce if there is one primary marital residence? At what point can a former spouse create his own new homestead by purchasing a new primary residence? Does a single filer debtor get to claim the entire homestead in a home titled as joint property with rights of survivorship? Does the result differ if the home is owned in community with rights of survivorship? Remember that joint tenancy property, as opposed to property held as community property, is presumed to be the

sole and separate property of each spouse. *See Skinner v. CIT Communications Finance Corp.*, 2009 WL 3163499 (Ariz. App.). Assuming that the title makes a difference, what will a trustee do with jointly held property when only one spouse files for bankruptcy? If jointly owned property is not community property, what then is actually in the estate?

Other exemptions include such things as equity in a motor vehicle and modest amounts held in a single bank account. Under Arizona case law, a married, sole filing debtor may claim the non-filing spouse's exemption, in essence doubling their available exemption. *See In re Perez*, 302 B.R. 661 (Bankr. D. Ariz. 2003). Interesting questions arise as to whether a single filing debtor may claim the non-filing spouse's exemptions where the parties have sought dissolution prepetition but no divorce decree has been entered as of the bankruptcy petition date. Under Arizona law, the community is not terminated until the divorce decree is officially entered:

B. Property that is acquired by a spouse after service of a petition for dissolution of marriage, legal separation or annulment is also the separate property of that spouse if the petition results in a decree of dissolution of marriage, legal separation or annulment.

A.R.S. § 25-213.

C. Either spouse separately may acquire, manage, control or dispose of community property or bind the community, except that joinder of both spouses is required in any of the following cases:

1. Any transaction for the acquisition, disposition or encumbrance of an interest in real property other than an unpatented mining claim or a lease of less than one year.
2. Any transaction of guaranty, indemnity or suretyship.
3. To bind the community, irrespective of any person's intent with respect to that binder, after service of a petition for dissolution of marriage, legal separation or annulment if the petition results in a decree of dissolution of marriage, legal separation or annulment

A.R.S. § 25-214.

While a debtor may claim a variety of property exempt from his creditors, it is important to note that under section 523(c), exempt property appears to remain subject to execution efforts to enforce certain familial support obligations called “DSO”s. This issue is discussed in more detail *infra*, Section IV. What is a DSO and Why is it Important?

III. AUTOMATIC STAY AND DIVORCE LITIGATION

The Bankruptcy Code provides for an automatic stay upon the filing of a petition under Title 11. This stay is set forth in 11 U.S.C. section 362(a) and generally serves as an injunction against actions pending or to be taken against the debtor or against property of the debtor or property of the estate. The automatic stay is one of the key elements of the bankruptcy system and serves an important purpose in both the liquidation and reorganization process. Bankruptcy judges are very protective of the stay and violations of the stay are treated seriously by the courts.

There are exceptions to the stay and some of those exceptions involve family law issues. Family law practitioners need to be careful that actions they take or plan on taking in the state court do not violate the stay. A stay violation can trigger liability for compensatory damages, attorneys’ fees and even punitive damages. When in doubt, seek guidance from the Bankruptcy Court. The filing of a motion for relief from stay, or even a motion seeking a determination that the stay does not apply, does not take a great deal of time and effort and can save time and money in the long run.

It is not uncommon for a debtor to be facing a pending order to show cause for contempt for non-payment of a domestic support obligation (“DSO”) at the time of the filing of the Title 11 proceeding. The automatic stay provisions of 11 U.S.C. section 362 contain an exception for the prosecution of a criminal action. Is the pursuit of a contempt citation for non-payment of

support a criminal action? That is the first question the family law practitioner will have to answer.

A criminal contempt punishes the defendant for disobedience of a court order and incarceration is the punishment. It is not designed to be a collection mechanism but rather is punitive in nature. “The enquiry should be directed to the query whether the contempt proceeding is designed to extract the payment of some financial obligation.” *In re Lori*, 241 B.R. 353, 355 (Bankr. M.D. Pa. 1999).

Arizona law is equally clear that the pursuit of a civil contempt proceeding brought before the state court is not in the nature of criminal contempt. Criminal contempt is defined as follows: “A person who willfully disobeys a lawful writ, process, order or judgment of the superior court by doing an act or thing therein or thereby forbidden, if the act or thing done also constitutes a criminal offense, shall be proceeded against for contempt as provided in §§ 12-862 and 12-863.” A.R.S. § 12-861. Civil contempt, on the other hand, does not envision an act that is otherwise not criminal. *See* A.R.S. § 12-864 (“[A]ll other contempts not specifically embraced within this article may be punished in conformity to the practice and usage of the common law.”). The effort to enforce the payment of a child support order by invoking the court’s broad contempt powers simply is an attempt to use the court as a collection agency. “Compensatory civil contempt sanctions are intended to benefit the complainant, and are therefore paid to the complainant.... Coercive civil contempt requires that the contemnor be given an opportunity to avoid punishment through compliance.” *Trombi v. Donahoe*, 223 Ariz. 261, 222 P.3d 284, 290 (App. 2009).

Contempt actions taken to enforce a divorce decree are civil and not criminal in nature under Arizona law. “We accordingly conclude that appellee’s petition to hold appellant in

contempt, which was filed within the framework of the original dissolution action, initiated a civil contempt proceeding within the scope of A.R.S. § 12-864, rather than A.R.S. § 12-861.” *Pace v. Pace*, 128 Ariz. 455, 626 P.2d 619 (App. 1981); *see also Ong Hing v. Thurston*, 101 Ariz. 92, 416 P.2d 416, 422 (1966) (“[C]ivil contempt is the disobedience of a court order directing an act for the benefit of the opposing party to the litigation”). If a party can purge the contempt by the payment of money, the contempt is civil in nature. A criminal contempt citation cannot be corrected by future conduct; it is punishment for past deeds. *Korman v. Strick*, 133 Ariz. 471, 652 P.2d 544 (1982). Clearly, the purpose of seeking incarceration is to aid in the collection of a debt; the contempt citation is clearly civil in nature. *In re Tipton*, 257 B.R. 865 (Bankr. E.D. Tenn. 2000).

Assuming the pursuit of civil contempt is not criminal, is there another exception to the automatic stay to permit the continuation or commencement of proceedings in the state court for family law purposes? This is the area that leads to the most confusion and the most traps for practitioners. What exactly does the non-debtor party wish to accomplish in the state court? What bankruptcy chapter has the debtor filed? The answers to these questions are crucial to a determination of whether the stay applies.

The specific exception to the automatic stay in family law matters is found in 11 U.S.C. section 362(b)(2), which provides as follows:

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay –

- (1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;
- (2) under subsection (a)

(A) of the commencement or continuation of a civil action or proceeding –

- (i) for the establishment of paternity;
- (ii) for the establishment or modification of an order for domestic support obligations;
- (iii) concerning child custody or visitation;
- (iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or
- (v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute.

What exactly is to be accomplished in the state court? If the goal is simply to establish paternity or to establish or modify an order for domestic support, or to grant dissolution of marriage (other than the division of estate property) or to collect a DSO from property that is not property of the estate, the stay will not apply and the state court action can proceed. Once a bankruptcy proceeding commences, any attempt to enforce a DSO against estate property requires lifting or terminating the stay.

Although subsection (b)(2)(A)(ii) of section 362 does provide an exception to the automatic stay in proceedings for “the establishment or modification of an order for alimony, maintenance, or support,” such an exception would only apply to the portion of a contempt motion requesting an award of spousal support and does not otherwise permit the contempt aspect of a motion without relief from the stay. *See In re Lori*, 241 B.R. at 355 (exception applies only to the establishment of support orders and does not extend to the commencement or continuation of a proceeding to enforce such orders); *In re Tipton*, 257 B.R. 865 (Bankr. E.D.

Tenn. 2000). “Pursuing a finding of contempt with respect to an alimony award is a violation of the automatic stay.” *In re Brooks*, 2007 WL 540786 *4 (Bankr. E.D. Tenn.).

It is necessary to carefully review and analyze the language of section 362(A)(b)(2), (B) and (C) to understand why the pursuit of a civil contempt citation is a violation of the stay. Practitioners must not confuse the concept of “collection of a domestic relations obligation” with the “commencement or continuation of a civil action” to establish or modify an obligation. There is a significant difference, and it is that difference that forms the basis for a potential stay violation. “While 362(b)(2)(B) would permit collection efforts against property not of the estate, such as wage assignments under Pa. C.S.A. §8127(a)(2), the Petition to hold Adrian Lori in contempt for violating the January 21, 1997 Order was not so limited.” *Lori*, 241 B.R. at 355. Similarly, subsection (C) would provide the same exception if the wages being collected were property of the estate.

The facts of *In re Caffey*, 384 B.R. 297 (Bankr. S.D. Ala. 2008), illustrate the problem. Debtor, a former professional athlete, had a very high child support order based on his income while he was an athlete. By the time he filed for relief under Chapter 11, he owed in excess of \$80,000 in back support, and the state court had issued a contempt citation. Subsequent to the filing of the Chapter 11 petition, the mother of the child for whom support was due caused an arrest warrant to be issued and Caffey was incarcerated. Relying in part upon the Arizona case *In re Johnston*, 321 B.R. 262 (Bankr. Ariz. 2005), the Bankruptcy Court concluded the stay had been violated and that Caffey was entitled to damages, including damages for emotional distress and punitive damages. The Bankruptcy Court held that the procedures required to collect back support were not “simply a formality.”

In *In re Moore*, 2009 WL 1616019 (Bankr. N.D. Ohio), debtor filed for Chapter 7 relief in March, 2008. In April, 2008, the state court entered an order finding debtor in contempt and ordering the immediate payment of arrears or debtor would be incarcerated. Debtor filed a motion to set aside the order based upon the pending bankruptcy. The court granted the motion and debtor thereafter sued his former spouse for violating the stay by not terminating the pending proceedings upon getting notice of the bankruptcy. The ex-wife filed a motion to dismiss, asserting that the exceptions to the stay, including (b)(2)(C), precluded a finding that the stay had been violated. The court denied the motion: “Thus a creditor’s use of civil contempt proceedings to collect unpaid prepetition domestic support obligations may well constitute a violation of the automatic stay.” 2009 WL 1616019 *5.

If the practitioner believes that the stay has either terminated or is inapplicable, it is certainly wise and prudent to advise the state court that a bankruptcy has been filed or is otherwise pending, and that the relief sought does not violate the stay and that any enforcement order must be limited to non-estate property.

Practitioners should also understand that they have an affirmative duty to advise the state court that a bankruptcy has been filed. They also have a duty to undue any harm they have caused by an unintentional or unknowing violation of the stay. The Ninth Circuit Court of Appeals upheld a sanctions award entered against a family law attorney who attempted to defend an order of the state court that violated the stay. The facts of *Sternberg v Johnston*, 595 F.3d 937 (9th Cir. 2010), illustrate what can occur when a non-debtor attempts to collect from a debtor. In *Sternberg*, an order to show cause for contempt was pending when a Chapter 11 proceeding was filed by the debtor. At the contempt hearing, debtor advised the court and opposing counsel that he had filed bankruptcy. The parties discussed what should happen next and the state court

heard evidence with the intent of reducing an arrears order to a sum certain. Had the court limited its order to an establishment of arrears, no harm would have been done and no violation of the stay would have occurred. However, in its ruling, the court entered a purge order. It did not limit the purge order to non-estate property. When debtor brought a special action to overturn the purge order, counsel attempted to defend the purge payment. It was that defense of the purge order that led to sanctions being filed against counsel. The Ninth Circuit ruled that counsel had an

“affirmative duty” to conform his conduct to the automatic stay once Johnston filed for bankruptcy. . . . We do not fault Sternberg for anything he did at the May 17 state court hearing, because the news of Johnston’s bankruptcy filing came as a surprise to him. The state court’s July 13 order also surprised him, and Sternberg cannot be held responsible for the order. Within a reasonable time after that, however, the law required Sternberg to take corrective action. He did not, and he affirmatively opposed Johnston’s efforts to obtain relief from the state appellate court.

Id. at 944.

There is very little upside to taking a chance or assuming that the stay does not apply. It is not a complicated proceeding to seek relief from stay, and the short delay and limited fees incurred as a result of seeking such an order are minimal to the risk of being wrong.

IV. WHAT IS A DSO AND WHY IS IT IMPORTANT?

A DSO is a domestic support obligation. It is defined in 11 U.S.C. §101(14A), which provides as follows:

(14A) The term “domestic support obligation” means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is –

(A) owed to or recoverable by—

(i) a spouse, former spouse, or child of the debtor or such child’s parent, legal guardian, or responsible relative; or

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- (ii) a governmental unit;
- (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
- (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—
 - (i) a separation agreement, divorce decree, or property settlement agreement;
 - (ii) an order of a court of record; or
 - (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
- (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

The classification of a debt as a DSO has significance to all parties in a bankruptcy proceeding, as its status will impact the dischargeability of the debt, the distribution of assets, and the confirmability of a Chapter 11 or Chapter 13 Plan of Reorganization.

11 U.S.C. section 523(a)(5) provides that a debt is not dischargeable if it is a domestic support obligation. A debt under (a)(5) is not dischargeable under any Chapter of the Bankruptcy Code. 11 U.S.C. §§ 1141 (d)(2), 1228 (a)(2), 1328 (a)(2). Any reorganization plan under Chapter 11, 12 or 13 must provide for full payment of any arrears in a DSO (unless otherwise agreed upon by the creditor) and all post-petition DSO payments must be current prior to confirmation of the Plan. The failure to pay post-petition DSO obligations is cause for conversion or dismissal. 11 U.S.C. §§ 1112 (b)(4)(P), 1208 (b)(10) and 1307 (c)(11).

In addition to being nondischargeable, a DSO is also a debt that is granted first priority status under 11 U.S.C. section 507(a)(1). This means that any assets that are recoverable by the Chapter 7 Trustee need to be paid first to the DSO obligation and ahead of all other expenses, including the administrative expense claim of the trustee (except for those expenses incurred by the trustee in administering the assets that are paid out as a DSO). In reorganization, all DSO claims must be paid in full, unless otherwise agreed upon by the holder to the DSO claim.

The Bankruptcy Code further provides that a debtor's exemption claims do not apply to a DSO. 11 U.S.C. § 522(c)(1). Can a Chapter 7 Trustee collect exempt assets from the debtor to satisfy a DSO obligation? The language of section 507 (a)(1)(C), which permits the trustee to be paid for expenses and fees incurred in collecting a DSO for a creditor, would seem to imply as much. In addition, using exempt property to pay a DSO would seem to result in additional distributions being available for other claims because the DSO would be reduced by whatever exempt property is available to pay it, leaving other, nonexempt estate assets available for other creditors. The case law, however, is not clear. While recognizing that exempt property is not protected against either a tax claim or a DSO, case law does not support the conclusion that a Chapter 7 Trustee can collect exempt assets to pay those claims. *See In re Bozeman*, 376 B.R. 813 (Bankr. W.D. Ky. 2007); *In re Ruppel*, 368 B.R. 42 (Bankr. D. Or. 2007); *In re Quezada*, 368 B.R. 44 (Bankr. S.D. Fla. 2007).

The court in *Quezada* noted that a Chapter 7 Trustee can only sell property of the estate. Exempt property ceases to be property of the estate once properly exempted:

The Trustee's § 522(c)(1) and § 507(a)(1)(C) argument is colorable but not convincing. Congress did use the term "assets otherwise available" for payment of DSO claims in § 507(a)(1)(C) and the Home is an asset liable for and hence "available" for payment of DSO claims under § 522(c)(1). Still, this choice of words in § 507(a)(1)(C) is not express authority for a trustee to administer exempt property. Besides the fact that Congress could have, but did not amend § 704(a),

section 507, which sets forth the priority of distributions, has to be read in conjunction with the distribution provisions in § 726 which implement the § 507 priorities. Section 726, titled “Distribution of property of the estate,” provides in relevant part,

(a) Except as provided in § 510 of this title, property of the estate shall be distributed—

(1) first, in payment of claims of the kind specified in, and in the order specified in, §507 of this title

(Emphasis added.)

As the foregoing analysis shows, § 507(a)(1)(C) cannot be read as a grant of authority for a trustee to liquidate exempt assets when § 507 itself simply provides the priorities for distribution of property of the estate.

368 B.R. at 48-49.

Can the DSO recipient ask the Bankruptcy Court to order the surrender of exempt property to satisfy the claim without going through the trustee? Can the creditor simply go to state court to collect the DSO from exempt assets? In *In re MacGibbon*, 383 B.R. 749 (Bankr. W.D. Wa. 2008), the court found that there was no violation of the automatic stay when a DSO recipient pursued collection efforts in the state court from the debtor’s exempt (non-estate property) pension plan. It would seem that the DSO recipient could also seek turnover of that property in the Bankruptcy Court as well. See *In re Galtieri*, 172 Fed. Appx. 397, 2006 WL 358546 (3d Cir.); *In re Crum*, 414 B.R. 103 (Bankr. N.D. Tex. 2009).

The determination of what is and what is not a DSO can be made by either the Bankruptcy Court or the state court. See *Jordan v Jordan*, 166 Ariz. 408, 803 P.2d 129 (App. 1990); *In re Lombardo*, 224 B.R. 774 (Bankr. S.D. Ca. 1998); *In re Siragusa*, 27 F.3d 406 (9th Cir. 1994). The Bankruptcy Court will apply a federal standard, not necessarily a state standard, to determine what is and what is not a DSO. See *In re Pierce*, 95 B.R. 154 (Bankr. N.D. Ca. 1988)(holding that a provision in a property settlement agreement to pay for college education

for adult children was a “child support” obligation even if state law would not recognize it as such).

A determination that a debt is a DSO pursuant to section 101(14A) will give the holder of the DSO preferred treatment as a priority creditor under 507(a)(1)(A). A practitioner should be sure that there are findings of fact and conclusions of law in the decree (or ask the judge to make them and help the judge by providing proposed findings of fact and conclusions of law) that address the relative financial status of the parties in detail -- including relative income and assets available to each of them. This is important in identifying the direct support needs of the client such as child support, payment of medical expenses for the children or former spouse, car insurance, school tuition, psychologists, etc.

It is also important in several other circumstances, such as an award of attorneys’ fees. Those obtaining post-petition awards or modifications from a debtor, former spouse (or soon to be former spouse) will want to ask the family court for a finding that such fees and costs awarded by the court are in the nature of support. That is, the award is not intended to punish the debtor spouse, but is part of the support obligation itself. Such findings will encourage treatment of the fees as part of a DSO. Findings of this nature are also important when the court is considering whether a party has taken an unreasonable position or has obstructed the proceedings so that the entire amount of an award is considered part of a DSO in the event the debtor spouse files for Chapter 13, in which a non-DSO debt under (a)(15) is dischargeable.

Another planning technique to protect nonexempt property is to award the nondebtor spouse the nonexempt property. However, such activity is not without risk, and the parties and their counsel need to be cognizant of the potential claims of fraudulent conveyance if the parties

simply conspire to transfer nonexempt property to one spouse in anticipation of a bankruptcy filing by the other spouse.

For the family law practitioner, understanding the value of a perfected lien is also significant, as it will impact how a non-debtor spouse is treated if the former spouse files for relief under the Bankruptcy Code. A creditor cannot be treated as a secured creditor unless there is a lien perfected in accordance with applicable state law. For example, recording a judgment with the county recorder simply creates a judgment lien against real property owned by the debtor in the county in which the lien is recorded. In non-DSO situations, the judgment lien is secured to the extent it does not impair the homestead exemption and there is excess equity in the real property to pay the lien in whole or in part.

Judgment liens in a divorce are created by recording the judgment and decree of dissolution in the county where the debtor owns real property. Do not underestimate the value of recording the judgment and decree. Recording a judgment with the county recorder creates a judgment lien against real property owned by the debtor in the county in which the lien is recorded. Once the lien has been recorded, the underlying debt is considered secured to the extent of non-exempt equity and will be treated as such in any bankruptcy proceeding. While it may be subject to attack as a preference (depending upon when the lien was recorded and attached), it is almost always preferable to be a secured creditor in a bankruptcy instead of an unsecured creditor.

A judgment lien may be set aside pursuant to 11 U.S.C. section 522 (f)(1) if it impairs the homestead exemption of a debtor. An exception is carved out in section 522(f)(1)(A) for “a judicial lien of a kind that is specified in section 523(a)(5).” This would include child support, spousal maintenance, unreimbursed medical expenses, and some attorney’s fees awards. While a

judgment lien may be set aside in the bankruptcy, if the underlying debt is a debt described in 11 U.S.C. section 523(a)(5), such as a DSO lien, the lien cannot be set aside. 11 U.S.C. § 522(f)(1)(A); *see also Hamel v. Hamel*, 2009 WL 888648 (Ariz. App. 2009); A.R.S § 33-1103(A)(3)(a).

It is important for the family law practitioner to understand the difference between the underlying debt and the security interest. In a situation where the debt would be characterized as a debt pursuant to section 523(a)(15), in a Chapter 7 or 11, the debt will not be discharged -- even if the lien is set aside pursuant to 11 U.S.C. sections 522 or 506. The important concept for non-bankruptcy practitioners to bear in mind is that avoiding the lien does not discharge the debt. It merely results in the debt being treated as an unsecured claim in the bankruptcy proceeding in the distribution of assets of the estate. If the debt is not subject to discharge, the remaining balance will remain due after the estate is terminated and the non-debtor spouse will still be entitled to collect the balance due. The lien is simply a security instrument.

To obtain preferred treatment of a client's claim as a secured creditor, as opposed to an unsecured creditor, it is imperative that the creditor hold a perfected lien. If a lien is not validly perfected, then it will not be treated as a secured claim. This may well put the creditor in the position of holding a nondischargable debt, albeit one where there is insufficient estate property to permit a full recovery.