

Consumer Update 2014

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U.S. Bankruptcy Court (N.D. Ga.); Atlanta

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Consumer Law Update

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CONSUMER LAW UPDATE

**Cases reported from July 1, 2013 through
September 30, 2013**

Prepared for Federal Judicial Center

8 William Houston Brown

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Automatic Stay

Unpaid supplier did not violate stay by criminal referral. The unpaid supplier's principals did not violate the stay when they contacted the county prosecutor concerning debtor's potential violation of state's lien fraud statute; those parties did not demand restitution and there was no evidence that the potential remedy of restitution in criminal prosecution was a use of criminal prosecution to collect prepetition debt. *Legendary Stone Arts, LLC v. Maness (In re Maness)*, ___ B.R. ___, 2013 WL 4566019 (BAP 8th Cir. Aug. 29, 2013).

Lack of equity and adequate protection cause for stay relief. The district court reviewed grounds for stay relief based on the Chapter 13 debtor's failure to provide the home lender adequate protection and lack of equity in the property, citing factors of *In re Robbins*, 964 F.2d 345 (4th Cir. 1992). The creditor had not received payment for 17 months prepetition and only one payment after the petition was filed, and the debtor did not have insurance on the property. "Insufficient equity [is] inextricably linked to a lack of adequate protection." *McCullough v. Horne (In re McCullough)*, ___ B.R. ___, 2013 WL 3466957 (W.D. N.C. July 10, 2013).

Confirmed plan prevents stay relief based on preconfirmation grounds. The effect of confirmation of the Chapter 13 plan bound the creditor and prevented stay relief based solely on grounds existing prior to confirmation. However, the debtor may be in violation of the confirmed plan's terms by, for example, failing to make required payments, giving rise to a new, postconfirmation basis for stay relief. *In re Morrow*, ___ B.R. ___, 2013 WL 3270762 (Bankr. N.D. Ill. June 27, 2013).

Car lender cannot rely on "ride-through." A vehicle lender willfully violated the stay by mailing demand letter for payment to Chapter 7 debtor who had indicated intention to surrender. The lender takes a risk in relying on § 521(a)(6) as a "ride-through" option; "if the debtor fails to act on his statement of intention within the 45-day period after the first meeting of creditors, the stay is terminated with respect to the personal property," but the creditor's letter went too far in repeatedly advising the debtor of the amount due on the car loan and of the last day to make payment. Actual, punitive and attorney fee damages were awarded. *In re Law*, ___ B.R. ___, 2013 WL 4602858 (Bankr. N.D. Tex. Aug. 29, 2013).

Avoidance Actions

Chapter 7 trustee was not estopped by prior turnover loss. Determination in prior turnover action that debtor had transferred ownership of assets to his wife did not prevent the trustee's current proceeding to avoid transfer as fraudulent. Although the positions were inconsistent, the issues were not identical. *Carroll v. Prosser (In re Prosser)*, ___ Fed.Appx. ___, 2013 WL 3943548 (3d Cir. Aug. 1, 2013). Compare

Hope v. Acorn Financial, Inc., ___ F.3d ___, 2013 WL 5366291 (11th Cir. Sept. 26, 2013) (Chapter 13 trustee was precluded by effect of confirmation from pursuing preferential perfection of security interest in vehicle, when the trustee knew of alleged defect prior to confirmation, and confirmed plan treated the creditor as secured. Confirmation bound the trustee.).

Lien avoidance opportunity ended when redemption period ceased on pawned vehicle. When the Chapter 7 debtor did not redeem a pawned vehicle within the time allowed under Georgia law, as extended by § 108, title to the vehicle vested in Titlemax, and § 522(f) was not available to avoid the lien, assuming that the pawn transaction in fact created a lien rather than transferring title. *In re Chastagner*, ___ B.R. ___, 2013 WL 4048197 (Bankr. S.D. Ga. Aug. 8, 2013).

Property of Estate

Marital settlement agreement did not remove annuity from estate. Prior to filing Chapter 7, the debtor and wife entered into a marital settlement agreement, under which the debtor agreed to pay his wife \$200 per month “in lieu” of her interest in an annuity that would pay him \$200 monthly for life. The wife relinquished her interest in the annuity, which became property of the estate, and the wife was left with an unsecured claim. The court did not directly address the nondischargeability of this claim in Chapter 7, since it appeared that all claims would be paid in full. *In re Peel*, 725 F.3d 696 (7th Cir. 2013).

Debtor had standing but judicial estoppel barred claim. Former Chapter 7 debtor had standing to bring slip and fall claim, because it was claimed as exempt and no one objected, even though the exemption was invalid under applicable Mississippi law, but the cause of action was scheduled as valueless and the debtor had knowledge that it had value during the bankruptcy proceedings. Although debtor did not conceal the fact that she had a cause of action, the scheduling of the claim as having no value was in bad faith, and the debtor had an ongoing duty to disclose the known value. Judicial estoppel barred her pursuit of the cause of action in federal court. *Bone v. Taco Bell of America, LLC*, ___ F.Supp.2d ___, 2013 WL 3848755 (W.D. Tenn. July 24, 2013).

Judicial estoppel barred Truth in Lending claim. The Chapter 7 debtor did not schedule a TILA claim, with judicial estoppel preventing the debtor from pursuing rescission. Also, a prior lawsuit was dismissed with prejudice, triggering res judicata. *Canterbury v. J.P. Morgan Acquisition Corp.*, ___ F.Supp.2d ___, 2013 WL 3899226 (W.D. Va. July 29, 2013).

Property of estate included attorney/debtor’s contingency interest in fees. Fact that Chapter 7 debtor’s interest in fees was contingent did not prevent that interest becoming property of the estate, and the debtor’s failure to disclose the potential bonus,

based on prepetition work for his law firm, led to a denial of discharge for false oath under § 727(a)(4). \$2.7 million bonus was paid by firm postpetition, but it was tied to prepetition work. *CIB Marine Capital, LLC v. Herman (In re Herman)*, 495 B.R. 555 (Bankr. S.D. Fla. 2013).

Postpetition settlement not property of estate. The Chapter 7 debtors received \$25,000 as a result of a settlement between the Federal Reserve Bank and Suntrust Bank, resulting from alleged foreclosure practices, but the debtors were not plaintiffs or parties to the underlying action. The settlement proceeds were the result of the Federal Reserve's enforcement action and were paid postpetition. The court found that the payment was not related to a prepetition cause of action held by the debtors, and the proceeds did not become property of the estate. *In re Vanwart*, ___ B.R. ___, 2013 WL 4547068 (Bankr. E.D. N.C. Aug. 27, 2013).

Exemptions

Opt out did not create new state-law exemption. The applicable Missouri exemption statutes did not permit exemption of unliquidated personal injury claims, and Missouri's opt out did not create an exemption separate from specific state exemption statutes; the court's prior decision, *In re Benn*, 491 F.3d 811 (8th Cir. 2007), was binding precedent. *Abdul-Rahim v. LaBarge (In re Abdul-Rahim)*, 720 F.3d 710 (8th Cir. 2013).

State exception to homestead did not prevent lien avoidance. Applying *Owen v. Owen*, 500 U.S. 305 (1991), the fact that Missouri's homestead exemption had an exception that the homestead was subject to attachment and levy of execution for causes of action existing at time of acquiring the homestead did not deprive the Chapter 13 debtor of using § 522(f) to avoid a judgment lien. The First Circuit was cited as the only court of appeals to directly address the issue, under Massachusetts' statutory exception to its homestead for liens attaching prior to acquisition, *In re Weinstein*, 164 F.3d 677 (1st Cir. 1999). Section 522(c) protects certain debts from the effect of exemption in bankruptcy, but that statute preempts state law, which cannot interfere with the use of § 522(f), citing other cases so holding. The opt out by Missouri does not change the conclusion. *J & M Securities, LLC v. Moore (In re Moore)*, 495 B.R. 1 (BAP 8th Cir. 2013).

Health Saving Account not exempt, unless under wildcard. The Chapter 7 debtor's health savings account (HSA) was not excluded from the bankruptcy estate under § 541(b)(7); the debtor had unrestricted access to the HSA's funds and the debtor did not prove that the HSA constituted a health insurance plan regulated by state law for purposes of § 541(b)(7). Moreover, the HSA was not exempt under §§ 522(d)(10)(C) or (D) as the right to receive a disability, illness or unemployment benefit or a payment on account of a personal bodily injury. The HSA funds could be used by the debtor for

purposes other than those found in these exemption statutes. *Leitch v. Christians (In re Leitch)*, 494 B.R. 918 (BAP 8th Cir. 2013).

Claim of exemption in specific amount did not trigger trustee's need to object. On schedule C, the Chapter 7 debtors claimed \$18,000 exemption in a prepetition personal injury and in Column's 1's description of the property, they stated estimate of value "\$1.00 - \$300,000.00, FULL MARKET VALUE (FMV) exempted." Applying *Schwab v. Reilly*, the court found that the debtor's Schedule C claimed an exempt amount within § 522(d)(5)'s applicable statutory limit and the reference in column 1 of Schedule C to "full market value" was "buried" and not repeated in column 3's exemption claim. Nothing in column 3 indicated anything other than \$18,000 exemption claimed; any ambiguity is construed against the debtors. The trustee's lack of objection did not prevent the trustee's recovery of the personal injury claim. *Williams v. Biesiada*, ___ B.R. ___, 2013 WL 4516667 (S.D. Tex. Aug. 23, 2013).

Inherited IRA could be exempt under Bankruptcy Code, but not under California law. In order for an IRA to be exempt, it must have received favorable determination under, or be in substantial compliance with, Internal Revenue Code. Discussing the split of authority on exemption of an inherited IRA, the court found the Seventh Circuit's "restrictive approach," in *In re Clark*, 714 F.3d 559 (7th Cir. 2013), to not be based on plain statutory language in § 522(b)(3)(C), and the court agreed with the majority view that the plain language contained no restriction of the exemption to the original owner. Assuming the funds were proven to be tax exempt, the IRA could be exempt under § 522(b)(3)(C), but an inherited IRA was not exempt under § 522(d)(12), since it was not a "similar plan or contract on account of illness, disability, death, age, or length of service" under California Code of Civil Procedure § 703.140(b)(10)(E). *Diamond v. Trawick (In re Trawick)*, ___ B.R. ___, 2013 WL 4574533 (Bankr. C.D. Cal. Aug. 29, 2013).

Debt Relief Agencies

Attorney violated prohibition against advising assisted person to make untrue statement. Even though the untrue or misleading statement was not included in a document filed with the court, § 526(a)(2) prohibits the counseling or advising of an assisted person to make a statement in a document that is untrue or misleading. The attorney advised the client to conceal a recent payment to her mother, a payment that would have been a preference. Although the documents filed with the court did not contain the false information, the court concluded that the statute "forbids counseling or advising untrue or misleading statements, even when the document in question is thereafter filed without adopting the proposal." A document filing is required under the statute, but "the misconduct is complete when it occurs." *Gargula v. Bisges (In re Clink)*, ___ B.R. ___, 2013 WL 4095212 (W.D. Mo. Aug. 13, 2013).

Chapter 7 Issues

Discharge Issues

Grant of additional time to file § 523(a)(2) complaint reversed. When creditors moved under Rule 4004(b) for additional time to file a complaint objecting to the debtor's discharge, or to dismiss the case under § 707(b)(3), the bankruptcy court granted additional time to file a complaint excepting a particular debt from discharge under § 523(a)(2)(A). The Ninth Circuit reversed, holding that the bankruptcy court could not use equitable power to extend the time under Rule 4007(c) when no timely motion was made under that Rule. The opinion stresses the difference between objections to discharge and dischargeability complaints falling under § 523(c) and Rule 4007. The creditors' motion did not reference § 523 or provide notice to the debtor that they intended to seek nondischargeability of a particular debt. By the time of hearing on the creditors' motion, the time to file a § 523(a)(2) complaint had expired. *Willms v. Sanderson*, 723 F.3d 1094 (9th Cir. 2013).

Debtor denied deferral of entry of discharge order. In a Chapter 7 case that had been open five years, the bankruptcy court did not abuse discretion in denying the debtor's motion for an additional deferral of entry of the discharge order. The debtor had moved 28 times for deferral to permit her to finalize a reaffirmation agreement, and prior extensions had been granted. Rule 4004(c)(2) is not a means to delay entry of discharge indefinitely. *In re Petrone*, ___ B.R. ___, 2013 WL 4854619 (BAP 1st Cir. Sept. 11, 2013).

Directing another person to provide financial information to lender. The debtor, a real estate developer, directed a third party to provide financial statements to the debtor's lender, without ever asking to see those statements, which were false, and this action was sufficient to "cause [the statements] to be made or published with intent to deceive" for purposes of § 523(a)(2)(B). Under the totality of circumstances, the court did not buy the debtor's argument that the third party acted on his own. *Toye v. O'Donnell (In re O'Donnell)*, ___ F.3d ___, 2013 WL 4504825 (1st Cir. Aug. 26, 2013).

Schedules did not provide notice to creditor and attorney's knowledge not imputed to former client. The Chapter 7 debtor's schedules did not list a creditor nor its prior arbitration award, and the actual creditor did not receive sufficient notice of the bankruptcy, permitting it to file a § 523(a)(3) complaint based on the debt being excepted from discharge under § 523(a)(6). An attorney who had, but no longer, represented this creditor three years before the bankruptcy received knowledge of the

bankruptcy on behalf of a different client, but that attorney's knowledge could not be imputed to the prior client. *Perle v. Fiero (In re Perle)*, 725 F.3d 1023 (9th Cir. 2013).

Disciplinary Board's costs and expenses are not dischargeable under § 523(a)(7). Although the Pennsylvania Rule of Disciplinary Enforcement did not specify that the Disciplinary Board's costs and expenses related to attorney disciplinary proceeding were punitive, they were viewed as fines or penalties for purposes of § 523(a)(7), but nondischargeability alone does not supply cause for stay relief requested by the Board; remand was required to determine under totality of circumstances whether the Board was entitled to stay relief. *The Disciplinary Board of the Supreme Court of Pennsylvania v. Feingold (In re Feingold)*, ___ F.3d ___, 2013 WL 5194272 (11th Cir. Sept. 17, 2013).

Undue hardship finding required for each of 15 separate student loans. Under the totality-of-circumstances test adopted by the Eighth Circuit, the debtor's monthly income fluctuated seasonally, and she did not have reasonably reliable future income to pay the entire \$118,000 student loan debt, but the bankruptcy court must determine undue hardship on a loan-by-loan basis. *Conway v. Nat'l Collegiate Trust (In re Conway)*, 495 B.R. 416 (BAP 8th Cir. 2013).

Revocation of Discharge.

Bankruptcy court did not abuse discretion in default revocation of discharge. When the Chapter 7 debtor was properly served with the trustee's complaint to revoke discharge and the motion for default, the debtor did not respond, and the bankruptcy court entered default judgment, with the complaint stating that the debtor had failed to turn over property of the estate and abide by court orders. On appeal, the debtor argued grounds to vacate the default judgment, but she had not asked the bankruptcy court to set aside the default, and the Bankruptcy Appellate Panel was limited to determining that the bankruptcy court did not abuse its discretion by default entry. *Rajala v. Taylor (In re Taylor)*, 495 B.R. 28 (BAP 10th Cir. 2013).

Lien Stripping

Chapter 7 debtors could not strip off second mortgage lien. In a no-asset Chapter 7 case, the junior lienholder did not file a proof of claim and the debtors were unable to strip off the lien, applying *Dewsnup v. Timm*, 502 U.S. 410 (1992). The debtors' argument that lien stripping is available in Chapter 13 carried no weight, since if they wanted that relief they should have filed under that Chapter. *Palomar v. First American Bank*, 722 F.3d 992 (7th Cir. 2013).

Case Closing/Reopening

Reopening closed case to administer undisclosed asset not abuse of discretion.

The Chapter 7 debtors did not disclose a cause of action that was settled after the case was closed, and the bankruptcy court properly reopened the case to allow administration of the funds resulting from settlement. The cause of action belonged to an LLC, of which one debtor was the sole member, and remand was required to determine how much of the settlement belonged to the bankruptcy estate. *In re Underhill*, ___ B.R. ___, 2013 WL 5042056 (BAP 6th Cir. Sept. 6, 2013).

Denying motion to vacate closing of no-asset case without hearing affirmed.

The Chapter 7 debtor was not denied due process rights when the bankruptcy court denied a motion, without holding a hearing, to vacate the order closing an 8-year old, no-asset case. The debtor had filed a brief with the motion to vacate and the court was very familiar with the case, carefully considering and ruling on the motion. The closing took place three years after the trustee had fully administered the case, and the debtor had not objected to the trustee's final report. *Cook v. Wells Fargo Bank, N.A. (In re Cook)*, 2013 WL 4067978 (BAP 10th Cir. Aug. 13, 2013), slip opinion.

Dismissal and Conversion

Same-sex domestic partner's net monthly income not included in means test, but case dismissed under totality of circumstances.

The United States Trustee did not carry burden of showing that net monthly income of same-sex domestic partner was included in debtor's income as amount paid on regular basis toward household expenses of debtor under § 101(10A)(B); therefore, no presumption of abuse existed under § 707(b)(2). The debtor and roommate had no legal relationship and had no intention to form a civil union; also, Pennsylvania had not yet recognized civil unions or same-sex marriages. However, under § 707(b)(3)'s totality of circumstances, the case was dismissed: the debtor had made purchases far in excess of ability to repay on the eve of bankruptcy filing; the debtor's budget was excessive for entertainment (\$6,000 per year); expenses could be reduced; and the debtor had a stable source of future income that would support a Chapter 13 plan. *United States Trustee v. Holmes (In re Holmes)*, ___ B.R. ___, 2013 WL 4446947 (Bankr. M.D. Pa. Aug. 21, 2013).

Totality of circumstances for dismissal included that one debtor was receiving Social Security benefits.

Under § 707(b)(3), the court could consider as part of the totality of circumstances that the husband/debtor was receiving Social Security benefits, even though this income was excluded from § 707(b)(2)'s presumption of abuse analysis, which relies on current monthly income as defined by § 101(10A). The Chapter 7 filing was not the result of "sudden calamity" but rather the debtors' inability to control spending, and the case was dismissed, with the debtors having opportunity to convert to Chapter 13. In Chapter 13, although Social Security benefits are excluded from projected disposable income, the debtors could voluntarily contribute that income

to the plan, citing *Mort Ranta v. Gorman*, 721 F.3d 2013 (4th Cir. 2013). *In re Riggs*, 495 B.R. 704 (Bankr. W.D. Va. 2013).

Converted case could be dismissed for abuse. Although the case was originally filed as Chapter 13, § 707(b) applied when case was converted to Chapter 7, with the court discussing the split of authority. “Adopting an interpretation of section 707(b) that allows certain debtors to evade the means test would be antithetical to the purposes of BAPCPA.” The U.S. Trustee was permitted to pursue a motion to dismiss under both § 707(a) for bad faith and § 707(b) for abuse. *In re Reece*, ___ B.R. ___, 2013 WL 4498994 (Bankr. W.D. Va. Aug. 20, 2013).

Chapter 7 trustee had standing to seek Chapter 13 administrative claim for pre-conversion work. Under §§ 1322(a)(2), 507(a)(1)(C), 503(b), and 330(a), the Chapter 7 trustee had standing to move for administrative expenses, including the trustee’s attorney fees, for work performed in the Chapter 7 before conversion to Chapter 13. The work performed by the trustee and attorney was necessary and the requested fees were reasonable. *In re Spence*, ___ B.R. ___, 2013 WL 4853310 (Bankr. D. Colo. July 31, 2013).

Chapter 13 Issues

Eligibility

Unsecured junior liens made debtors ineligible. Applying *In re Scovis*, 249 F.3d 975 (9th Cir. 2001), and looking to the debtors’ schedules, the Ninth Circuit held that three junior liens that were unsecured because of property value were included within the unsecured debt for eligibility, and the fact that the liens were voluntarily granted did not distinguish the case from *Scovis*. *Santos v. Dockery (in re Santos)*, ___ Fed.Appx. ___, 2013 WL 51877213 (9th Cir. Sept. 17, 2013).

Disposable Income

Nondischargeable student loan was not “special circumstance” for means test, but separate classification not unfair discrimination. Discussing the split of authority, the court concluded that solely because a student loan debt was nondischargeable does not make it a “special circumstance” for purposes of the means test deduction. Moreover, § 1322(b)(5)’s cure and maintain provision does not permit the debtor to pay a long-term student loan debt directly if it would unfairly discriminate against other unsecured creditors (again citing a split of authority); however, applying the traditional factors of unfair discrimination, the court determined that §§ 1322(b)(1), (b)(5) and (b)(10) were not irreconcilable, concluding that § 1322(b)(5) “deals specifically with curing and maintaining long term debts. Section 1322(b)(5) was not amended or restricted in 2005 when Congress adopted § 1322(b)(10). While §

1322(b)(5) allows interest on secured and unsecured long debt, § 1322(b)(10) restricts interest payments on non-dischargeable unsecured debts that are not eligible for cure and maintenance under § 1322(b)(5), such as debts that are non-dischargeable due to a debtor's fraud." Section 1322(b)(10) was found not to apply to long term debt such as student loans. "Arguably, the courts holding that § 1322(b)(10) prevents debtors from using (b)(5) to cure and maintain student loan payments effectively strike out the language 'unsecured claim. . .on which the last payment is due after the date on which the final payment under the plan is due' from § 1322(b)(5)." The court found that this debtor's plan that would pay postpetition interest on the student loan did not unfairly discriminate, even though other unsecured creditors would receive 1% compared to 16% if all unsecured creditors were treated without the separate classification. *In re Brown*, ___ B.R. ___, 2013 WL 4806392 (Bankr. S.D. Ga. Sept. 6, 2013).

Child support received by debtor excluded from projected disposable income.

The trustee objected to the debtor's exclusion from projected disposable income of \$200 monthly support for each of two children, arguing that expenses for the children are included in the standard expense deductions under the means test. The court concluded that § 1325(b)(2)'s parenthetical exclusion of "child support payments. . .to the extent reasonably necessary to be expended for such child" was a congressional exclusion from the income side of the calculation, and that applicable state law, as applied by the state court in fixing the amount of child support, had determined the "reasonably necessary" inquiry. While there may be a few cases in which the child support received by a debtor was not reasonably necessary, that test is a "hedge against the risk of abuse," but the receipt of \$200 per child is a "far cry" from abuse. *In re Brooks*, ___ B.R. ___, 2013 WL 4854140 (Bankr. C.D. Ill. Sept. 11, 2013).

Retirement plan contributions at filing are not included in projected disposable income.

One above-median income debtor deducted on Form 22C \$541.67 monthly voluntary contribution to an employer-sponsored retirement plan under IRC § 457, and the initial contribution began three months before filing Chapter 13. Discussing the three views of § 541(b)(7), the court adopted the view that "if debtors are making voluntary retirement contributions on the date of the petition, they are permitted to continue them during the life of the plan." However, the court must still weigh whether the plan is proposed in good faith; this one was, since the debtors offered valid reasons for beginning the contributions. The court was persuaded that the debtors did not begin those contributions shortly before bankruptcy filing with a motive to reduce the return to unsecured creditors. *In re Jensen*, 496 B.R. 615 (Bankr. D. Utah 2013).

Social Security income of non-filing spouse not included in projected disposable income.

Applying rationale of *Mort Ranta v. Gorman*, 721 F.3d 2013 (4th Cir. 2013), which excluded the debtor's Social Security income from the projected disposable income calculation, the non-filing spouse's Social Security income was also excluded.

Section 101(10A)'s definition excluded all Social Security benefits from current monthly income. Following from that conclusion, the debtor appropriately used the National Standards applicable to a household of two persons, rejecting the trustee's argument that the spouse should bear one half of the household expenses. The trustee's argument would undercut the *Mort Ranta* holding, forcing the spouse's Social Security income into the equation. *In re Dye*, 495 B.R. 699 (Bankr. E.D. Va. 2013). See also *In re Canniff*, ___ B.R. ___, 2013 WL 5310178 (Bankr. S.D. Ind. Sept. 19, 2013) (Good faith analysis cannot be used to overcome § 407 of the Social Security Act or § 101(10A)'s exclusion from current monthly income of Social Security benefits.).

Debtors may not deduct from projected disposable income secured payments on second mortgage to be stripped. Although the means test deduction for contractually due secured payments is mechanical, debtors must also consider postpetition changes that are known or virtually certain. Since the debtors were proposing to strip a wholly unsecured junior mortgage, they may not deduct from projected disposable income the contractually scheduled payments on that mortgage. *In re Kramer*, 495 B.R. 121 (Bankr. D. Mass. 2013).

Applicable Commitment Period

Applicable commitment period applies to debtors with no projected disposable income. The Ninth Circuit, en banc, overruled one aspect of *Maney v. Kagenveama* (*In re Kagenveama*), 541 F.3d 868 (9th Cir. 2008), holding that § 1325(b)(1)(B) requires for confirmation that the length of the plan must be at least equal to § 1325(b)(4)'s applicable commitment period. Even when the debtor has no projected disposable income, the applicable commitment period is a temporal term, not a monetary requirement, for confirmation. *Danielson v. Flores* (*In re Flores*), ___ F.3d ___, 2013 WL 4566428 (9th Cir. Aug. 29, 2013). See also *In re Niday*, ___ B.R. ___, 2013 WL 4525207 (Bankr. W.D. Va. Aug. 27, 2013) (Applicable commitment period is temporal requirement for below-median income debtors, who do not have unqualified right to pay off the plan early; rather, they must seek modification of the confirmed plan.).

Five-year plan in good faith, even though debtors had ability to pay in shorter time. Above-median income debtors proposed five year plans, paying 100% to unsecured creditors, but the trustee objected to confirmation on the basis that the debtors had income sufficient to complete plans in less than three years. The court concluded that five year plans were all that was required under the Code's applicable commitment period and that calculating the repayment plan in accordance with the Code's requirement could not be bad faith. *In re Milano*, 495 B.R. 37 (Bankr. D. Colo. 2013).

Best Interests Test

Plan proposing to pay net preference recovery if trustee pursued it did not satisfy best interests test. A plan's distribution to unsecured creditors conditioned on the trustee's recovery of a preference was not confirmable, discussing authority that the plan must propose to pay the estimated liquidation value of the preference, without regard to whether the trustee pursues avoidance. The trustee may choose not to pursue it, but the debtors still have an obligation to pay present value of the estimated liquidation amount to satisfy § 1325(a)(4). *In re Engle*, 496 B.R. 456 (Bankr. S.D. Ohio 2013).

Lien Stripping and Modification

Section 506(d) applies in Chapter 13. Agreeing with *In re Woolsey*, 696 F.3d 1266 (10th Cir. 2012), the Seventh Circuit held that § 506(d) applies in Chapter 13, and *Dewsnup v. Timm*, 502 U.S. 410 (1992), did not distinguish between Chapter 7 and 13 cases, preventing the debtor from using § 506(d) as a means to void a partially secured IRS tax lien. The court noted that Chapter 13 provides alternative means of avoiding liens. *Ryan v. United States (In re Ryan)*, ___ F.3d ___, 2013 WL 3380131 (7th Cir. July 8, 2013). See also *Briseno v. Mutual Federal Savings and Loan Assoc. (In re Briseno)*, 496 B.R. 509 (Bankr. N.D. Ill. 2013) (When debtors did not object to claim of junior lienholder, the claim was allowed and § 506(d) did not provide basis to strip down the lien to value of the property; however, the lien on multi-use property was not protected from modification by § 1322(b)(2), provided that the plan was otherwise confirmable.).

Section 1322(b)(2) did not prevent interest modification on loans covered by § 1322(c)(2). Section 1322(c)(2) carves out exception to the antimodification protection; for mortgage loans with the last payment contractually due before the last plan payment, the interest rate may be modified, provided that § 1325(a)(5) is satisfied. *Witt v. United Companies Lending Corp. (In re Witt)*, 113 F.3d 508 (4th Cir. 1997), established that § 1322(c)(2) was not a means to bifurcate an undersecured claim into secured and unsecured components, but *Witt* does not prevent modification of interest rate or other terms of the short-term mortgages covered by § 1322(c)(2). *In re Hubbell*, ___ B.R. ___, 2013 WL 4511640 (Bankr. E.D. N.C. Aug. 23, 2013).

Effect of Confirmation

Plan did not clearly provide for discharge of unpaid tax debt. Discussing the typical plan that would not pay postpetition interest on unsecured claims, the Bankruptcy Appellate Panel distinguished § 507(a)(8)(C) priority "trust fund" tax claims, which are excepted from discharge under § 1328(a)(2). The debtor remains liable after discharge for any unpaid portion of those tax claims, including accrued postpetition interest. The plan did not provide for discharge of the § 507(a)(8)(C) tax claim,

although it provided for payment of the claim in full, as required by § 1322(a)(2). “In the absence of language clearly providing for a discharge of the priority tax claim. . . , the debtor failed to give the IRS the clear, open, and unambiguous notice of any intent to discharge such claim which the decision in *Espinosa* and due process requires.” The discharge injunction did not prevent IRS’s collection of the accrued interest. *United States of America v. Monahan (In re Monahan)*, ___ B.R. ___, 2013 WL 5289741 (BAP 1st Cir. Sept. 19, 2013). See also *American Family Mutual Ins. Co. v. Reichartz (In re Reichartz)*, ___ B.R. ___, 2013 WL 4502094 (E.D. Wis. Aug. 22, 2013) (Postpetition interest on § 523(a)(9) nondischargeable claim was not discharged; confirmed plan did not state that postpetition interest would be discharged, only that “interest, penalties and garnishment shall cease” at confirmation, and the discharge order did not address discharge of the interest.).

Taxing authority not bound because of failure to serve plan. Although the Tax Injunction Act, 28 U.S.C. § 1341, did not prevent bankruptcy court from determining whether collection of tax violated terms of confirmed Chapter 13 plan (citing conflicting authority on whether that Act is trumped by Bankruptcy Code), the plan was not served on the taxing authority or its assignee prior to confirmation, depriving them of opportunity to object. Also, the plan did not address the secured claim for property taxes, resulting in the lien passing through the case unaffected. *Thomas v. City of Philadelphia (In re Thomas)*, ___ B.R. ___, 2013 WL 4400428 (Bankr. E.D. Pa. Aug. 15, 2013).

Conversion and Dismissal

Debtor did not have absolute right to dismiss. After the largest unsecured creditor, the debtor’s ex-wife, moved to convert Chapter 13 case, the debtor did not have absolute right to voluntarily dismiss; there was evidence of bad faith, and the debtor’s only motive for filing case was to avoid state court orders in marital dissolution and contempt proceedings. Conversion to Chapter 7 was in the best interests of creditors. The court discussed the split of authority on whether the debtor has the absolute right to dismiss, distinguishing a case involving bad faith. *In re Mattick*, ___ B.R. ___, 2013 WL 3866497 (Bankr. W.D. N.C. July 25, 2013).

When case dismissed prior to confirmation, trustee must return payments to debtor. Section 1326(a)(2) controls the disposition of funds held by the trustee prior to confirmation. No fees had been approved prior to the dismissal, and administrative expenses for the debtors’ attorney had not been allowed. Discussing prior judicial authority, the court concluded that it could not compel the trustee to honor an assignment of those funds to the debtors’ attorney; however, the attorney was given opportunity to file a fee application. *In re Garris*, 496 B.R. 343 (Bankr. S.D. N.Y. 2013). See also *In re Acevedo*, ___ B.R. ___, 2013 WL 4048852 (Bankr. D. N.M. Aug. 7, 2013)

(Section 1326(a)(2) requires the trustee to return payments to the debtors on dismissal before confirmation, and that specific direction controls over 28 U.S.C. § 586(e)(2). The latter statute was construed to identify the source of the trustee's percentage fees, but the trustee was not to pay those fees until payments began to creditors. As a result, on dismissal prior to confirmation, the trustee could not hold out the trustee's percentage fee before returning funds to the debtor.).

Discharge

Personal liability for post-discharge deficiency claim was discharged. The confirmed plan provided that payments on the residential mortgage would be paid directly by the debtors to the credit union, but after plan completion and discharge, the debtors defaulted, resulting in foreclosure and a deficiency balance. Section 1322(b)(5) did not except this debt from discharge, since the plan did not provide for curing of prepetition arrears or default, and the plan did not modify any of the secured creditor's rights, including the right to recover a deficiency. The discharge included a discharge of the debtors' personal liability for the deficiency. *In re Rogers*, 494 B.R. 664 (Bankr. E.D. N.C. 2013).

Attorney Issues

Debtors' attorney sanctioned and appearance attorneys not favored. In a case converted from Chapter 13 to 7, the trustee sought disgorgement of fees and sanctions, and the court found that the debtor's attorney acted improperly, violating Rule 2016 disclosures and § 504, by employing appearance attorney to represent debtors at meeting of creditors without disclosing the sharing of fees. Section 504(a) is construed narrowly, permitting fee-sharing only between attorneys in the same law firm, and that did not permit fee-sharing with appearance attorney, even though regularly employed for that purpose. Debtors' attorney also improperly instructed legal assistant to electronically file documents without obtaining debtors' signature or authorization. Monetary sanctions were entered against firm and name partners. *In re Bradley*, ___ B.R. ___, 2013 WL 3753559 (Bankr. S.D. Tex. July 16, 2013). *Compare In re Ortiz*, ___ B.R. ___, 2013 WL 4478900 (Bankr. S.D. N.Y. Aug. 20, 2013) (It is not per se inappropriate to have appearance counsel, but that attorney must file separate Rule 2016 and § 329(a) disclosure of compensation. Debtor's attorney is expected to provide assistance to debtor throughout normal, fundamental aspects of case, and attorney may not exclude from services more than one § 341 appearance as a part of flat fee in Chapter 7 case.).

Claims

State's claim for overpayment of child support was DSO. The father of the debtor's children had been ordered to pay child support, with income withholding from his pay, but after the father died someone used his Social Security number so that the payroll withholding continued for some time. The Nebraska Department of Health & Human Services also continued to pay the debtor even though one child had been placed in foster care. The overpayment obligation to the Department met the requirements of § 101(14A) for a domestic support obligation owing to a governmental unit. *Hernandez v. Nebraska Department of Health & Human Services (In re Hernandez)*, ____ B.R. ____, 2013 WL 4029207 (BAP 8th Cir. Aug. 8, 2013).

DSO claims not required to be paid directly to ex-wife. The parties' marital settlement agreement provided that the husband would pay a mortgage obligation on the marital residence, and the definition of domestic support obligation does not require that the obligation be paid directly to the former spouse; rather, the obligation may be a DSO if the former spouse has a legal right to recover from the debtor. The debtor's obligation to pay the mortgage was in the nature of support, notwithstanding label used in the marital settlement agreement. The opinion reviews the pre- and post-BAPCA case authority on marital obligations that fall within § 523(a)(5) and § 507(a) priority. *In re Bub*, 494 B.R. 786 (Bankr. E.D. N.Y. 2013). *Compare In re Gaetaniello*, 496 B.R. 238 (Bankr. M.D. Fla. 2013) (Obligation to pay portion of proceeds from sale of former marital home was not intended to be in nature of support or alimony and was property settlement, dischargeable in Chapter 13; obligation did not become DSO merely because debtor consented to QDRO on retirement funds to effectuate payment.).

Untimely claim to be paid in Chapter 7. Although the court could not extend the bar date to file a proof of claim, except to the extent permitted by Rules 3002(c) and 9006(b)(3), under § 726(a)(2)(C) a tardily filed proof of claim may receive a distribution if the creditor did not have notice or actual knowledge of the case in time to file a timely claim. The tardy claim must be filed in time to permit payment. Laches did not apply to prevent this creditor from receiving a distribution. *In re Jemal*, ____ B.R. ____, 2013 WL 4804420 (Bankr. E.D. N.Y. Sept. 10, 2013).

CONSUMER LAW UPDATE

**Cases reported from October 1, 2013 through
December 31, 2013**

Prepared for Federal Judicial Center

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Jurisdiction and Authority of Bankruptcy Court

Bankruptcy court had constitutional authority to determine fees but lacked authority to enter final judgment on debtor's counterclaim under Deceptive Trade Practices Act. In ruling on fees for attorneys representing the Chapter 13 debtor (the attorneys recovered on a suit for the debtor in sufficient amount to pay all claims in full but the debtor objected to their fee applications), the bankruptcy court necessarily determined the debtor's counterclaim for malpractice, and the bankruptcy court had constitutional authority to make factual determinations under the debtor's Deceptive Trade Practices Act counterclaim, as a necessary part of adjudicating the fee applications; however, the court lacked authority to enter a final judgment on the DTPA claim. That part of the district court's affirmance was reversed and remanded, but the Circuit Court noted that the district court may have authority to enter final judgment on the DTPA claim. *Frazin v. Haynes & Boone, L.L.P. (In re Frazin)*, 732 F.3d 313 (5th Cir. 2013).

Automatic Stay

Extension of automatic stay not abuse of discretion. Under § 362(e)(2), the automatic stay in an individual's case terminates 60 days after the stay relief request is made, unless the court extends the time for good cause, but this statute does not require a preliminary hearing for extension, in contrast to § 362(e)(1). The bankruptcy court had good cause to extend the stay to allow the Chapter 7 trustee to retain new counsel and prepare for a hearing. The extension was not an abuse of discretion. *Grant, Konvalinka & Harrison, P.C. v. Still (In re McKenzie)*, ___ F.3d ___, 2013 WL 6607062 (6th Cir. Dec. 17, 2013).

Debtor's defensive appellate rights are property of Chapter 7 estate, controlled by the trustee. In a matter of first impression in the Circuit and under Texas law, the Fifth Circuit held that the Chapter 7 debtor's right to appeal from adverse state court judgments was a right "valuable in nature, irrespective of whether the underlying judgment has any value to the debtor. While it is true that a judgment against the debtor is an obligation and has no value to the estate—and would therefore not be included in a list of property—the right to appeal that judgment certainly has a quantifiable *value* to the debtor, and therefore constitutes property under Texas law." As a result, the Chapter 7 trustee had exclusive decisional authority on whether to pursue the appeal or sell the defensive appellate rights. *Croft v. Lowry (Matter of Croft)*, 737 F.3d 372 (5th Cir. 2013).

Grant of stay relief proper in serial filing under § 362(d)(4). Serial filer originally filed Chapter 11, which was dismissed but reinstated and converted to Chapter 7, and the bankruptcy court granted stay relief to allow real estate creditor to complete prepetition foreclosure. Section 362(d)(4) does not require specific finding of the intent to defraud, only that the petition involved scheme to delay, hinder, "or" defraud creditors. The bankruptcy court's findings were supported by the records in prior dismissed bankruptcy cases, and the court was not required to allow the debtor to present additional evidence.

Behrens v. U.S. Bank Nat'l Assoc. (In re Behrens), ___ B.R. ___, 2013 WL 6169829 (BAP 8th Cir. Nov. 26, 2013).

No stay relief to pursue dischargeable claim. The creditor's prepetition state court actions for malpractice and negligence were dischargeable claims, and the creditor did not timely file a dischargeability complaint on fraud claim; therefore, there was no point in granting requested stay relief to pursue discharged debts. *Chae v. Bennett (In re Bennett)*, 501 B.R. 93 (BAP 8th Cir. 2013).

Debtor wife bound by in rem relief in husband's prior case. Applying § 362(d)(4), a properly recorded order granting in rem stay relief as to property in the husband's prior Chapter 13 case bound the wife in her subsequent Chapter 13 case. The spouses were serial filers, and § 362(d)(4) relief had prospective effect as to specific property. The wife's challenge to the adequacy of the factual findings in her husband's prior case amounted to collateral attack on a final order. *Alakozai v. Citizens Equity First Credit Union (In re Alakozai)*, 499 B.R. 698 (BAP 9th Cir. 2013).

Creditor entitled to reopen case to determine if tax sale void. A creditor harmed by a stay violation may seek relief, and the closed case was reopened on motion of a mortgage creditor alleging violation of the automatic stay when tax sale occurred. The property was still in the bankruptcy sale at the time of the sale, and the deed resulting from the sale was transferred before the case was closed. Notwithstanding a state court's prior approval of the sale, the bankruptcy court had exclusive jurisdiction over stay violations, and in the Second Circuit actions in violation of the stay are void. The *Rooker-Feldman* doctrine did not prevent the bankruptcy court's determination of a stay violation. *In re Killmer*, ___ B.R. ___, 2013 WL 6038838 (Bankr. S.D. N.Y. Nov. 15, 2013).

Avoidance Actions

Trustee may avoid entire charitable contribution, if it exceeds 15% of gross annual income. Under the Religious Liberty and Charitable Donation Protection Act's safe harbor of 15% of gross annual income (GAI), charitable contributions are protected from § 548 avoidance, but The Tenth Circuit found the language of § 548(a)(2) to be plain-- "[w]ithout language limiting the word 'transfer' to that portion of the transfer exceeding 15%, the entire transfer is avoidable." The statute was also not absurd; "The statute establishes a bright-line rule—donations not exceeding 15% of GAI are protected; donations exceeding 15% are not. . . .It is entirely reasonable for Congress to view the latter conduct as fraudulent and subject to avoidance, especially when made by an insolvent debtor within two years of filing for bankruptcy who receives less than a reasonably equivalent value in exchange for his donation." *Wadsworth v. The Word of Life Christian Center (In re McGough)*, ___ F.3d ___, 2013 WL 6570853 (10th Cir. Dec. 16, 2013).

Chapter 13 debtor lacked derivative standing. Without deciding if a Chapter 13 debtor ever had derivative standing in avoidance actions, the debtor lacked such standing to avoid a foreclosure sale in a case in which the trustee decided not to pursue the

avoidance based on lack of equity in the property for the benefit of creditors. *Weyandt v. Federal Home Loan Mortgage Corp. (In re Weyandt)*, ___ F.3d ___, 2013 WL 6052130 (3d Cir. Nov. 18, 2013).

Trustees had constructive record notice of mortgages. Chapter 7 trustees sued to avoid mortgages that failed to state maturity dates or interest rates, but under Illinois law, constructive notice may be by either record or inquiry notice. The mortgage form provided under the state's statute provided essential terms of the mortgage and was safe harbor, even though the mortgages at issue did not state maturity dates or interest rates. The trustees had constructive notice through the recorded mortgages, preventing avoidance. *In re Crane*, ___ F.3d ___, 2013 WL 6731850 (7th Cir. Dec. 23, 2013).

Trustee could defensively assert avoidance power after expiration of statutory time to file complaint. Notwithstanding § 546(a)'s two-year limitation for avoidance actions, the Chapter 7 trustee could assert avoidance powers as defense to creditor's stay relief motion, with the Sixth Circuit rejecting the minority view on this issue. *Grant, Konvalinka & Harrison, P.C. v. Still (In re McKenzie)*, ___ F.3d ___, 2013 WL 6607062 (6th Cir. Dec. 17, 2013).

Chapter 13 debtor had standing for avoidance of attorney's lien on homestead. Applying § 522(h), the debtor had standing to use § 545(2) to avoid an attorney's statutory lien against the homestead property. The attorney had represented the debtor in prebankruptcy divorce, and no objection had been filed to an exemption claim on the homestead under § 522(d)(1). Section 522(h) includes potential use of § 545, when the lien transfer was not voluntary and the trustee did not attempt avoidance. *McCarthy v. Brevik Law (In re McCarthy)*, 501 B.R. 89 (BAP 8th Cir. 2013).

Chapter 7 trustee's abandonment did not deprive court of jurisdiction to hear § 522(f) lien avoidance. The bankruptcy court retained authority under § 522(f) to hear the Chapter 7 debtor's motion to avoid judicial lien, notwithstanding the trustee's prior abandonment of the cause of action. Under 28 U.S.C.A. § 1334(e)(1), the court had jurisdiction over property of the estate and of the debtor. *Ramos v. Negron (In re Ramos)*, 498 B.R. 401 (BAP 1st Cir. 2013).

Chapter 13 debtors had authority to bring avoidance action. Applying §§ 522(g) and (h), the debtors could pursue avoidance of a prebankruptcy tax sale under § 548, with the court concluding that "reasonably equivalent value" could not be ascertained from a tax foreclosure sale under applicable New Jersey law, distinguishing *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994). Here, the tax debt was \$36,000 and the property value was at least \$100,000 more than the debt. *Matter of Varquez*, 502 B.R. 186 (Bankr. D. N.J. 2013).

Lien avoidance and domestic support obligation. Interpreting § 522(f)(1)(A)'s exception from lien avoidance for a judicial lien securing a domestic support obligation, the court found that the lien at issue did not fit within § 101(14A)'s definition of a domestic

support obligation; as a result, the lien was avoidable. *In re Ballinger*, ___ B.R. ____, 2013 WL 6383011 (Bankr. E.D. Ark. Nov. 25, 2013).

Property of Estate and Exemptions

Chapter 7 trustee’s authority to sell residence. A debtor’s residence, in which there was no equity above the first mortgage, remained property of the estate, notwithstanding the debtor’s reservation of \$60,000 homestead exemption, which was subordinate to the first lien. The reserved exemption did not prevent the trustee’s sale of the residence, with the mortgage lien attaching to proceeds. Applying *Schwab v. Reilly* and North Carolina’s homestead, the residence was not subject to an in-kind or unlimited exemption, and unless the trustee abandoned the property, the trustee had statutory authority to sell it. *Reeves v. Callaway*, ___ Fed.Appx. ____, 2013 WL 6085340 (4th Cir. Nov. 20, 2013).

Determination of when causes of action become property of estate. Examining factors in determining when a cause of action is sufficiently rooted in prepetition conduct or facts, the Sixth Circuit disagreed with the Tenth Circuit, holding that a Chapter 7 debtor’s FDCPA cause of action was part of the estate when the creditor had filed a collection complaint, even though the complaint had not been served on the debtor by the time of bankruptcy filing. “First, filing a complaint may cause actual harm to the debtor. . . . Second, the alternative to dating violations from the filing of the complaint can become factually complicated. . . . Third, there is no good reason to protect debt collectors who have filed complaints but not yet served process. . . . Finally, . . . the relevant bankruptcy-law question is when is the claim minimally actionable, not whether the claim is fully mature.” The FDCPA cause of action was property of the Chapter 7 estate, and the debtor could not pursue it, unless the trustee declined to do so. *Tyler v. DH Capital Management, Inc.*, 736 F.3d 455 (6th Cir. 2013).

Profit-sharing plan was not exempt. Prior to filing Chapter 13, which was converted to Chapter 11 and then 7, the IRS had audited the debtor’s tax return, including requesting documentation about a profit-sharing plan. The fact that IRS had closed its audit did not create a presumption that the profit-sharing plan was exempt from the bankruptcy estate, and the bankruptcy court found that the plan was not exempt under § 522(b)(3)(C), due to repeated violations of applicable tax laws, including eight transactions by the plan that violated Internal Revenue Code § 4975. The record also supported finding that the debtor omitted material formation about the plan and was indifferent to the truth. A finding of the debtor’s bad faith in the trustee’s turnover action had collateral estoppel effect for purposes of revoking the debtor’s discharge. *Daniels v. Agin*, 736 F.3d 70 (1st Cir. 2013).

Section 1306(a) extends timeline for inclusion in properly of estate. Addressing the split of authority on whether an inheritance received by the Chapter 13 debtor beyond § 541(a)(5)’s 180-day period, the Fourth Circuit held that the plain language of § 1306(a) includes postpetition acquisitions, “in addition to the property described in section 541,” so long as acquired “before the case is closed, dismissed, or converted.” Section 541’s definition of property of the estate is expanded by § 1306 for purposes of Chapter 13

cases. In this case, a debtor inherited \$100,000 from his deceased mother over three years after filing the case, and that inheritance was property of the estate. *Carroll v. Logan*, 735 F.3d 147 (4th Cir. 2013). See also *In re Ormiston*, 501 B.R. 303 (Bankr. E.D. N.C. 2013) (Section 1306(a)'s expanded definition brought inheritance acquired more than 180 days from petition into estate for modification purposes.).

Section 522(o) applied to lien. Chapter 7 debtor claimed homestead under Texas law, but owned residential property in Texas and Missouri. Applying law-of-case doctrine (see *In re Cipolla I*), 476 Fed. Appx. 301 (5th Cir. 2012)), the debtor transferred property within meaning of Texas Uniform Fraudulent Transfer Act and disposed of property within meaning of section 522(o) when he created lien on Missouri property, obtaining loan to purchase Texas property. There was sufficient evidence that debtor acted with intent to defraud. *Cipolla v. Roberts (In re Cipolla)*, ___ Fed. Appx. ___, 2013 WL 5596848 (5th Cir. 2013) (unpublished).

Annuity purchased through rollover from tax-exempt IRA remained exempt. The Chapter 7 debtor had purchased an IRA annuity, with the entire purchase amount of \$267,319.48 coming from a rollover of a previously owned tax-exempt IRA, and the trustee objected to the annuity being exempt under § 522(b)(3)(C) because the purchase price exceeded the annual limits imposed for an IRA by the IRS. The court concluded, in construing § 508 of the Internal Revenue Code, that annual purchase limitations did not apply to a rollover. *Running v. Miller (In re Miller)*, 500 B.R. 578 (BAP 8th Cir. 2013).

Annuity claimed as exempt was still in estate until time to object to exemptions expired, with analysis of stay relief. The Chapter 13 debtor claimed an annuity as exempt and the former spouse sought to collect past due and ongoing domestic support obligation from the annuity. The annuity remained in the estate, protected by the automatic stay, until the time to object to exemption had passed, but cause existed to grant stay relief to allow the former spouse to pursue collection in state court. In reaching the decision, the court discussed § 362(b)(2) and different considerations for granting stay relief as to postpetition domestic support and prepetition delinquent domestic support. As to the latter, which was treated as priority claim, with full payment, in the proposed plan, "the determination of whether 'cause' exists to grant relief from the automatic stay requires that the bankruptcy court evaluate whether the case has been filed in good faith, much in the same manner as the court determines whether the automatic stay should be extended under 11 U.S.C. § 362(c)(3)(B). Essentially, this is a determination whether the case was filed in both subjective good faith (for a proper bankruptcy purpose and not merely for delay or to target a particular creditor) and objective good faith (i.e., there is some reasonable prospect that the chapter 13 rehabilitation will be successful)." *In re Miller*, 501 B.R. 266 (Bankr. E.D. Pa. 2013).

Lack of timely objection to exemption did not prevent trustee asserting higher than scheduled value of entireties property. The Chapter 7 debtor had scheduled tenancy by entireties property value at \$260,000, but the lack of timely objection to the claimed exemption did not prevent the trustee from asserting a higher value. Applying Florida

law, the debtor may not exempt the entirety property to the extent there were joint creditors against both spouses, and the debtor overstated the amount of exemption that was available over and above the joint creditors' claims. Notwithstanding timely objection to the claimed exemption, the trustee could assert higher value, and if the property sold for more than \$260,000 value, the trustee could satisfy liens and administer proceeds for benefit of joint creditors. *In re James*, 498 B.R. 813 (Bankr. E.D. Tenn. 2013). See also *In re Bradigan*, 501 B.R. 151 (Bankr. W.D. N.Y. 2013), for discussion of valuing the Chapter 7 debtor's interest in homestead owned as tenancy by entirety with nondebtor wife.

Chapter 7 Issues

Abuse Dismissal

Spouse's income considered for abuse purposes. Under § 707(b)(3)(B)'s totality of circumstances inquiry, the nondebtor husband's income contributed to debtor's household expenses could be considered in abuse determination. Husband was wealthy and parties had been married for twenty-one years, pooling income and expenses. Credit card debt incurred by debtor benefitted household and husband. The specific provisions of § 707(b)(2) did not subsume broader § 707(b)(3). *Kulakowski v. United States Trustee (In re Kulakowski)*, 735 F.3d 1296 (11th Cir. 2013).

Discharge

Sanction against creditor's counsel for baseless complaint. Finding pattern of filing frivolous dischargeability complaints, when counsel failed to conduct reasonable investigation into facts and circumstances alleged in § 523(a)(2) complaint, it was baseless within scope of Rule 9011, and \$5,000 sanction was imposed, with the attorney ordered to report sanction to state bar. *Target Nat'l Bank v. Nelson (In re Nelson)*, ___ B.R. ___, 2013 WL 6499701 (Bankr. C.D. Cal. Dec. 11, 2013). See also *Ettinger and Assoc., LLC v. Miller (In re Miller)*, 730 F.3d 198 (3d Cir. 2013), discussing sanctions and Rule 9011 safe harbor provisions in connection with fraud-based nondischargeability complaint.

Default judgment excepting debt from discharge for willful failure. When the Chapter 7 debtor willfully failed to attend status conference and cooperate in discovery, the bankruptcy court properly entered default judgments excepting debts from discharge under § 523(a)(2)(A). *Pryor v. ITEC Financial, Inc. (In re Pryor)*, ___ Fed.Appx. ___, 2013 WL 5739452 (9th Cir. Oct. 23, 2013); *Pryor v. RW Investment Co., Inc. (In re Pryor)*, ___ Fed.Appx. ___, 2013 WL 5834428 (9th Cir. Oct. 23, 2013);

Postpetition state court findings had preclusive effect in discharge. In actions begun prepetition but concluded postpetition, the state court found that two nondebtor LLC entities were owned and controlled by the Chapter 7 debtor and that those entities had converted assets belong to the LLC and a member of the LLC. Applying Minnesota's collateral estoppel law, the court concluded that the automatic stay's protection of the

debtor did not prevent the state court's findings of control being given preclusive effect in a dischargeability action. The state court did not enter judgment against the debtor; therefore, there was no stay violation. The bankruptcy court's determinations that the debtor was personally liable for the conversions and that the debts were nondischargeable were affirmed. *Phillips v. Phillips (In re Phillips)*, 500 B.R. 570 (BAP 8th Cir. 2013).

Debtor acted with fraudulent intent for purposes of § 523(a)(2)(A). Home equity line of credit had been paid off when the property was sold, and the debtor acted with fraudulent intent in drawing on that line of credit, with the bank's mistake in not closing the line no defense. The bank justifiably relied on the debtor's representations, and the debtor failed to alert the bank of fact that she knew the line should have been closed. *Old Republic Nat'l Title Ins. Co. v. Levasseur (In re Levasseur)*, ___ F.3d ___, 2013 WL 6570917 (1st Cir. Dec. 16, 2013).

Materially false financial statement, notwithstanding tax returns that might be clue to statement's inaccuracy. The bankruptcy court did not err in finding that the debtor's written financial statement was materially false. The fact that tax returns provided to the creditor provided some clue that the financial statement might not be accurate did not prevent the creditor's reliance being reasonable. "The returns were not obviously inconsistent with the personal financial statement." *Kempf v. Hitachi Capital America Corp. (In re Kempf)*, ___ Fed.Appx. ___, 2013 WL 6487513 (9th Cir. Dec. 11, 2013).

California's antideficiency statute prevented § 523(a)(2) exception from discharge. The lender had made two mortgage loans to enable the borrower to purchase residence, and after foreclosure there was no enforceable debt under the junior mortgage; therefore, the creditor could not enforce the obligation, even if there was fraudulent misrepresentation. Under § 523(d), the bankruptcy court did not abuse discretion in awarding attorney fees to the Chapter 7 debtor. *Heritage Pacific Financial, LLC v. Montano (In re Montano)*, 501 B.R. 96 (BAP 9th Cir. 2013).

Debtor's divorce attorney failed to prove false representation in fee agreement. Prior to filing Chapter 7, the debtor hired the plaintiff to represent her in divorce proceeding, but the attorney did not prove that the debtor made a false representation or did not intend to honor her initial agreement to pay fees. If a debtor enters into a contract with intent not to pay, that may provide the basis for an exception from discharge, but the attorney did not carry her burden under § 523(a)(2)(A). *deBenedictis v. Brady-Zell (In re Brady-Zell)*, 500 B.R. 295 (BAP 1st Cir. 2013).

Section 523(a)(4) requires wrongful intent or other culpable conduct. Applying *Bullock v. BankChampaign, N.A.*, 133 S.Ct. 1754 (2013), prior Tenth Circuit authority was reversed, and in order to hold a debt nondischargeable under § 523(a)(4), "a bankruptcy court must find that the debtor acted with wrongful intent, or at a minimum, with conscious disregard of his or her fiduciary duties." *Jantz v. Karch (In re Karch)*, 499 B.R. 903 (BAP 10th Cir. 2013).

Loan agreement did not create partnership or fiduciary obligation. Investors in a spec house built by Chapter 7 debtor failed to satisfy § 523(a)(4), when the parties' loan agreement did not create a partnership under California law. In the absence of partnership, there was no fiduciary obligation within the meaning of § 523(a)(4). *Utnehrmer v. Crull (In re Utnehrmer)*, 499 B.R. 705 (BAP 9th Cir. 2013).

Overpayment of spousal support not domestic support obligation but nondischargeable under § 523(a)(15). Reviewing § 101(14A)'s requirements for a domestic support obligation, the former spouse's overpayment of spousal support was not actually in the nature of support and was not excepted from discharge under § 523(a)(5). However, the overpayment fell within the plain language of § 523(a)(15), since it was incurred in the connection with a divorce decree. The former spouse was not entitled to attorney fees for pursuing the nondischargeability, since the bankruptcy court did not have authority to award fees under the parties' separation agreement. *Taylor v. Taylor (In re Taylor)*, 737 F.3d 670 (10th Cir. 2013).

Prebankruptcy state court judgment for conversion did not preclude litigation of willfulness under § 523(a)(6). Applying Wisconsin's preclusion law, a prior state court judgment that the debtor intentionally controlled or took property of creditor only established issue preclusion for intent to act, leaving open for litigation by the debtor whether there was intent to injure. The debtor had been a real estate agent and proved that he did not intend to injure his former employer real estate agency. Denial of the exception from the debtor's discharge was affirmed. *First Weber Group, Inc. v. Horsfall*, ___ F.3d ___, 2013 WL 6698511 (7th Cir. Dec. 20, 2013).

Fraud that would have resulted in denial of discharge supported revocation. If it would have been known and would have served as grounds for denial of discharge (here false oath under § 727(a)(4)(A)), the material fraud may justify subsequent revocation of discharge. *Jones v. U.S. Trustee (In re Jones)*, 736 F.3d 897 (9th Cir. 2013). *Compare In re Herman*, 737 F.3d 449 (7th Cir. 2013) (Denying reopening of case to seek revocation of discharge under §§ 727(a)(4)(A) and 727(d)(1), when the alleged fraud related to prebankruptcy home construction and was not connected to the Chapter 7 discharge.). *See also Johnson v. Johnson*, ___ Fed.Appx. ___, 2013 WL 5788524 (8th Cir. Oct. 29, 2013) (Discharge revoked for fraud, which, had it been known, would have caused denial of discharge under §§ 727(a)(2)(A) and (a)(4)(A).); *Daniels v. Agin*, 736 F.3d 70 (1st Cir. 2013) (Discharge revoked for failure to disclose material facts related to profit-sharing plan.).

Notice of foreclosure did not violate discharge injunction. The bankruptcy court did not abuse discretion in denying a Chapter 7 debtor's motion to reopen the case to pursue mortgage lender's alleged violation of discharge injunction, when the court properly determined that applicable state law required the mortgage lender to notify the debtor of right to cure in order to accelerate the mortgage and foreclose. The foreclosure notice was not an attempt to collect from the debtor personally. Reopening the case was futile.

Pennington-Thurman v. Bank of America, N.A. (In re Pennington-Thurman), 499 B.R. 329 (BAP 8th Cir. 2013)

Chapter 13 Issues

Trustee

Trustee was “person acting under” officer of United States for removal of suit. A standing Chapter 13 trustee was sued by a terminated employee in state court, and the trustee removed action to federal district court, under the federal officer removal statute, 28 U.S.C.A. § 1442. Chapter 13 trustees receive delegated authority, assisting and carrying out duties of the United States trustee; as such, the Chapter 13 trustee was “acting under” an officer of the United States. A colorable federal defense was asserted, and the trustee was not an employer under the Louisiana Employment Discrimination Law, which was the foundation for the suit. *Bell v. Thornburg*, ___ F.3d ___, 2013 WL 6850026 (5th Cir. Dec. 30, 2013).

Disposable Income

Step up payments required after completion of 401(k) loan. Sustaining the trustee’s objection to confirmation and citing the majority position, when the debtors would complete repayment of a 401(k) plan loan within twenty-four months, they were required to increase plan payments, since the funds previously used to repay the loan would become disposable income. Repayment of the loan is a known or virtually certain change in financial circumstances under *Hamilton v. Lanning*. The debtors’ argument that they needed the extra funds as a cushion for future unanticipated expenses was rejected. *In re Afko*, 501 B.R. 202 (Bankr. S.D. N.Y. 2013).

Payments on stripped mortgage were part of projected disposable income. Notwithstanding § 707(b)(2)(A)(iii)(I)’s deduction for “amounts scheduled as contractually due to secured creditors,” the debtors were not permitted to deduct payments on a junior mortgage that was being stripped in the plan. Under *Hamilton v. Lanning*, the stripping’s result in elimination of secured claim was a “known or virtually certain” change in deductible payments. *In re Garrepy*, 501 B.R. 13 (Bankr. D. Mass. 2013).

Classification

Separate classification of student loan debt did not unfairly discriminate. Debtors’ plan proposed to maintain monthly payments on student loan debt, outside the plan, and pay -0- dividend to other unsecured creditors, and this effectively was a separate classification of the student loan debt. The court found the test for unfair discrimination in *In re Bentley*, 266 B.R. 229 (BAP 1st Cir. 2001), to more accurately reflect the statutory scheme than the more commonly cited test found in *In re Leser*, 939 F.3d 669 (8th Cir. 1991). In this case, the debtors had negative projected disposable income on the B22C means test form; therefore, their payment of the ongoing, contractual student loan monthly amount would be from discretionary income that they were not required by the Code to commit to the plan—the other unsecured creditors would be receiving no

distribution anyway. As to the student loan payments, there was no unfair discrimination. However, there was unfair discrimination in the plan's proposal to fully pay an unsecured claim of the state for overpayment of unemployment compensation. Further, the proposal to retain a third vehicle for a two-person household, while distributing nothing to unsecured creditors, was not in good faith. Confirmation was denied, with opportunity for debtors to file an amended plan. *In re Knowles*, 501 B.R. 409 (Bankr. D. Kan. 2013).

Lien Stripping

Court could not strip lien on tenancy by entirety. In Chapter 13 filed by only one spouse, the debtor could not strip off lien with no value on property owned as tenants by entirety. The bankruptcy court lacked jurisdiction to modify a lienholder's rights as to the non-debtor's property interest. *Alvarez v. Grigsby (In re Alvarez)*, 733 F.3d 136 (4th Cir. 2013).

Debtor ineligible for discharge could not cram down lien. Agreeing with the reasoning of lower courts' holdings that debtors ineligible for discharge may not modify secured creditors' rights, the facts of this case involved an attempt to cram down an undersecured creditor, with the court holding that a debtor who was ineligible for Chapter 13 discharge could not strip down undersecured first-priority liens. *Colbourne v. Ocwen (In re Colbourne)*, ___ Fed. Appx. ___, 2013 WL 5789159 (11th Cir. Oct. 29, 2013) (unpublished). Note that a Chapter 20 lien stripping case, involving a debtor ineligible for discharge, is pending before the 11th Circuit, *In re Scantling*, with oral arguments set for March 17, 2014.

Untimely proof of claim did not void lien. Secured creditor's lien was not void solely because creditor filed untimely proof of claim in Chapter 13 case. Debtors did not attack substantive validity of the lien, relying solely on section 506(d). *Shelton v. Citimortgage, Inc. (In re Shelton)*, 735 F.3d 747 (8th Cir. 2013).

For lien stripping, petition date proper time to value property and determine senior lien. In determining whether § 1322(b)(2) prevents stripping of lien, there is inconsistent case authority, and finding no plain meaning in the statute, the court concluded that the petition date, rather than confirmation date, is most appropriate for determination of whether a junior lien is protected from modification. Both property value and amount of the senior lien are determined as of that date. *In re Gutierrez*, ___ B.R. ___, 2013 WL 6198220 (Bankr. C.D. Cal. Nov. 27, 2013).

Effect of Confirmation

Disputed claim "provided for" by plan. The debtor and creditor had been involved in litigation for years, and the plan specifically stated that no payment of the disputed claim would be made, but that if the creditor prevailed in obtaining judgment and then filed a proof of claim, the plan would be amended to reflect the status. The nonbankruptcy litigation continued, and the plan was never amended, nor was a final amended proof of claim filed. The plan was completed, with no payment to this disputed creditor. The

creditor's claim was "provided for" in the plan, and the creditor had stipulated that the debtor did not need to amend the plan while appeal and remand of an order in the litigation was pending. The creditor had been free to move the court to require plan modification. "The issue is not whether [the] plan provides for [the creditor's] claim in a way that pleases [the creditor]. The issue is whether the plan provides for [the] claim in the broad sense established by *Rake v. Wade*." The court also discussed the meaning of "plan completion," looking to "the entire plan and to declare completion of payments when all the financial conditions stated in the plan are satisfied." (quoting Lundin, Chapter 13 Bankruptcy). The creditor was bound by the plan and discharge entered. *In re Orenshteyn*, 500 B.R. 305 (Bankr. D. Mass. 2013).

Postconfirmation Modification

Decline in value did not permit modification and stripping of junior lien. When equity existed at confirmation to partially support second mortgage, alleged decline in value after confirmation did not permit modification to strip lien; effect of confirmation protected mortgage. If there were cause to reconsider the claim under § 502(j), that would not permit reclassification of the claim that was partially secured and protected from modification at confirmation. *Warren v. PNC Bank, Inc. (In re Warren)*, 499 B.R. 914 (Bankr. S.D. Ga. 2013).

No categorical bar to postconfirmation surrender and reclassification, but lack of good faith prevented modification. Discussing the split of authority on whether a debtor may modify a confirmation plan to surrender collateral and reclassify a creditor, the court concluded that there is no *per se* bar, since there are adequate safeguards in the Code to protect creditors. However, the debtor failed to satisfy § 1325(a)(3)'s good faith requirement for modification, when she did not maintain insurance on the vehicle, which was required by the confirmation order and loan agreement. The vehicle had been damaged by fire. *In re Tucker*, 500 B.R. 457 (Bankr. N.D. Miss. 2013).

Discharge

Ineligibility for loan restructure supported § 523(a)(8) undue hardship. The Chapter 13 debtor had cosigned student loans for former spouse, and the facts that the debtor was not the borrower and that the loans were not government-issued prevented the debtor's eligibility to restructure the loans under the extended loan repayment provisions of 34 C.F.R. § 685.208. Therefore, the *Brunner* test was satisfied for undue hardship purposes. *The Education Resources Institute, Inc. v. Zumbro (In re Zumbro)*, ___ Fed.Appx. ___, 2013 WL 5486231 (11th Cir. Oct. 3, 2013).

Marital relationship did not constitute express or technical trust for purposes of § 523(a)(4). Under Washington common law, the marital relationship does not constitute the required trust for purposes of § 523(a)(4); therefore, the Chapter 13 debtor did not commit defalcation of a fiduciary duty as to management of community property during the marriage. *Mele v. Mele (In re Mele)*, 501 B.R. 357 (BAP 9th Cir. 2013).

False pretense in settlement justified § 523(a)(2) exception. Prebankruptcy litigation resulted in a settlement agreement between the debtor and the father of her deceased husband, involving an extensive model train collection, but the debtor failed to comply with the agreement or state court orders to turn over parts of the train collection. As a result, a monetary judgment was entered against the debtor, as well as monetary sanction for willful contempt of the state court orders. The BAP affirmed a finding that the debtor entered into the settlement agreement under false pretenses and with material misrepresentation, never intending to comply with it. The entire damages, including the monetary sanction, were excepted from discharge, applying the rationale of *Cohen v. De La Cruz*, 523 U.S. 213 (1998). *Lowry v. Nicodemus (In re Lowry)*, 497 B.R. 852 (BAP 6th Cir. 2013).

Dismissal and Conversion

Failure to disclose personal injury lawsuits grounds for conversion. Debtor's alleged belief that prepetition causes of action were not "viable" did not overcome duty to disclose them, and failure to disclose was evidence that petition was filed in bad faith, constituting grounds for conversion to Chapter 7. "Notice and hearing" is a defined term, meaning an opportunity for hearing, and the debtor had that opportunity, but the court did not abuse discretion in not conducting evidentiary hearing in absence of debtor's request. *Zizza v. Pappalardo (In re Zizza)*, 500 B.R. 288 (BAP 1st Cir. 2013).

Failure to file required documents and tax returns supported dismissal. The Chapter 13 debtor's failure to file required documents within fifteen days of petition, including payment advices, or to submit tax returns within seven days prior to meeting of creditors justified automatic case dismissal. *In re Quezada*, ___ B.R. ___, 2013 WL 6698728 (D. D.C. Dec. 20, 2013).

Credit counseling received on date of petition was timely and dismissal denied. Denying the trustee's motion to dismiss, the court found the language of § 109(h)(1), as amended in 2010, plain and unambiguous, and credit counseling received "on the date of filing the petition" was timely. *In re Walker*, ___ B.R. ___, 2013 WL 6440225 (Bankr. N.D. Ill. Dec. 9, 2013).

Reopening Cases

Appeal of denial of reopening dismissed for lack of standing. After completion of the plan and discharge, individuals moved to reopen the case for the purposes of vacating discharge and filing dischargeability complaint, and the motion was denied. Those individuals failed to demonstrate that they had a pecuniary interest or were "persons aggrieved," and they lacked standing to appeal the denial. *Allen v. Joseph (In re Hawkins)*, ___ B.R. ___, 2013 WL 6729887 (D. Del. Dec. 20, 2013). See also *Finley v. James (In re Finley)*, ___ Fed.Appx. ___, 2013 WL 5614901 (9th Cir. Oct. 9, 2013); *Conway v. Heyl (In re Heyl)*, ___ B.R. ___, 2013 WL 6500884 (BAP 8th Cir. Dec. 12, 2013), for discussion of "person aggrieved" doctrine's limitation on appellate standing.

Claims

Chapter 7 debtor lacked standing to appeal from order finding no standing to seek claim disallowance. The debtor did not demonstrate “person aggrieved” standing to appeal from the bankruptcy court’s order that she lacked standing to sue for disallowance of a claim. It was a no-asset case, and the debtor did not show financial interest in the claim’s allowance, since she did not show a surplus of assets that would allow distribution to her. *Khan v. Regions Bank (In re Khan)*, ___ Fed.Appx. ___, 2013 WL 5942052 (6th Cir. Nov. 1, 2013).

Interest rate on tax lien certificate determined under state law. The Chapter 13 debtors objected to the claim of a purchaser of delinquent real estate taxes, and under Ohio’s law governing tax certificates, in effect when the certificates were purchased, the interest rate was 0.25%—the rate on the face of the tax certificate, so long as the Chapter 13 case remained open, not the 18% claimed by the certificate purchaser. *In re Bowers*, ___ B.R. ___, 2013 WL 6123042 (BAP 6th Cir. Nov. 22, 2013).

Attorney fees for debtor’s children qualified as domestic support obligation. Affirming, the district court first held that the bankruptcy court should have determined the dischargeability and priority of attorney fee claims in an adversary proceeding, but the failure was harmless because the debtor was given due process hearing on objection to the attorneys’ claims. The divorce court’s order for the debtor/father to pay a portion of fees for the attorneys representing the minor children’s interests was properly determined to be domestic support, even though the fees were not payable directly to the debtor’s former spouse or children. Citing the majority view, “[b]ecause the term ‘domestic support obligation’ in § 101 derives from the ‘definition of a nondischargeable debt for alimony, maintenance, and support contained’ in the prior version of the Bankruptcy Code, the case law construing the prior Code’s language remains ‘relevant and persuasive.’” The fees awarded were necessary to protect the interests of each child, and the divorce court intended the award to be in the nature of support. *McNeil v. Drazin*, 499 B.R. 484 (D. Md. 2013). See also *In re Miller*, 501 B.R. 266 (Bankr. E.D. Pa. 2013), for discussion of stay relief to allow former spouse to seek clarification from state court of nature of attorney fee award. The *Miller* court also discussed the nature of debtor’s obligation to sell the former marital residence and divide the proceeds as being a property settlement rather than a domestic support obligation.

Untimely claim basis for disallowance but not lien avoidance, and stay relief motion was not informal proof of claim. The bankruptcy court had constitutional authority to decide disallowance of a late-filed claim, as a matter stemming from the bankruptcy itself. Although the creditor’s mortgage lien would not be affected, the untimely proof of claim was disallowed. Moreover, the filing of a motion for stay relief did not serve as an informal proof of claim, with informal proof of claim being a narrow doctrine, applying “only when a creditor files a document that is meant as a proof of claim but is somehow defective or incomplete.” *In re Batista-Sanechez*, 502 B.R. 227 (Bankr. N.D. Ill. 2013).

Insufficient notice justified allowance of late-filed claim. The debtor did not schedule IRS, resulting in IRS not receiving notice of the claims' bar date for governmental entities. Discussing the split of authority on whether lack of notice of the case filing permits allowance, the court found justification for allowance, reasoning that the claims bar date is not absolute when there is no notice to the creditor, since the Code assumes that the creditor actually received notice. Fundamental fairness questions prevailed, and denial of IRS's claim would adversely affect its rights as well as debtor's fresh start. *Goodman v. Internal Revenue Service (In re Adams)*, ___ B.R. ___, 2013 WL 6530558 (Bankr. N.D. Ga. Dec. 11, 2013). *Compare In re Aleman*, 499 B.R. 236 (Bankr. D. Puerto Rico 2013) (concluding that court had no discretion to enlarge claims bar date, unless exceptions of Rules applied).

State law did not make debt unenforceable for purposes of § 502(b)(1). North Carolina statute required a debt buyer to attach specific materials to a complaint or claim, including a copy of the contract or writing and assignment, but the court determined that this requirement was applicable to actions to collect debt, distinguishing collection activity from the filing of a proof of claim. "If filing of a proof of claim constituted a 'collection' activity, than filing of proofs of claim under § 502(b) would be fundamentally at odds with language in § 362(b)(6) providing that the filing of petition 'operates as a stay, applicable to all entities, of . . . any act to collect.'" The particular state statute's requirements did not, therefore, make the debt unenforceable for purposes of § 502(b)(1). *In re Nussman*, 501 B.R. 297 (Bankr. E.D. N.C. 2013).

Failure to provide notice of correct cure amount required disallowance of claim. HUD's rules and regulations that were incorporated into the mortgage were binding on both the mortgagor and mortgagee, and when the mortgagee's notice of intent to foreclose provided incorrect amount needed to cure and reinstate the loan, the creditor had no right to foreclose under applicable state law, with its claim for foreclosure costs disallowed. *In re Ruiz*, 501 B.R. 76 (Bankr. E.D. Pa. 2013).

Attorney Fees and Issues

Requiring attorney to return properties to estate not sustained under § 329. In a Chapter 13 case then converted to Chapter 7, the debtor had transferred to his attorney two properties that were subsequently foreclosed, with the attorney using his funds to purchase at foreclosure. The bankruptcy court found that the attorney's services provided no reasonable value to the debtor and that the attorney did not disclose the transfers, requiring the attorney to disgorge fees received and return the properties to the bankruptcy estate. Although the bankruptcy court has authority to discipline attorneys who violate Code and Rule disclosure requirements, the court improperly relied on § 329, since the attorney used his funds to purchase the properties at foreclosure. The properties were not valued at the time of transfer to the attorney, and the record did not show that the estate had suffered loss, with the order requiring return of the properties to the estate imposing a sanction beyond the amount of compensation that the attorney

received. Remand was ordered to develop the basis for sanction. *Baker v. Cage (In re Whitley)*, ___ F.3d ___, 2013 WL 6596790 (5th Cir. Dec. 16, 2013).

Postpetition retainer and out-of-court settlement improper. The Chapter 13 debtors' attorney acted improperly by receiving postpetition retainer from an entity in which debtors had an interest, and the attorney violated professional obligations and fiduciary obligations to the estate by permitting debtors to borrow money for purposes of effecting an out-of-court settlement of claims. The attorney could not be paid for any services performed subsequent to the fiduciary breach. *In re Stein*, ___ B.R. ___, 2013 WL 6247438 (Bankr. E.D. Pa. Nov. 25, 2013).

Out of state firm, and local counsel, representing debtors failed to provide adequate representation. Neither Florida law firm, which solicited business nationally as provider of mortgage defense and bankruptcy services, nor its local attorneys, provided adequate representation of Chapter 13 debtors when Florida firm failed to adequately supervise paralegals and legal assistants in preparation of petition and schedules, and local counsel recklessly provided ECF login and password to Florida firm. Attorneys also failed to attend hearing on motion to dismiss for filing deficiencies, which standing order required. Substitute attorney who did appear, as arranged by Florida firm, was uninformed and had no authority to bind debtors. Florida firm agreed to cease practicing law through local attorneys and to repay fees to Texas clients. Texas attorney had ECF privileges cancelled until completion of 15 hours CLE. *In re Kuykendall*, 501 B.R. 311 (Bankr. S.D. Tex. 2013).

Plan paying debtor's attorney before mortgage not confirmable. The proposed plan provided that the balance of debtor's attorney fees would be paid before the debtor began to make ongoing mortgage payments, and the creditor objected. Section 1322(b)(2)'s anti-modification extends to this proposal, and the regular mortgage payment must be paid timely. The opinion also discusses the justification for presumptive, or no-look, fees in Chapter 13 cases, concluding that the procedure is consistent with Sixth Circuit, and other Circuit, authority. *In re Rogers*, 500 B.R. 537 (Bankr. W.D. Mich. 2013).

Fair Debt Collection Practices Act

FDCPA claim may arise from communication to debtor. After the Chapter 7 case was filed, a law firm, acting on behalf of a creditor, sent a letter to the debtor's counsel suggesting settlement to prevent the creditor pursuing a dischargeability proceeding. A Rule 2004 examination was scheduled but quashed by the bankruptcy court because of defective issuance and service. The Third Circuit held that the letter and notice of Rule 2004 examination were "communications" within the meaning of the FDCPA, constituting attempts to collect a credit card debt. The court discussed the case law on the relationship between the FDCPA and Bankruptcy Code. Agreeing with the Seventh Circuit, the court held that "when FDCPA claims arise from communications a debt collector sends a bankruptcy debtor in a pending bankruptcy proceeding, and the communications are alleged to violate the Bankruptcy Code or Rules, there is no

categorical preclusion of the FDCPA claims. . . .The proper inquiry. . .is whether the FDCPA claim raises a direct conflict with the Code or Rules and the FDCPA, or whether both can be enforced.” The court reversed dismissal of the FDCPA claim under § 1692e(5) and (13) for allegedly violating Civil Procedure Rule 45 and Bankruptcy Rule 9016 subpoena rules. *Simon v. FIA Card Services, N.A.*, 732 F.3d 259 (3d Cir. 2013).

CONSUMER LAW UPDATE

**Cases reported from January 1, 2014 through
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Prepared for Federal Judicial Center

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Automatic Stay

Attorney fee award against IRS was based on litigation cost statute. In another appeal involving the Chapter 7 debtor's attorney fees related to the Internal Revenue Service's violation of discharge injunction (see *Kovacs v. United States*, 614 F.3d 666 (7th Cir. 2010)), the bankruptcy court properly applied the prior *Kovacs* remand instructions, with the debtor's attorney fees determined under 26 U.S.C. § 7430's reasonable litigation fees, which has a statutory fee cap, rather than under 26 U.S.C. § 7433's damages provision. The bankruptcy court found no § 7433 damages, and its finding of \$3,750 in litigation costs was affirmed. *Kovacs v. United States*, 739 F.3d 1020 (7th Cir. 2014).

Multiple filings not cause for in rem relief. The fact that the debtor had filed multiple cases, maybe 16 over a number of years, without proof that those filings were part of a scheme to delay, hinder or defraud creditors as to specific property, did not support in rem stay relief. *In re Gray*, ___ Fed.Appx. ___, 2014 WL 889355 (3d Cir. March 7, 2014).

Stay annulment reversed. The bankruptcy court had annulled the automatic stay, permitting the foreclosure purchaser to complete unlawful detainer action, but the Bankruptcy Appellate Panel held that purchaser's sales report was not admissible into evidence under the business records exception to hearsay. The report had been obtained by the purchaser from the trustee conducting foreclosure sale, and it was offered into evidence to prove that the sale was completed just minutes before the Chapter 13 case was filed. The report lacked foundational support under Fed. Rule of Evidence 803(6) to show that it was a record regularly kept in the course of the foreclosure purchaser's or trustee's business or that those parties regularly relied on the business record. Admission of the report was prejudicial, requiring reversal of the annulment. *Hudson v. Martingale Investments, LLC (In re Hudson)*, 504 B.R. 569 (BAP 9th Cir. 2014).

Effect of defective mailing address. Discussing the presumption of receipt of mailed notice of the bankruptcy filing, the court discussed the factors to consider when there was a defect in the address. The address used by the debtor was to the correct street address but contained no suite or floor number, and the address was an office building with 100 other companies. With a weakened presumption of delivery, the testimony of the creditor established that the notice was not delivered, and stay was annulled to retroactively validate foreclosure, in the debtor's third case. *In re Cunningham*, ___ B.R. ___, 2014 WL 1003733 (Bankr. E.D. N.Y. March 13, 2014).

Avoidance

Section 547(c)(8) threshold applied. In a Chapter 13 case, one debtor's employer withheld \$858.98 as a result of prepetition wage garnishment, but the actual amount transferred to the judgment creditor was less than \$600, with the remaining amount returned to the debtor after the creditor cancelled the garnishment. As a result, the aggregate amount was less than the \$600 threshold of § 547(c)(8), preventing the

avoidance of \$572.78 transfer as a preference. *Pierce v. Collection Associates, Inc. (In re Pierce)*, 504 B.R. 506 (BAP 8th Cir. 2014).

Judgment lien avoidable against debtor's interest in entireties property.

Considering the issue of whether a single-filing debtor may avoid a judgment lien against tenancy by entireties property, the court concluded that Maryland's homestead exemption created an exception to the general rule seen in *In re Alvarez*, 733 F.3d 130 (4th Cir. 2013). Maryland had opted out of the § 522(d) exemptions, and its homestead exemption provided that the debtor "may exempt the debtor's aggregate interest in . . . owner-occupied residential real property." *Alvarez* was a lien-stripping case under § 506(a), in which the Fourth Circuit held that the bankruptcy court lacked jurisdiction over a non-filing spouse's interest in entireties property. The Maryland homestead exemption was distinguished from *Alvarez*, concluding that the Chapter 7 debtor could avoid the judicial lien only as to his interest in the residence, but not as to his non-filing spouse's interest. *Raskin v. Susquehanna Bank (In re Raskin)*, 505 B.R. 684 (Bankr. D. Md. 2014).

Discrimination

Former debtor not protected in political appointment. The Wisconsin Governor had intended to appoint an individual as interim county register of deeds but decided not to do so after learning of her prior bankruptcy filing. The individual then sued the Governor and another governmental official for violation of statutory and constitutional rights, but the Seventh Circuit held that the defendants had not waived qualified immunity. The defense of qualified immunity was not raised until the answer to plaintiff's amended complaint. The defendants, as governmental officials, had qualified immunity from the plaintiff's privacy and equal protection claims. The publication of the plaintiff's bankruptcy was not a privacy violation, since the bankruptcy was already a matter of public record. There was no violation of the equal protection clause by the Governor's declining to make a discretionary appointment. *Chasensky v. Walker*, 740 F.3d 1088 (7th Cir. 2014).

Property of Estate and Exemptions

Surcharge of exemption violated § 522(k). The Supreme Court held, in the unanimous opinion of Justice Scalia, that the bankruptcy court had exceeded its authority when it surcharged the Chapter 7 debtor's homestead exemption for the payment of a portion of the trustee's administrative expense. The debtor's only significant asset was his California home, which he valued at \$363,348, and the debtor claimed the California homestead of \$75,000. The debtor had a first mortgage, apparently valid, for approximately \$147,000, but he asserted that there was a second mortgage held by an individual. After litigation, the bankruptcy court determined that the second mortgage did not exist; the asserted second mortgage, which would have consumed all equity in the home, was intended to prevent the trustee's sale of the home. In the course of prolonged litigation, including avoidance of the fraudulent deed of trust, the trustee incurred \$500,000 in attorney fees. Under these facts, the bankruptcy court, affirmed by the Ninth Circuit, approved a surcharge of the \$75,000 exemption, permitting the trustee to capture that in partial reimbursement of incurred fees. There was appellate authority in that Circuit

approving surcharge as an equitable remedy in appropriate cases. *Latman v. Burdette*, 366 F.3d 774 (9th Cir. 2004). The crux of the opinion is that specific Code provisions prevail over equitable remedies: “Section 105(a) confers authority to ‘carry out’ the provisions of the Code, but it is quite impossible to do that by taking action that the Code prohibits.” The *Law* Court observed that the claimed homestead exemption had been allowed, becoming final before the surcharge was imposed, since no one objected to it, applying *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992). The Court then stated that the surcharge contravened § 522(k), which prevented the allowed exemption from being liable for the trustee’s attorney fees, which were administrative expenses. *Law v. Siegel*, 571 U.S. ____, 134 S.Ct. 1188 (Mar. 4, 2014).

Turnover to trustee not restricted to property of estate at time motion filed. The Chapter 7 debtor had a checking account at commencement of case, with an account balance, and the Ninth Circuit held that the plain language of § 542(a) permitted turnover against an entity at any time during the pendency of the case, even if that entity no longer had possession, custody or control over the property at the time the motion is filed. When the debtor has or had possession of the property at some point during the case, turnover is not restricted to possession at the time the trustee filed the motion. Moreover, § 542(a) permits recovery of the “value of the property,” indicating that if the entity no longer has possession of the property, the trustee still has a remedy. The Court examined pre-Code turnover practice, as well as current § 542(a) in context with other Code provisions. The Court disagreed with conflicting authority from the Eighth Circuit, *In re Pyatt*, 486 F.3d 423 (8th Cir. 2007). *Shapiro v. Henson*, 739 F.3d 1198 (9th Cir. 2014).

Sale of Texas homestead. Texas law requires that proceeds from the sale of homesteads must be reinvested in another homestead within six months, and when debtor did not reinvest within that time, the proceeds became nonexempt property of estate. The Fifth Circuit had previously held that the six-month limit was an “integral feature” of Texas homestead exemption, and that “this essential element of the exemption must continue in effect even during the pendency of a bankruptcy case.” *In re Zibman*, 268 F.3d 298, 301 (5th Cir. 2001). Even though in this case the debtor sold his homestead postpetition, absent reinvestment within six months, the sale “voided the proceeds exemption, regardless of whether the sale occurred pre- or post-petition.” Moreover, the holding did not violate § 522(c). *Viegelahn v. Frost (In re Frost)*, ___ F.3d ___, 2014 WL 866393 (5th Cir. Mar. 5, 2014).

Exception from normal judicial estoppel. The debtor was not barred from pursuing cause of action when failure to schedule was attorney’s mistake, and debtor’s exemption offset any motive to conceal. *Javery v. Lucent Technologies, Inc.*, 741 F.3d 686 (6th Cir. 2014)

Social Security Act protects benefits. Rejecting the Chapter 7 trustee’s argument that Social Security benefits could be reached on equitable grounds when the debtor did not have present need for the benefits that had been paid and were held in bank account, the court applied *Law v. Siegel* to hold that it lacked such equitable authority. Moreover, “§

407(a) [of the Social Security Act] implements a three-pronged protective regime for social security benefits, both paid and payable,” including protecting those benefits from the operation of bankruptcy laws. *In re Franklin*, ___ B.R. ___, 2014 WL 960874 (Bankr. C.D. Ill. March 12, 2014).

Interest in retirement plan received through marital dissolution decree was exempt.

The Chapter 7 debtor received \$80,000 interest in former husband’s tax-qualified employee retirement plan in a marital dissolution decree, and the funds were entitled to Illinois exemption, despite fact that the transfer meant that proceeds were no longer in hands of employee who had funded the plan. Under Illinois law, the retirement plan was marital property before the entry of marital dissolution, and the debtor’s interest became quantified as her separate property on entry of the decree. Although that interest became property of the Chapter 7 estate, it was exempt, distinguishing *In re Clark*, 714 F.3d 559 (7th Cir. 2013). “The critical factor in *Clark* was that the IRA’s retirement attributes had been lost upon inheritance by a non-spouse. In contrast, a retirement plan transferred pursuant to a QDRO is done expressly for the purpose of preserving the retirement nature of the plan.” The trustee’s objection to exemption was overruled. *In re West*, ___ B.R. ___, 2014 WL 1230067 (Bankr. N.D. Ill. March 26, 2014).

New objection period only for those amended exemptions. Under Bankruptcy Rule 4003(b) and the majority of opinions applying it, the filing of an amended list of exemptions does not restart the objection period for original exemptions, with a new 30-day objection period applying only for those exemptions that were amended. *In re Walker*, 505 B.R. 217 (Bankr. E.D. Tenn. 2014).

Debtor-husband not entitled to wildcard exemption in inheritance of debtor-wife.

The Chapter 7 debtor-husband had no separate property interest in an inheritance received by his debtor-wife, rejecting the argument that the husband had an exemptible property interest based on equitable distribution rights that could be asserted in an unfiled divorce proceeding or probate. Under the majority view, “a spouse has no present property interest in the separate property of the other spouse unless and until the contingency occurs.” Moreover, § 541(a)(5) defines property of the estate to include property acquired by “bequest, devise, or inheritance” within 180 days after the petition filing. *In re Hampshire*, 505 B.R. 668 (Bankr. E.D. Pa. 2014).

Debt Relief Agency

Debt relief agency did not provide reasonably equivalent value to debtor. In Chapter 7 trustee’s § 548 complaint, the court found that a debt resolution entity acted as a debt relief agency, failing to perform required duties and making misrepresentations to the debtor, justifying \$28,000 civil penalty under § 526. Moreover, the debtor did not receive reasonably equivalent value for \$7,000 that was paid to agency, which agreed to negotiate at least 35% reduction in debts, but agency failed to settle any debt, applying bulk of prepetition payments to its fee. *Henderson v. Legal Helpers Debt Resolution, L.L.C. (In re Huffman)*, 505 B.R. 726 (Bankr. S.D. Miss. 2014). See also *In re Falck*, 503

B.R. 904 (Bankr. S.D. Fla. 2014) (Individuals preparing and executing debtor's petition were non-attorney bankruptcy petition preparers, who filed false disclosure of fees, with preparers ordered to disgorge \$7,600 fees and enjoined from acted as bankruptcy petition preparers in any district.).

Chapter 7 Issues

Means Test

Nondischageable student loans are not priority debts for means test. The mere fact that \$240,000 student loan debt would be nondischargeable, in absence of undue hardship proof, did not make it priority debt for purposes of the means test calculation, nor did the fact that the student loan debt was substantial constitute a special circumstance—the debtors put on no proof to support special circumstance finding. *In Matter of Martin*, 505 B.R. 517 (Bankr. S.D. Iowa 2014).

Current monthly income includes pay earned in six-month look-back, even though received afterwards. Concluding that the date of receipt of pay was not determinative, § 101(10A)'s definition of current monthly income included pay that "derived" during the six months. Also, reviewing what other courts had held, the debtor's prepetition wage garnishment was not a deductible expense, since the automatic stay prevented the garnishment from being an ongoing expense. And, the debtors' monthly student loan payments were not a special circumstance rebutting the presumption of abuse. The U.S. trustee's motion to dismiss for abuse was granted, with opportunity for the debtors to convert to Chapter 13. *In re Strickland*, 504 B.R. 542 (Bankr. D. Minn. 2014).

Ability to pay 24% to unsecured established cause for dismissal. Under totality-of-circumstances test, United States trustee established that debtor had ability to pay 24% of unsecured debt in Chapter 13, and under *In re Seafort*, 669 F.3d 661 (6th Cir. 2012), after retirement plan loan would be repaid funds were then available to Chapter 13 plan. *In re Pittman*, ___ B.R. ___, 2014 WL 946570 (Bankr. S.D. Ohio March 10, 2014).

Priority Claims

Payment of priority, nondischargeable tax did not subrogate debtors to rights of tax authority. In their schedules, the Chapter 7 debtors admitted liability for prepetition sales and withholding taxes, which fell within § 507(a)(8)(C) and § 523(a)(1)(A)'s exception from discharge. The case administration continued after the grant of discharge, and the debtors had negotiated with the state an amount of nondischargeable taxes, which they had substantially paid. The debtors then sought reimbursement from the trustee of their tax payments, but adopting the majority view, the court held that the debtors, rather than the bankruptcy estate, were liable for nondischargeable taxes and they were not subrogated to the rights of the state taxing authority. The debtors had no right to reimbursement. *In re Lettieri*, 506 B.R. 208 (Bankr. W.D. N.Y. 2014).

Discharge and Dischargeability

State’s Single Business Tax of defunct company was nondischargeable excise tax in former officer’s case. Michigan’s Single Business Tax owed by a defunct company, of which the Chapter 7 debtor had been an officer, was an excise tax under § 507(a)(8)(E), and the debtor’s derivative liability on that tax was excepted from discharge under § 523(a)(1)(A). “Because whether a tax is an ‘excise’ or not does not depend upon who is required to pay it, section 507(a)(8)(E)’s reference to ‘excise tax’ denotes only the nature of the assessment, not who is ultimately required to pay the assessed funds.” Michigan’s statute placed derivative liability on the former officer. *Rizzo v. State of Michigan Department of Treasury (In re Rizzo)*, 741 F.3d 703 (6th Cir. 2014).

Late-filed state income tax returns qualified as “returns” for discharge. Interpreting BAPCA’s hanging paragraph definition of “return,” § 523(a)(1)(B) excludes from discharge those tax liabilities for which a return was never filed, but this debtor filed returns, albeit late, and there was no contention that the state prepared returns for the taxpayer. Under Massachusetts state law, a “return” was defined as a “taxpayer’s signed declaration of the tax due, if any, properly completed by the taxpayer or the taxpayer’s representative on a form prescribed by the Commissioner and duly filed with the Commissioner.” There is no timeliness requirement in this state definition. “In other words, the determination is controlled by what the debtor filed, not when.” In this case, the debtor’s late-filed returns supported discharge of the relevant state income taxes. *Gonzalez v. Massachusetts Department of Revenue (In re Gonzalez)*, ___ B.R. ___, 2014 WL 888460 (BAP 1st Cir. March 6, 2014).

Creditors justifiably relied under § 523(a)(2)(A). The Chapter 7 debtor had been hired to build a vacation home, and the creditors justifiably relied on the builder’s false representation that he would work exclusively on their vacation home, devoting all of particular payments to winterize the home. The bankruptcy court’s holding that a portion of the construction payments was excepted from discharge was affirmed. *Falcone v. Ragonese (In re Ragonese)*, 505 B.R. 605 (BAP 1st Cir. 2014).

Imputing agent’s fraud requires that debtor knew or should have known of agent’s fraud. When record did not establish that debtor knew or had reason to know of sales agent’s misrepresentation to judgment creditor, agent’s fraud was not imputed to debtor/principal. Decisions from the Supreme Court, including *Bullock v. BankChampaign, N.A.*, 133 S.Ct. 1754 (2013), “appear to cut strongly against applying imputed fraud under § 523(a)(2)(A) to except a debt from discharge in the absence of showing of culpability on the part of the debtor.” *Sachan v. Huh (In re Huh)*, ___ B.R. ___, 2014 WL 936803 (BAP 9th Cir. March 11, 2014).

Debt owed to husband’s ex-wife and her attorney was not domestic support obligation. In prebankruptcy litigation, the Chapter 7 debtor and her husband had judgment against them jointly for \$280,000 attorney fees related to fraudulent transfer action filed by husband’s former wife. The fraudulent transfer action was part of the

husband's marital dissolution proceedings. The debtor filed the adversary proceeding, seeking determination that the debt owed to the husband's former wife and her divorce attorney was not excepted from discharge. In both §§ 523(a)(5) and (15), the phrase "spouse, former spouse, or child" on its face appears to specify to whom the debt must be owed for nondischargeability to apply." The Panel acknowledged that some courts had construed the phrase by "choosing to focus on the 'nature' of the underlying debt as determining the applicability of the statute. . . . One thing is clear from all of these [cited] cases. Even when the debt was not directly payable or owed to the spouse, former spouse or child of the debtor, the bounty of that debt had flowed to one of those family members explicitly covered by the statute, or that discharge of the debt would have adversely impacted the finances of one of those explicitly-covered family members." Here, the debtor's obligation to her husband's ex-wife and her divorce attorney was not related to a familial relationship—it was not owed to the debtor's former spouse. Even though the state court had joined the debtor as a party in the fraudulent transfer action, which gave rise to the judgment, that did not mean that the debt was covered by §§ 523(a)(5) or (15). *Bendetti v. Gunness (In re Gunness)*, 505 B.R. 1 (BAP 9th Cir. 2014).

Failure to comply with divorce obligations was willful and malicious injury. Chapter 7 debtor's repeated refusal to comply with divorce decree's requirement for him to transfer marital assets to his ex-wife was a willful and malicious injury for purposes of § 523(a)(6). There was an objective substantial certainty of harm to the former spouse by the debtor's failures. *Shankle v. Shankle (In re Shankle)*, ___ Fed.Appx. ___, 2014 WL 486208 (5th Cir. Feb. 7, 2014).

Sale of counterfeit watches was willful and malicious injury to trademark owner. Debtor's sale of hundreds of watches that bore counterfeit Rolex trademarks was willful and malicious injury to owner of trademark. *Goaz v. Rolex Watch U.S.A., Inc. (In re Goaz)*, ___ Fed.Appx. ___, 2014 WL 1047020 (5th Cir. March 19, 2014).

Landlords committed willful and malicious injury by eviction. After the state court announced oral ruling of judgment for tenant in forcible entry and detainer action, and landlords were in courtroom at ruling, the landlords committed willful and malicious injury to tenant when they proceeded with eviction. The state court had determined \$104,000 damages, including tenant's attorney fees. *Brown v. Ausley (In re Ausley)*, ___ B.R. ___, 2014 WL 1044252 (Bankr. W.D. Tenn. March 18, 2014).

Marital settlement agreement's obligation to hold spouse harmless from credit card debt gave rise to implied indemnity right for purposes of § 523(a)(15). Under California law, the Chapter 7 debtor's promise in marital settlement agreement to pay credit card debt and hold wife harmless was enforceable, even though the agreement did not include indemnification language. Section 523(a)(15) does not require that the obligation be paid directly to the former spouse, and under California law, the debtor's obligation was an implied indemnification claim. The former spouse had paid the credit card debt upon the debtor's failure to do so, resulting in damages. *Francis v. Wallace (In re Francis)*, ___ B.R. ___, 2014 WL 936797 (BAP 9th Cir. March 11, 2014).

Fee awards under § 523(d) and “special circumstances.” The debtor had successfully defended a fraud-based complaint dealing with a consumer debt, and the bankruptcy court found that the plaintiff was not substantially justified in pursuing the § 523(a)(2) complaint, but the requested fees were reduced under a determination of “special circumstances.” The Bankruptcy Appellate Panel held that § 523(d)’s “special circumstances” required complete disallowance, not reduction, of fees, and complete disallowance was not justified on the record in this case. The bankruptcy court had found that the requested fees were reasonable, and with that finding there was no authority to reduce the fees. *Daecharkhorn v. Waugh Real Estate Holdings, LLC (In re Daecharkhorn)*, 505 B.R. 898 (BAP 9th Cir. 2014).

One-year lookback in § 727(a)(2)(A) is not subject to equitable tolling. In issue of first impression in Ninth Circuit, the Bankruptcy Appellate Panel held that § 727(a)(2)(A)’s one-year lookback period is a statute of repose, not subject to equitable tolling. The Chapter 7 debtor was a former dentist, and a medical malpractice judgment had been entered against him. Before that judgment, the debtor had executed a revocable living trust, with the res consisting of real property that the debtor had owned for years, but the debtor did not execute a quitclaim deed to the trust for a couple of years. The debtor then filed two Chapter 13 cases, which were dismissed, and the quitclaim deed was recorded two days before the first Chapter 13 was dismissed. The debtor’s third bankruptcy was this Chapter 7, and the judgment creditor filed a § 727(a) complaint, alleging that the transfer to the trust was fraudulent. The BAP found that the language of § 727(a)(2)(A) did not expressly provide for tolling, unlike some Bankruptcy Code sections, such as §§ 108 and 523(a)(8)(A). The Panel then discussed the difference in statutes of repose and limitations, with equitable tolling applicable only to limitations periods. The Panel also held that the doctrine of “continuing concealment” did not apply here, since the debtor did not attempt to conceal any “interest” in the property into the year before filing his Chapter 7 case. The Panel distinguished concealment of an “interest” in the property from concealment of the transfer to the trust. *DeNoce v. Neff (In re Neff)*, 505 B.R. 255 (BAP 9th Cir. 2014).

Discharge denied for refusal to comply with court order. The debtor willfully failed to comply with court’s order to allow trustee, auctioneer and real estate broker to have reasonable access to residence for review of exempt and nonexempt property. Discharge was properly denied under § 727(a)(6). *Moore v. Robbins*, ___ F.Supp.2d ___, 2014 WL 930852 (D. D.C. March 11, 2014).

Post-discharge complaint violated discharge injunction. Creditors violated the discharge injunction by filing a complaint against the debtor, who had been a contractor, even though the plaintiffs were seeking restitution from Minnesota Contractors Recovery Fund (MCRF). The complaint exposed the debtor to potential personal liability, since it sought determination that the debtor was accountable for the underlying debt and it asked for damages in excess of the restitution cap under the MCRF—the debtor could have had an excess judgment against him. The plaintiffs should have asked the bankruptcy court

for leave to file the complaint, allowing the bankruptcy court to determine in advance whether the complaint would violate the discharge injunction and to structure the appropriate relief. *Bradley v. Fina (In re Fina)*, ___ Fed.Appx. ___, 2014 WL 46166 (4th Cir. Jan. 7, 2014).

Interests of creditors not considered in waiver of discharge. Considering the requirements under § 727(a)(10) for waiver of discharge and the split of authority on whether the court should consider the interests of creditors and other parties in interest, the court found it significant that the statute had no language suggesting such consideration. This debtor filed a written and signed waiver, and the debtor testified that his waiver was made knowingly, with assistance of counsel. The waiver was approved, which rendered moot complaints to deny discharge. *In re Akbarian*, 505 B.R. 326 (Bankr. D. Utah. 2014). Compare *Wank v. Gordon (In re Wank)*, 505 B.R. 878 (BAP 9th Cir. 2014) (Debtor's declaration amounted to prepetition waiver of discharge.).

Conversion

Earnings of individual Chapter 11 debtor revert to debtor on conversion to Chapter 7. The case was converted from Chapter 7 to 11 and then reconverted to 7, and the individual debtor received a bonus from personal services that was property of the Chapter 11 estate. Disagreeing with courts deciding otherwise, on reconversion to Chapter 7, the Bankruptcy Appellate Panel concluded that "there is no reason to treat chapter 11 debtors differently than chapter 13 debtors in this context." The bonus that would have been property of estate if case stayed in Chapter 11 reverted to the debtor on conversion to Chapter 7. *Wu v. Markosian (In re Markosian)*, ___ B.R. ___, 2014 WL 956475 (BAP 9th Cir. March 12, 2014).

Chapter 13 Issues

Eligibility

Debt limits are not jurisdictional and are subject to waiver. In a case filed in 2010, then dismissed for failure to file a plan but reinstated, the bankruptcy court heard evidence in 2012 on a creditor's motion to dismiss for lack of eligibility. By the time the creditor filed its motion to dismiss, asserting that the debtors exceeded the unsecured limit, the debtors had maintained plan payments for two years, and the creditor had not moved to dismiss when it filed its plan objection. Finding that a majority of courts had concluded that § 109(e) debt limits are not jurisdictional, the district court agreed, holding that a creditor may waive the debt limit eligibility by not raising it timely. The case and confirmation had been heavily litigated for two years before the creditor moved to dismiss on § 109(e) grounds, with the doctrine of laches applying. The court also affirmed the bankruptcy court's finding of the debtors' good faith in filing the case and proposing a plan. *General Lending Corp. v. Cancio*, 505 B.R. 63 (S.D. Fla. 2014).

Debtor ineligible when credit counseling completed after petition filed. Although completed on the same day as the petition filing, the debtor did not complete the required

credit counseling before filing. Discussing the split of authority on the meaning of “date of filing” in § 109(h)(1), as well as the status of a “debtor” under that statute, the court concluded that “[i]f a person must qualify as a ‘debtor’ to file a case, then someone who has not yet received a credit counseling briefing—and so may not be a debtor—cannot properly file.” Section 109(h)(1)’s “present perfect tense [‘has received’] does not indicate continuing activity. Rather, the tense is used in a phrase or sentence to set out an action, completed in the past, that has a present effect.” The debtor’s motion to vacate dismissal was denied. *In re Arkuszewski*, ___ B.R. ___, 2014 WL 1203144 (Bankr. N.D. Ill. March 24, 2014).

Curing Defaults

Tax purchaser’s claim could be paid through plan. Under Illinois law, a tax purchaser who paid Chapter 13 debtor’s real property taxes but had not received title to the property held a secured claim that could be treated in the plan. The bankruptcy court correctly denied the purchaser stay relief to acquire a tax deed. The debtor still retained a right of redemption, and the purchaser’s secured claim was subject to modification and payment by installments in the plan, rejecting the purchaser’s argument that the redemption must be in lump sum before the redemption deadline. “The plan is treating the secured claim, *not* formally redeeming the property.” *In re LaMont*, 740 F.3d 397 (7th Cir. 2014).

Foreclosure sale was complete prepetition. Applying New Hampshire law, mortgage foreclosure was complete when the auctioneer’s hammer fell, ending the mortgagor’s equity of redemption. Under § 1322(c)(1), even though legal title had not passed and a deed had not been recorded, the foreclosure was complete, and the property was not part of the bankruptcy estate. The debtor had no rights in the property and could not cure default. *TD Bank, N.A. v. LaPointe (In re LaPointe)*, 505 B.R. 589 (BAP 1st Cir. 2014).

Postpetition Property of Estate

Inheritance received more than 180 days postpetition included in property of estate. Section 1306(a)(1) broadens § 541(a)’s definition of property of the estate, to include all property acquired after commencement of the case, not limited by § 541(a)(5)’s 180-day postpetition limit, agreeing with *Carroll v. Logan*, 735 F.3d 147 (4th Cir. 2013). The inheritance must be turned over, unless the debtors modified their plan to increase distribution to unsecured creditors. *Dale v. Maney (In re Dale)*, 505 B.R. 8 (BAP 9th Cir. 2014).

Disposable Income

Stripped off junior mortgage not deductible for projected disposable income. Applying *Lanning’s* forward-looking approach, when it was known that the debtors would be stripping off wholly unsecured junior lien, those payments could not be deducted in the projected disposable income calculation. *Kramer v. Bankowski (In re Kramer)*, 505 B.R. 614 (BAP 1st Cir. 2014).

Debtors' voluntary contribution of Social Security benefits did not require dedication of all benefits, but deduction for long-term care insurance was denied.

Under the Eighth Circuit's *In re Carpenter*, 614 F.3d 930 (8th Cir. 2010) and *In re Thompson*, 439 B.R. 140 (BAP 8th Cir. 2010), there is no forced inclusion of Social Security benefits in a plan. Therefore, the debtors are in control of whether and how much of their Social Security benefits they devote to a plan. In the absence of other indicia of bad faith, the debtors' voluntary contribution of only part of those benefits is not grounds to deny confirmation. However, when the debtors failed to justify a deduction for long-term care insurance premiums and that type of expense was not listed in § 707(b)(2) as "other necessary expense," and when the plan did not provide for payment in full of unsecured claims, confirmation was denied. *In re Melander*, ___ B.R. ___, 2014 WL 988484 (Bankr. D. Minn. Mar. 13, 2014). See also *In re Worthington*, ___ B.R. ___, 2014 WL 1173316 (Bankr. S.D. Ind. March 21, 2014) (Social Security benefits were not included in definition of current monthly income, and debtor's failure to dedicate all of those benefits to plan was not lack of good faith; debtor had voluntarily devoted part of benefits to plan.).

Cash surrender value of whole life insurance not disposable income when debtors did not deduct premiums.

The above-median income debtor had whole life insurance, with cash surrender value that would increase over the plan life. Form B22C provides for deduction from disposable net income of the premiums on term life insurance, but not whole life, when calculating necessary expenses. The debtors deducted term life premiums but did not deduct from their means test their whole life premiums. The issue before the court was not the necessity or reasonableness of the premium expense, but "whether the increase in value postpetition must be paid to unsecured creditors." The trustee argued that the *Lanning* "forward-looking" approach required the increasing value to be included in disposable income. The court looked to the IRS Manual for actual expenses under its "Other Necessary Expenses" category, finding that one of those IRS expenses was for term life insurance premiums, as well as premiums on whole life, "to the extent that it does not increase its cash value." Here, the debtors did not attempt to adjust their means test by deducting the whole life premiums, and the court found that these debtors satisfied the requirements of § 1325(b)'s projected disposable income. "As a general rule, debtors need not commit any more funds to payment of unsecured creditors than those required by the 'projected disposable income' test, in order to meet the requirements for confirmation." *In re Uhlig*, 504 B.R. 916 (Bankr. E.D. Wis. 2014).

Single economic unit approach for "household" adopted. Reviewing the undefined term "household" in § 1325(b)(4) and the judicial interpretations, the bankruptcy court rejected the "heads-on-bed" and "IRS dependent" approaches, in favor of the "economic unit" approach. The "heads-on-bed" approach "depends solely on the number of residents in a structure and is unconcerned with the presence of a familial or economic relationship between the individuals. . . .The 'IRS dependent' definition is narrow, as it only allows individuals that can satisfy each requirement of the IRS test to be included within a debtor's 'household.' . . .The 'economic unit' definition realizes that there may be

individuals who have a significant impact on a debtor's financial reality that do not qualify as a dependent for IRS purposes, or that an individual can live with the debtor without affecting his ability to pay creditors." The court then discussed the evidentiary burden for the debtor, adopting a rebuttable presumption: "If an individual is listed as a dependent on the debtor's or the debtor's non-filing spouse's most recent income tax return, that individual is presumed to be a member of the debtor's bankruptcy 'household.' . . . If an individual is not listed as a dependent on the debtor's or the debtor's non-filing spouse's most recent income tax return, that individual is rebuttably presumed to not be a member of the debtor's bankruptcy 'household.' . . . The party desiring a different conclusion has the initial burden of providing evidence showing that the individual satisfied the 'economic unit' definition. . . . [T]he burden then shifts to the opposing party to provide countervailing evidence." In the present case, there were part-time children residing in the residence, with both spouses having children from prior marriages, and the court discussed the difficulty of accounting for such living arrangements. *In re Skiles*, 504 B.R. 871 (Bankr. N.D. Ohio 2014).

Applicable Commitment Period

Fourth Circuit holds that above-median debtor must maintain 60-month plan. The above-median debtors, who had negative disposable income, proposed a plan that contained early termination language permitting completion in 55 months, but that would not pay unsecured creditors in full. The bankruptcy court denied confirmation and direct appeal to the Fourth Circuit resulted in holding that the applicable commitment period is a temporal requirement. Such debtors must either maintain a full 60-month plan or pay unsecured creditors in full. In dicta, the court also stated that § 1329 "expressly incorporates the applicable commitment period as a temporal limit for purposes of plan modification. . . . In other words, for purposes of plan modification, the applicable commitment period appears to serve as a measure of plan duration wholly unrelated to debtors' disposable income." *Piiler v. Stearns*, ___ F.3d ___, 2014 WL 1259569 (4th Cir. March 28, 2014).

Best Interests of Creditors Test

Postpetition domestic support obligation was not allowed claim and best interests test failed. Although the Code defines domestic support obligation to include pre- and postpetition obligations, and the debtor may deduct postpetition domestic support obligations in the projected disposable income calculation, § 502(b)(5) disallows a claim to the extent it is for a debt unmatured at petition date, while the debt is excepted from discharge under § 523(a)(5). Only the prepetition DSO claim is an "allowed claim," notwithstanding other Code requirements that the debtor pay postpetition domestic support obligations. Since the former spouse's postpetition DSO is not an allowed claim, that debt and its proposed payment in the plan may not be deducted in the best interests calculation. The debtor was attempting this in order to avoid liquidation of otherwise nonexempt assets. In addition, this above-median debtor could not deduct as a business expense the mortgage payments on an office building, since there was lack of proof that

the building was suitable for or used regularly as an office. *McKinney v. McKinney (In re McKinney)*, ___ B.R. ___, 2014 WL 1047806 (Bankr. W.D. Pa. March 18, 2014).

Secured Claims

Replacement value applied when debtor surrenders collateral. The plan provided for surrender of a vehicle to satisfy the secured claim, and the bankruptcy court and Eleventh Circuit held that § 506(a)(2)'s valuation standard applied. The bankruptcy court conducted a valuation hearing, finding that the replacement value was at least equal to the debt and that the surrender had satisfied the secured claim. The creditor disputed that § 506(a)(2) applied to surrendered collateral. The Circuit Court held that by its plain terms the section applied, rejecting the argument that replacement value only applied when the debtor retained collateral. Although § 506(a)(2) has been described as a codification of *Rash*, its scope is not limited to retention. *Santander Consumer USA, Inc. v. Brown (In re Brown)*, ___ F.3d ___, 2014 WL 1245266 (11th Cir. March 27, 2014).

Oversecured creditor subject to *Till* rate after confirmation. Interpreting Fifth Circuit precedent, *In re Smithwick*, 121 F.3d 211 (5th Cir. 1997), the court concluded that an oversecured creditor was entitled to postpetition contract interest of 27.84% only until confirmation, but after confirmation, *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004) controlled interest to ensure present value of payments. Locally accepted *Till* rate of 7% was appropriate. *In re Stringer*, ___ B.R. ___, 2014 WL 1117083 (Bankr. N.D. Miss. March 20, 2014).

Unfair Discrimination

Plan unfairly discriminated in payment of non-priority taxes. Plan treated non-priority, nondischargeable tax debt at 100%, with nothing to other unsecured creditors, and when bankruptcy court rejected that plan, debtors amended but then objected to confirmation of plan with that classification removed. Applying test of *In re Lesser*, 939 F.2d 669 (8th Cir. 1991), the separate classification was not justified by the nondischargeability of the taxes. Proposing a plan that would pay those taxes in full, with nothing to other creditors was not in good faith. "In short, they propose to 'protect' those creditors least in need of protection, at the expense of the most vulnerable." *Copeland v. Fink (In re Copeland)*, 742 F.3d 811 (8th Cir. 2014).

Modification

Decision certified to Fifth Circuit on whether above-median debtor may receive discharge prior to completion of 60-month plan. With no controlling decision from Fifth Circuit, the bankruptcy court approved the confirmed debtors' ability to obtain discharge without paying unsecured creditors 100%, when they had made a lump sum payment that, combined with regular payments, exceeded the plan base. Trustee had moved to modify the plan to increase the plan base and appealed denial of that motion, citing four circuits' opinions that above-median debtors are bound by 60-month applicable commitment period, unless unsecured creditors are paid 100%. The bankruptcy court

found certification of the appeal to the Fifth Circuit to be appropriate. *In re Ruth*, 505 B.R. 804 (Bankr. S.D. Tex. 2014).

Postconfirmation modified plan not required to comply with projected disposable income test. After confirmation of above-median debtor's plan, debtor's income decreased and he moved to modify to reduce term of plan and distribution to unsecured creditors. The court concluded that § 1329(a)(2) permits shortening of plan term and that § 1325(b)'s projected disposable income is not enumerated in § 1329(b)(1)'s modification requirements. The split of authority on the issue was discussed, concluding that "the inclusion of section 1325(b) in the requirements for modifying a plan under section 1329(b) is too oblique and tenuous to be what the modification statute is intended to provide. Congress included certain statutory references in section 1329 and left out this one. Dragging in the requirement for unmodifiable duration indirectly, when other requirements are addressed directly is not appropriate." *In re Barnes*, ___ B.R. ___, 2014 WL 1016062 (Bankr. E.D. Wis. March 17, 2014). See also *In re Pasley*, ___ B.R. ___, 2014 WL 1199558 (Bankr. E.D. Cal. March 21, 2014) (Although below-median debtor's plan was confirmed with good cause for 60 months, to allow amortization of mortgage arrearage, debtors did not waive right to modify plan to 44 months. Code does not provide for forcing below-median debtors to remain in plan longer than 36 months, rejecting trustee's objection to modification.).

Effect of Conversion

Undistributed funds in confirmed case are property of creditors. Reviewing split of judicial authority, the court distinguished *In re Michael*, 699 F.3d 305 (3d Cir. 2012), in part on the basis that it involved a plan in which re-vesting occurred on confirmation. Here, the confirmed plan provided that property did not re-vest in debtors until plan completion. The court concluded that whether the debtors or creditors received undistributed funds upon conversion to Chapter 7 was a question of law, and nothing in the Code, including § 348, indicated that conversion acted to vacate the effect of confirmation. Further, under that section, the undistributed funds were no longer property of the estate, but the debtors had no property interest in them. The binding effect of confirmation meant that the undistributed funds must go to the Chapter 13 creditors. *In re Markham*, 504 B.R. 1 (Bankr. D. Mass. December 31, 2013).

Dismissal

Attorney-fee case in bad faith. The Eleventh Circuit held that the bankruptcy court did not clearly err in dismissing a Chapter 13 case filed for the purpose of paying attorney fees by installment. The bankruptcy court found that the debtor clearly would be better served by a Chapter 7 case and discharge. The debtor scheduled \$16,000 in unsecured claims, but only three creditors filed claims, totally \$1,355. The plan proposed to pay administrative claims, including \$2,000 attorney fees, over a seventeen month period. Acknowledging that under *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004), the debtor's Chapter 7 attorney could not be paid from estate funds, and without deciding whether

“attorney-fee-centric” plans were ever confirmable, the bankruptcy court did not clearly err in finding that the case was filed and plan proposed in bad faith. Such determinations are necessarily case-by-case. *Brown v. Gore*, 742 F.3d 1309 (11th Cir. 2014).

Attorneys and Fees

Court had authority under Rule 9011. Bankruptcy court had inherent authority under Rule 9011 to sanction Chapter 13 debtor’s attorney, on finding that attorney violated Rule throughout case, including amendment of schedules and plan to treat postpetition alimony as prepetition debt, when attorney knew that debtor had failed to make postpetition DSO payments. Sanctions included suspension from practice in bankruptcy court for six months, \$1,000 fine and CLE requirement, and these were affirmed. However, further sanction for attorney’s misrepresentation in testimony at the show cause hearing was remanded, because the attorney did not have notice of potential sanctions flowing from that hearing. *Young v. Young (In re Young)*, ___ B.R. ___, 2014 WL 944846 (BAP 8th Cir. March 12, 2014).

Debtor did not require court approval of special counsel. Under §§ 1303 and 1306(b), the Chapter 13 debtor had possession of state-law cause of action against a creditor for wrongful repossession. The debtor and the Chapter 13 trustee have concurrent authority over estate property, subject to § 363’s exclusive authority to the debtor to use, sell or lease property. A debtor is not a “trustee” for purposes of § 327, and the debtor was not required to seek court approval of employment of special counsel; however, such counsel must comply with §§ 329 and 330 concerning compensation. Any recovery from the cause of action would be property of the estate, for the benefit of creditors. *In re Jones*, 505 B.R. 229 (Bankr. E.D. Wis. 2014).

Dismissal and Conversion

Case properly dismissed for failure to comply with credit counseling. Assuming the debtor’s alleged lack of funds to pay for credit counseling could be an exigent circumstance, the debtor did not demonstrate that he had applied for credit counseling and had been unable to obtain it within the required seven days. The requirements of § 109(h)(3) were not satisfied, and the case was properly dismissed. *Taal v. Sumski (In re Taal)*, 504 B.R. 682 (BAP 1st Cir. 2014).

Case properly dismissed for bad faith. Bankruptcy court properly considered prior bankruptcy filings and timing of current case that was filed on morning of sheriff’s sale of commercial property, after state court had denied numerous attempts to stop sale. Debtor’s mother had also filed Chapter 13 to stay sale of jointly owned property. Court found no legitimate reason for debtor’s filing and no prospect of reorganization. Case was dismissed for bad faith, and bankruptcy court did not abuse discretion in sanctioning debtor for judgment creditor’s and trustee’s costs. *In re Mondelli*, ___ Fed.Appx. ___, 2014 WL 889352 (3d Cir. March 7, 2014).

Claims

Non-debtor spouse has claim for equitable distribution of marital property when parties were in prepetition divorce proceeding. On a direct appeal, the Third Circuit decided the issue of whether a non-debtor spouse has an allowable claim for equitable distribution of marital property in a divorce proceeding that was pending at the time the other spouse filed Chapter 7. Stating that the issue had divided courts in the Circuit, the court looked to the definition of a “claim” under § 101(5)(A), with the spouse’s interest, “at the least, unliquidated and contingent on a final decree apportioning marital property.” Citing its decision, *In re Grossman’s*, 607 F.3d 114 (3d Cir. 2010), in which an asbestos-tort claim arose when the claimant was exposed to a product or conduct prepetition, the Circuit’s earlier “accrual test” had been overruled. The focus is not on when the claim accrues, but “whether a claim exists,” and the contingent nature of the spouse’s claim did not change the fact that she had a claim for equitable distribution. *In re Ruitenberg*, ___ F.3d ___, 2014 WL 959485 (3d Cir. March 13, 2014).

Chapter 13 debtor was not “prevailing party” under California law for purposes of recovering attorney fees for claim objection. The Chapter 13 debtor filed an objection to the proof of claim for mortgagee, disputing \$425 attorney fees in the claim. The claimant amended its proof of claim, deleting the attorney fees, and the debtor then sought her own attorney fees and costs of \$5,265, under a California statute, but the bankruptcy court correctly concluded that the debtor was not a “prevailing party” under that statute. The claimant voluntarily amended its proof of claim, before the bankruptcy court was required to make any disposition on the claim or its objection. *Brosio v. Deutsche Bank Nat’l Trust Co. (In re Brosio)*, ___ B.R. ___, 2014 WL 901093 (BAP 9th Cir. March 7, 2014).

CONSUMER LAW UPDATE

**Cases reported from April 1, 2014 through
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Jurisdiction and Authority of Bankruptcy Courts

De novo review satisfied Stern. Without deciding the issue of whether a party to a non-core proceeding may consent to the bankruptcy court's entry of final judgment, see footnote 4 to opinion, the Supreme Court held that in a non-core fraudulent conveyance claim, the defendant received *de novo* review by an Article III district court. The district court conducted such a review, "concluding in a written opinion that there were no disputed issues of material fact and the trustee was entitled to judgment as a matter of law." Even if the bankruptcy court's entry of judgment was invalid, the district court's *de novo* review and entry of its own judgment cured any error. *Executive Benefits Insurance Agency v. Arkison*, ___ S.Ct. ___, 2014 WL 2560461 (June 9, 2014).

But wait, Court granted certiorari on consent and property of estate issues. Subsequent to *Executive Benefits*, the Court granted *certiorari* on July 1, 2014, from the Seventh Circuit's *Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d. 751 (7th Cir. 2013), specifying two issues: (1) whether the presence of a subsidiary state law property issue in a § 541 action deprives the bankruptcy court of constitutional authority to enter final judgment; and (2) whether Article III permits a bankruptcy court to have authority as a result of a litigant's consent, and if so, whether implied consent is sufficient.

Automatic Stay

Emotional distress damages possible but not proven. Although emotional distress damages are potentially available for intentional stay violations, when the notice of foreclosure sale was removed on the day of the publication and the debtor did not offer evidence other than generalized affidavits, the debtors failed to prove those damages. The Eleventh Circuit had not previously decided whether such damages were allowable, but it reviewed the decisions of four other circuits that had addressed the issue, concluding that emotional distress damages fell within the broad term of actual damages in § 362(k). "At a minimum, to recover 'actual' damages for emotional distress under § 362(k), a plaintiff must (1) suffer significant emotional distress, (2) clearly establish the significant emotional distress, and (3) demonstrate a causal connection between that significant emotional distress and the violation of the automatic stay." *Lodge v. Kondaur Capital Corp.*, 750 F.3d 1263 (11th Cir. 2014). See also *In re Voll*, ___ B.R. ___, 2014 WL 2567414 (Bankr. N.D. N.Y. June 6, 2014) (Chapter 13 debtors failed to prove significant emotional distress damages for state taxing authority's willful stay violation, but debtors were entitled to attorney fees. To recover for emotional distress, debtors must establish causal connection between distress and stay violation, and the distress must be "distinct. . . from the anxiety and pressures inherent in the bankruptcy process." Quoting *In re Dawson*, 390 F.3d 1139, 1149 (9th Cir. 2004).).

Debtor's attorney fees defending lender's appeal of stay violation were incurred to remedy stay violation. Affirming, the Ninth Circuit distinguished *Sternberg v. Johnston*, 595 F.3d 937 (9th Cir. 2010), holding that the Chapter 13 debtor's attorney fees incurred

in the defense of the creditor's appeal from the bankruptcy court's finding of stay violation were allowed as part of the action to remedy the stay violation. The fees at issue fell within § 362(k)'s "actual damages." *Sternberg* "does not apply to a situation where a debtor defends herself when a creditor who had violated the automatic stay appeals that finding." A dissenting judge expressed constitutional concern about the Bankruptcy Appellate Panel's citation of its precedent, which had been rejected in *Sternberg*. *America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard)*, 751 F.3d 966 (9th Cir. 2014).

Stay protected debtor's possessory interest. Affirming, the Bankruptcy Appellate Panel agreed that the automatic stay protected the debtor's bare possessory interest in property and the mortgage lender, which had completed prepetition foreclosure, violated the stay when it changed locks and prevented the debtor's access to personal property in the residence. This was an exercise of control over property of the estate. Although under California law the debtor's ownership interest had ceased, there was still a possessory interest since the debtor was still occupying the residence. The lender's action was void. *Eden Place, LLC v. Perl (In re Perl)*, ___ B.R. ___, 2014 WL 2446317 (BAP 9th Cir. June 5, 2014). See also *In re Salov*, 510 B.R. 720 (Bankr. S.D. N.Y. 2014) (Creditors violated stay by filing and serving writ of eviction without seeking stay relief, entitling Chapter 13 debtor to compensatory and punitive damages. Debtor had possessory interest in house owned by relatives, and mortgage had been foreclosed prepetition.).

Stay relief should have been granted for cause. Reversing and remanding, the Bankruptcy Appellate Panel found that the mortgage lender had shown cause for stay relief, based on the Chapter 13 debtors' failure to make 15 of 22 postconfirmation payments. *CitiMortgage, Inc. v. Borm (In re Borm)*, 508 B.R. 104 (BAP 8th Cir. 2014).

Judgment creditor violated stay by failing to cancel status conference on discovery. Interrogatories had been issued in aid of the creditor's collection effort, with a hearing set in state court, and the creditor's failure to take steps to cancel the hearing or discontinue the interrogatories was a stay violation. The state court hearing was a continuation of a judicial proceeding to recover a claim against the debtor, barred by § 362(a)(1). The creditor was given notice of the Chapter 7 filing and its failure to act accordingly made it a willful violation. Remand was required for damage findings. *Skillforce, Inc. v. Hafer*, 509 B.R. 523 (E.D. Va. 2014).

IRS willfully violated stay by offset to collect non-tax debt. The government's postpetition setoff of the Chapter 7 debtor's tax refund to collect a non-tax debt was a willful stay violation. The setoff was against the tax refund for the tax year immediately preceding the Chapter 7 filing, and the debt to be collected was an obligation to the United States Department of Rural Development Services, resulting from a prepetition foreclosure. The offset was made under the Department of Treasury's program, authorizing interception of tax overpayment to satisfy enforceable debt owed to another federal agency. 26 U.S.C. § 6402(d)(1). Discussing the split of judicial authority, the

court declined to follow *IRS v. Luongo*, 259 F.3d 323 (5th Cir. 2001), and analyzed property of the estate and § 362(b)(26). The latter section excepts from the automatic stay setoff by a governmental unit of a prepetition tax refund “against an income tax liability,” which did not protect an offset to collect non-tax liability, absent stay relief. The government was responsible for the debtor’s costs and fees related to the seizure, and the government must release the \$4,201 tax refund; however, the action did not justify punitive damages. The debtor’s interest in the prepetition tax refund had become property of the estate, but the debtor had claimed exemption. Retroactive stay relief was not appropriate, since the government knew of the bankruptcy filing and intercepted the tax refund without seeking stay relief. *Sexton v. Department of Treasury*, 508 B.R. 646 (Bankr. W.D. Va. 2014). *Compare In re Pugh*, 510 B.R. 862 (Bankr. E.D. Wis. 2014) (Stay relief granted to allow IRS to offset debtor’s postpetition overpayment of taxes against unpaid prepetition taxes, discussing the split in authority.).

Debtor and ex-husband violated stay. In a prebankruptcy divorce, the debtor’s husband had been ordered to pay spousal support of \$4,500 monthly, and the wife was ordered to hold the husband harmless from liability on a home equity line of credit after the husband paid thirty-six months of that debt. The wife subsequently filed Chapter 13 and obtained confirmation, but the parties then returned to family court after the wife had defaulted on the line of credit and that creditor obtained judgment against the ex-husband. The parties agreed in family court to a reduction of the ex-husband’s monthly support by \$750 to protect him against the debtor’s default of her hold-harmless obligation, but the parties did not obtain stay relief before going to family court. The result of the parties’ agreement in family court was to reduce the debtor’s monthly income, while benefitting her ex-husband’s contingent claim at the expense of other creditors, and that action was not excluded from the stay by § 362(b)(2). The court set alternative conditions for the debtor and ex-husband to rectify the stay violation and correct the reduction of debtor’s monthly income. *In re Coats*, 509 B.R. 836 (Bankr. W.D. Mich. 2014).

Avoidance

Chapter 7 trustee could not sell home with no equity. The Chapter 7 trustee filed complaint to avoid an assignee’s unrecorded first mortgage and to preserve that lien for estate. The debtor objected, and the debtor was current on both mortgages, which would prevent either mortgagee from foreclosing. The debtor also had claimed homestead exemption in all equity. So long as the mortgages remained with the lenders, the trustee would have no claim to sell the property. Assuming the trustee avoided the unperfected mortgage, he could not sell the home in the position of the mortgagee, since the debtor was current and no right of foreclosure existed. And, avoiding the mortgage would not create equity, since the debtor’s \$500,000 unchallenged homestead would consume the equity created if the mortgage were eliminated. Avoidance of the unperfected mortgage only preserves that mortgage for the benefit of the estate, but does not give the estate ownership of the property. The trustee could sell the avoided mortgage, but if the underlying property had been fully exempted, it no longer was part of the estate for purposes

of selling the property. Distinguishing *Schwab v. Reilly*, the issue here was whether the trustee's power of sale under § 363 justified sale when there was no equity remaining for the estate after the secured claims and the debtor's exemption. The avoided mortgage would not carry with it the power to foreclose in the absence of default. "The preservation of a lien entitles a bankruptcy estate to the full value of the preserved lien—no more and no less." *Degiacomo v. Traverse (In re Traverse)*, ___ F.3d ___, 2014 WL 2142521 (1st Cir. May 23, 2014).

Debtor's transfer to husband's corporation was constructively fraudulent. Seven months before bankruptcy, the Chapter 7 debtor had transferred her interest in property jointly owned with her husband to her husband's corporation, and the transfer was constructively fraudulent, but the district court, which had reversed the bankruptcy court, incorrectly found a resulting trust based on the corporation's having owned the property. The bankruptcy court made findings that no resulting trust was proven, and the Fourth Circuit could not find this to be clear error. Since the district court's finding of a resulting trust was reversed, remand was required to address other issues not reached by the district court. *Anderson v. Architectural Glass Const., Inc. (In re Pfister)*, 749 F.3d 294 (4th Cir. 2014).

Judicial lien avoidance motion was properly served. Reviewing the "coherent scheme of procedural due process safeguards" found in Rules 4003(d), 9014 and 7004, the debtors' motion to avoid a judicial lien was properly served, reversing denial of the motion. Rule 7004(h) requires a motion involving an insured depository institution to be served by certified mail addressed to an officer of the institution, unless one of the exceptions found in the Rule applies. These debtors' motion was served in compliance with that Rule, when certified mail was addressed to attention of an officer of the corporate lienholder at the address indicated on the lienholder's proof of claim. Since the debtors complied with the Federal Rule, it was not necessary to comply with a California Rule requiring service on the attorney for the creditor, as listed on the abstract of judgment. An attorney had not appeared for the lienholder in the bankruptcy case to trigger application of Rule 7004(h)(1). The motion also sufficiently notified the lienholder of the property subject to the lien. *Frates v. Wells Fargo Bank, N.A. (In re Frates)*, ___ B.R. ___, 2014 WL 982851 (BAP 9th Cir. Mar. 13, 2014).

Valuation sixteen days after petition date was not relevant for lien avoidance. The district court vacated lien avoidance, holding that the debtor's expert appraiser valued residential property as of sixteen days after the petition date, and § 522(a)(2) requires that fair market value be determined as of the petition date. There was nothing in the record to support an inference that value related back to the petition date. Reviewing the formula for avoidance of judicial liens under § 522(f)(2)(A), the avoidance of two liens in their entirety was error, since there was \$735.31 of equity after two mortgages to partially satisfy the liens; therefore, on remand the bankruptcy court may consider partial avoidance. *Prangley v. Cokinios*, 509 B.R. 822 (D. Maryland 2014).

Foreclosure judgment lien was not avoidable under § 522(f). The debtor sought to avoid the lien of a foreclosing creditor, asserting that the consensual deed of trust lien merged into the judgment for foreclosure. Even assuming that merger occurred, the foreclosure judgment stated that the deed of trust lien would continue perfected, and § 522(f)(2)(c) states that this section's avoidance does not apply to judgment arising out of mortgage foreclosure. *In re McCracken*, 509 B.R. 329 (Bankr. D. Ore. 2014).

Property of Estate and Exemptions

Inherited IRA not exempt. The Supreme Court held that an inherited IRA does not constitute a "retirement fund" within the meaning of 11 U.S.C. § 522(b)(3)(C). Since that Code section is identical to § 522(d)(12), inherited IRAs would not be exempt under the latter section either. Although the Court affirmed the Seventh Circuit's decision, *In re Clark*, 714 F.3d 559 (2013), the unanimous opinion by Justice Sotomayor is broader than the Seventh Circuit's. The Circuit Court had distinguished the IRA before it, one inherited from someone other than the debtor's spouse, from spousal inheritance, leaving open the argument that an IRA inherited from a spouse would be exempt, but the Supreme Court held that an inherited IRA lacked the legal characteristics of funds set aside for retirement. The Court recognized that if the heir is the original owner's spouse, the heir may "roll over" the IRA into his or her own IRA, while an heir of someone other a spouse does not have the "roll over" option. Notwithstanding this distinction, the Court broadly concluded that an inherited IRA simply does not operate like an ordinary IRA, stating that the inquiry into exempt status is an objective one, not a case-by-case factual examination. Looking at three legal characteristics of an inherited IRA, the heir is not able to invest additional funds in the account; the heir is required to withdraw the funds or take minimum annual distributions, rather than hold the funds for retirement; and the heir may withdraw the funds without tax penalty, rather than wait until age 59 ½, as is the case with a regular IRA. There will be litigation over the extent to which the opinion has impacts on state-law exemptions for retirement funds. *Clark v. Rameker*, 134 S.Ct. 2242 (June 12, 2014)

Debtor's homestead limited to dollar amount claimed and nondebtor spouse's interest protected in forced sale. Affirming, the bankruptcy court had authority to order a sale of the home that was subject to the nondebtor spouse's homestead rights, without deciding the monetary amount of those rights. This property was acquired before enactment of BAPCPA, and was titled only in the name of the subsequent debtor. Less than 1215 days after the property was acquired by the debtor, a creditor filed an involuntary Chapter 7 case, which was subsequently converted by the individual debtor to Chapter 11. Although the debtor claimed unlimited homestead, § 522(p) limited the homestead to that statute's dollar cap, at the time of filing \$136,875. Section 363 authorizes a forced sale, even though a third party holds an interest in the property, and a decision from the Texas Supreme Court supports the right of sale under federal law that is enforceable against a non-debtor spouse, even though that non-debtor has homestead rights. As to whether the spouse's homestead was capped by § 522(p), it was stipulated that the residence was the separate property of the debtor, or the property of the debtor's

sole management community, or was the joint management community of both spouses. Although the non-debtor spouse had homestead rights, the question was the value of those rights, and the parties had not sufficiently briefed the calculation of value. “Neither argues that the determination by Congress to permit an exemption of \$136,875 [the then cap under § 522(p)] for a debtor such as Mr. Kim would not be just compensation for Mrs. Kim’s homestead interest since \$136,875 in proceeds would be impressed with her homestead rights. The Kims have not adequately briefed their claim that a taking would occur unless Mrs. Kim is compensated more than the \$136,875 exemption.” The Kims also did not address the applicability of § 363(j), and the Court did not express an opinion as to whether she was entitled to compensation under that section. *Kim v. Dome Entertainment Center, Inc. (In re Kim)*, 748 F.3d 647 (5th Cir. 2014).

Objection to tenancy by entirety exemption in vehicles sustained. Affirming, the Chapter 7 trustee objected to the debtor’s § 522(b)(3)(B) claimed tenancy by entirety ownership of three vehicles, when the certificates of title contained only the debtor’s name. Under Delaware law, the certificates of title provided presumptive evidence of ownership, and the debtor had the burden of rebutting that presumption. There was no evidence that the funds for purchase of the vehicles came from jointly-held marital funds, and the debtor failed to carry the rebuttal burden. *In re Scioli*, ___ Fed.Appx. ___, 2014 WL 2119187 (3d Cir. May 22, 2014).

Assets acquired for fledgling outdoor guide business were exempt. Affirming, the bankruptcy court did not err in finding that firearms, boats, camper, all-terrain vehicle, trailers and fishing equipment that the Chapter 7 debtor had acquired for use in a fledgling business of outdoor guiding were exempt as tools of trade under Colorado’s statute. That statute permitted \$20,000 exemption in tools of trade used “for the purpose of carrying out any gainful employment.” Although the business had not yet operated at a profit, and “gainful employment” was not defined in the statute, “whether or not gainful is synonymous with profitable has not been addressed within a bankruptcy context in any meaningful way,” which is attributable in part to the unique use of that term in Colorado’s statute. See opinion at n. 37. While “complete disregard for profitability with respect to the term ‘gainful employment’ . . . would be difficult to justify,” the debtor was actively engaged in promoting the new business, had developed an expertise in the field and losses of the business were attributable to the start-up costs. The party objecting to the exemption 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 specific facts of the case, the trustee failed in that burden. *Larson v. Sharp (In re Sharp)*, 508 B.R. 457 (BAP 10th Cir. 2014).

Chapter 7 debtor entitled to state homestead increased one week before filing. The Bankruptcy Code and Ohio exemption statute pointed to the petition date as the time for determining entitlement to specific exemptions and the exemption amount. Although uncodified language of the Ohio General Assembly purported to limit application of the increased homestead amount to creditors’ “claims accruing” on or after the amendment’s

effective date, this language was silent as to application in bankruptcy and the codified language of the Ohio homestead exemption made it clear that the debtor's interest was determined as of the bankruptcy petition date. The bankruptcy was filed after the effective date of the increase in the homestead from \$21,625 to \$125,000, and allowing exemption in the increased amount did not retroactively divest creditors of substantive or vested rights. Moreover, under § 522(c) and majority authority, the Bankruptcy Code preempts application of the uncodified language—to apply that language in this case would cause creditors whose claims “accrued” before the amendment to be excepted from the increased homestead exemption, while creditors whose claims “accrued” after the increase would be subject to the increased exemption. *In re Kyle*, ___ B.R. ___, 2014 WL 1931608 (Bankr. S.D. Ohio May 14, 2014).

“Separate filing rule” applied to tax refund. Reversing, the district court held that when the Chapter 7 trustee and debtors disagreed about how much of a tax refund belonged to the estate, the IRS’s “separate filing rule” should be applied, rather than a “50/50 rule.” The debtor claimed that all of a refund from a joint tax return was attributable solely to the nondebtor wife’s overpayment, and the trustee insisted on receiving one half of the refund. “Specifically, the formula is based on IRS Revenue Ruling 74-611 which states that when a husband and wife file a joint return, each spouse has a separate interest in the jointly reported income and a separate interest in overpayment.” The formula must take into account the respective spouse’s withholdings, income and contributions as a whole, as well as tax credits attributable to each spouse. *Lee v. Walro (In re Lee)*, 508 B.R. 399 (S.D. Ind. 2014).

Debtor’s exemption under resulting trust theory denied. The debtor-wife claimed exemption in a vehicle that was titled in debtor-husband’s name, asserting that she owned the vehicle under a resulting trust; however, under Massachusetts law requirements for a resulting trust, there was not clear evidence that the parties intended a trust relationship when the car was purchased and titled only in the husband. The wife’s exemption claim was denied. *In re Frankel*, 508 B.R. 527 (Bankr. D. Mass. 2014).

Petition Preparers

Petition preparers acted as more than referral service. Affirming bankruptcy court’s finding that individual and wholly-owned corporation acted as bankruptcy petition preparers, they violated disclosure requirements in advertising, failed to provide required notices to customers, misrepresented services that were provided, and caused untrue statements to be made in bankruptcy documents. Violations justified injunctive relief, disgorgement of fees and liquidated damages. *Jonak v. McDermott*, ___ B.R. ___, 2014 WL 2213187 (D. Minn. May 28, 2014).

Chapter 7 Issues

Eligibility

Filing 47 days after voluntary dismissal and two stay relief motions was Rule 9011 violation. The debtors voluntarily dismissed their Chapter 11 case after the filing of two stay relief motions, but then filed a Chapter 7 case 47 days later. Under Rule 9011, a debtor's attorney must perform reasonable investigation of facts and law before filing a pleading, and the refiling was a Rule 9011 violation, as one for improper purpose to delay state foreclosure proceeding. Admonishment of attorney and monetary sanction of reasonable attorney fees for creditor were appropriate. *In re Terron Hernandez*, ___ B.R. ___, 2014 WL 2467974 (Bankr. D. Puerto Rico June 2, 2014). See also *Desiderio v. Parikh (In re Parikh)*, 508 B.R. 572 (Bankr. E.D. N.Y. 2014) (Numerous inconsistencies in Chapter 7 and 13 schedules showed lack of pre-filing investigation by debtor's attorney, justifying sanction for Rule 9011 violation, but sanction was publication of decision, with no attorney fees awarded against attorney or debtor.).

Chapter 7 Trustee

Trustee entitled to commission compensation absent extraordinary circumstances. Unless there are extraordinary circumstances, the Chapter 7 trustee's commission must be based on § 330(a)(7)'s commission calculation, which refers to § 326. Noting a split of judicial authority subsequent to BAPCPA, the Fourth Circuit cited as persuasive authority, *Hopkins v. Asset Acceptance LLC (In re Salgado-Nava)*, 473 B.R. 911 (BAP 9th Cir. 2012). The bankruptcy court should determine maximum statutory commission under § 326(a) and then determine if there are extraordinary circumstances to show that the commission is unreasonable. *Gold v. Robins (In re Rowe)*, 750 F.3d 392 (4th Cir. 2014).

Trustee could employ own firm as counsel. The Chapter 7 trustee had burden to show that employment of her own firm to represent trustee was in best interest of the estate. Reviewing the trustee's statutory duties and the basis for employment of counsel under the Code and Rules, the court provided the following guidelines for an application: (1) state why the employment of an attorney is necessary; (2) identify the person to be employed; (3) set forth why the particular selection was made; (4) set forth the range of potential services to be rendered; (5) set forth contemplated fee arrangement; and (6) set forth all connections of the person to be employed with the debtor, creditors, any party in interest, and the United States trustee. If the application seeks to employ the trustee's own firm or attorneys in that firm, the application must set forth why that is in the best interests of the estate in order to satisfy § 327(d). *In re Edwards*, 510 B.R. 554 (Bankr. S.D. Texas 2014).

Discharge and Dischargeability

Debtor's late tax return did not qualify as "return" for § 523(a)(1)(B). BAPCPA's definition of "tax return" in hanging paragraph of § 523(a) does not exclude the pre-

BAPCPA test found in *Beard v. Commissioner*, 793 F.3d 139 (6th Cir. 1986); rather, the definition incorporated the *Beard* factors to determine the meaning of a “return.” The court discussed the majority and minority views on the issue. The return filed by the debtor seven years after it was due and more than three years after IRS prepared a substitute return did not qualify as a “return” for purposes of discharge. *IRS v. Smith (In re Smith)*, ___ B.R. ___, 2014 WL 1727011 (N.D. Cal. Apr. 29, 2014). Compare *Pendergast v. Massachusetts Dept. of Revenue (In re Pendergast)*, 510 B.R. 1 (BAP 1st Cir. 2014) (Section 523(a)’s definition replaced *Beard* test but “a late-filed, post-assessment Massachusetts state income tax return does not qualify as a return for discharge purposes.” Under prior holding of *In re Gonzalez*, 506 B.R. 317 (BAP 1st Cir. 2014), a late return is treated as a return under that state’s law, but when the return is filed after the state’s assessment, the treatment changes, and the taxes related to that post-assessment return were not dischargeable.).

Bankruptcy court has constitutional authority to enter monetary judgment in dischargeability action. The Sixth Circuit held that *Stern v. Marshall* did not deprive the bankruptcy court of constitutional authority to enter final monetary judgments as a part of a dischargeability determination. The bankruptcy court had found four loans to be nondischargeable debts under § 523(a)(2)(B) and also determined the monetary amounts. *Stern* did not alter the reasoning of the Sixth Circuit’s pre-*Stern* decision that the bankruptcy court could enter final monetary judgment in such proceedings, *In re McLaren*, 3 F.3d 958 (6th Cir. 1993). *Hart v. Southern Heritage Bank (In re Hart)*, ___ Fed.Appx. ___, 2014 WL 1663029 (6th Cir. Apr. 28, 2014). See also *Ray Cai v. Shenzhen Smart-In Ind. Co., Ltd. (In re Ray Cai)*, ___ Fed.Appx. ___, 2014 WL 1647730 (9th Cir. Apr. 25, 2014) (“Determining the scope of the debtor’s discharge is a fundamental part of the bankruptcy process, and determining whether a claim against a creditor is discharged under § 523(a)(2)(A) does not raise any issues of state law.”).

Fraudulent intent was actually litigated in prepetition slander of title suit. Applying Illinois law for whether the debtor’s fraudulent intent was actually litigated for purposes of collateral estoppel, it is only required that the parties disputed the issue and that the trier of fact resolved the issue—actual litigation does not mean “thoroughly litigated.” The debtor’s fraudulent intent was a necessary element of the state court’s decision in a slander of title suit, with the state court finding that the debtor acted fraudulently and with malice, which findings formed the basis for punitive damages. The debt was nondischargeable under §§ 523(a)(2)(A) and (a)(6). *Gambino v. Koonce*, ___ F.3d ___, 2014 WL 2959130 (7th Cir. July 2, 2014). See also *Cherry v. Neuschafer (In re Neuschafer)*, 2014 WL 2611258 (BAP 10th Cir. June 12, 2014), slip copy, for discussion of issue preclusion and effect of default judgment.

No abuse of discretion in denying amendment of complaint from § 523(a)(6) to § 523(a)(2). The plaintiff filed a timely complaint under § 523(a)(6), but the bankruptcy court found no evidence to support action under that section, and denied the plaintiff’s request to amend to plead § 523(a)(2)(A). The request was made seventeen months after the

complaint's filing and just one week before scheduled trial. Rule 15(a)'s liberal amendment policy does not excuse lack of diligence, and the bankruptcy court did not abuse its discretion in denying amendment, when there was no explanation for the seventeen-month delay. *Zullo v. Lombardo (In re Lombardo)*, ___ F.3d ___, 2014 WL 2620958 (1st Cir. June 13, 2014).

Debt to county for supporting incarcerated child was domestic support obligation.

Affirming, the county probation office did not violate discharge injunction when it attempted collection from the debtor, because the debt was nondischargeable domestic support obligation. The debt arose from the county's expenses in providing the debtor's minor son with necessary food, clothing, personal supplies and medical care while the son was incarcerated for almost two years. A California statute provides that a parent is liable for reasonable costs of support of a minor child who is incarcerated pursuant to an order of the juvenile court, with a statutory limit of \$30 per day. The county continued collection efforts after the debtor received Chapter 7 discharge. At the first hearing, the bankruptcy court issued a tentative ruling, concluding that the debt was not covered by §§ 523(a)(5) and 101(14A), but after further briefing by the parties and prior to second hearing that court issued another tentative ruling reversing its conclusion. The bankruptcy court did not err in considering additional authority or requesting further briefing. The debt to the county fell within § 101(14A)'s definition of domestic support obligation, as a prepetition debt owed to a governmental unit, incurred for the support of the debtor's child as "assistance provided by a governmental unit," and the debt was established prebankruptcy by an order of a state court. The debt had not been assigned to the government for collection. BAPCPA broadened categories of creditors protected from discharge by § 523(a)(5), and the debt to county was excepted from discharge. *Rivera v. Orange County Probation Dept. (In re Rivera)*, ___ B.R. ___, 2014 WL 2510185 (BAP 9th Cir. June 4, 2014).

"Intervention fees" imposed by State Department of Corrections not covered by § 523(a)(7).

The pro se Chapter 7 debtor reopened discharged case to determine if the Missouri Department of Corrections violated the discharge injunction, and the issue was whether \$90 withheld from the debtor/prisoner's inmate fund account was excepted from discharge as a fine, penalty or forfeiture. The \$90 was an intervention fee that was authorized under state law to fund the State's Probation and Parole Board's community corrections and intervention services for offenders, including services related to transition from prison to society. Although the fee was payable to and for the benefit of a governmental entity, it was not imposed as a part of the debtor's criminal sentence. The court focused on the nature of fines, penalties and forfeitures "as in essence takings grounded in wrongful acts and effectuating a punishment therefor," quoting *In re Soileau*, 488 F.3d 302, 310-11 (5th Cir. 2007). This intervention fee was not for the purpose of punishment but for transition assistance; as such, the fee was not penal in nature and was not a debt excepted from discharge under § 523(a)(7). Although the collection violated the discharge injunction, the remedy was to restore the \$90 to the debtor's

account, with no further sanction. *In re Miller*, ___ B.R. ___, 2014 WL 2012828 (Bankr. W.D. Mo. May 15, 2014).

Eighth Circuit affirms remand to determine discharge of each student loan. The Bankruptcy Appellate Panel had remanded for the bankruptcy court to determine undue hardship on loan-by-loan basis, and the Eighth Circuit affirmed. There were fifteen different student loans, and partial discharge was not an available remedy for the totality of the student loans, but the remand was not an abuse of discretion. *Conway v. Nat'l Collegiate Trust (In re Conway)*, ___ Fed.Appx. ___, 2014 WL 2565825 (8th Cir. June 9, 2014).

Highly educated 63-year old debtor did not prove undue hardship. Affirming the bankruptcy court, although the debtor had been unemployed since 2002, last working as president of a corporation, the debtor was highly educated and was not burdened with other significant debt. Although close to retirement age, the prolonged unemployment did not support discharge, since the debtor still had significant time left to work in potential high-income jobs. The court did not consider the debtor's failure to participate in the Ford Income Contingent Repayment program to be a factor of great significance. The court used the totality-of-circumstances test for undue hardship, commenting that the differences between that test and the *Brunner* test were "modest." *Murphy v. Educational Credit Management Corp.*, ___ B.R. ___, 2014 WL 2126083 (D. Mass. May 21, 2014).

Debt to individual co-signer was nondischargeable for "funds received as an educational benefit." An individual cosigned student loan for Chapter 7 debtor, and after debtor's default, the individual paid the lender. Discussing the expansion of § 523(a)(8)(A)(ii) to cover "an obligation to repay funds received as an educational benefit," the dispute did not involve undue hardship, but whether the obligation was an "educational benefit." The loan itself clearly fell within that term, and the court discussed whether the plaintiff was a coborrower, guarantor or accommodation party under applicable Ohio law, concluding that the plaintiff was at least an accommodation party on the credit agreement. As an accommodation party, the plaintiff had the right of subrogation, stepping into the shoes of the original lender. Under § 523(a)(8)(A)(ii), there is no requirement that the obligation be related to a governmental unit or a nonprofit institution. Citing *Benson v. Corbin (In re Corbin)*, 506 B.R. 287 (Bankr. W.D. Wash, 2014), a case with similar facts, the court concluded that the focus of § 523(a)(8)(A)(ii) is not on the original lender, but on whether the obligation is to "repay funds received as an educational benefit." The obligation to the cosigner fell within the statute's broad reach for exception to discharge. *Brown v. Rust (In re Rust)*, 510 B.R. 562 (Bankr. E.D. Ky. 2014).

Obligation to private university was dischargeable. Also considering the 2005 expansion of § 523(a)(8)(A)(ii) to cover "an obligation to repay funds received as an educational benefit, scholarship, or stipend," the court examined case law under that section, concluding that the obligation at issue was not excepted from discharge. The Chapter 7 debtor had signed promissory notes to a private university, in exchange for

tuition credits—this was university’s way of allowing the debtor to take classes. But, no funds changed hands; therefore, the court concluded that the obligation did not fall within § 523(a)(8)(ii)’s requirement of “an obligation to repay funds.” *Institute of Imaginal Studies v. Christoff (In re Christoff)*, ___ B.R. ___, 2014 WL 2695533 (Bankr. N.D. Cal. June 13, 2014).

Transfer by attorneys of partnership assets was with intent to hinder, delay or defraud. Affirming, the Eleventh Circuit agreed with the findings that two attorneys could not discharge in Chapter 7 their debt to another law firm. The evidence supported findings that the attorneys entered into a secret settlement that forced another law firm out of bad faith litigation, knowing that their conduct would harm the other law firm by depriving it of compensation. This action was a willful and malicious injury. Also, the two attorneys transferred assets from their partnership, which had filed unsuccessful Chapter 11, less than one year before they filed individual Chapter 7 cases. These transfers were by insiders, with intent to hinder, delay or defraud creditors of the insiders, constituting cause for discharge denial under §§ 727(a)(2) and (a)(7). *Kane v. Stewart, Tilghman Fox & Bianchi PA (In re Kane)*, ___ F.3d ___, 2014 WL 2884603 (11th Cir. June 26, 2014).

Failure to keep records justified denial of discharge. The plaintiffs were investors and received two checks signed and negotiated by the debtor, which checks were returned for insufficient funds, giving the plaintiffs standing as creditors to object to discharge. The bankruptcy court did not err in finding that the debtor failed to maintain and preserve adequate financial records and that the discharge would be denied under § 727(a)(3). *Hussain v. Malik (In re Hussain)*, 508 B.R. 417 (BAP 9th Cir. 2014).

Stipulation by debtor and creditor to extension of time for discharge complaint not effective. The pro se Chapter 7 debtor agreed with a creditor to extend the time to file a § 727 complaint, and the complaint was filed within the agreed extension. However, the agreement did not comply with Rule 4004(a)(1)’s provision that the court may for cause extend the time, on motion filed before the original time expired. No motion was filed in this case and the Ninth Circuit had interpreted rules regarding a debtor’s discharge strictly. The creditor could not rely on the debtor’s agreement, when an extension was dependent on compliance with the Rule and the court’s grant of an extension. The complaint was properly dismissed. *Shahrestani v. Alazzeah (In re Alazzeah)*, 509 B.R. 689 (BAP 9th Cir. 2014).

Discharge Injunction

Assignee debt collector willfully violated discharge injunction. Several debts had been assigned for collection prebankruptcy, including a debt to a county, which was asserted to be for fines associated with criminal charges. The assignee continued collection efforts after the Chapter 7 discharge, with five garnishment writs served on the debtor’s employer. Section 523(a)(7) did not cover this debt collector, which had obtained prebankruptcy judgment in its name; therefore, the debt arising from fines was not a debt payable to a governmental unit, nor was it for the benefit of a governmental unit. The

proof established that the debtor had personally paid all but \$150 of the fines before the debt collector obtained its judgment. The collector willfully violated the discharge injunction, for which it was held in contempt. The debtor's actual damages and reasonable attorney fees were awarded. *In re Dickerson*, 510 B.R. 289 (Bankr. D. Idaho 2014). See also *Gecy v. Bank of the Ozarks (In re Gecy)*, 510 B.R. 510 (Bankr. D. S.C. 2014) (Mortgagee willfully violated discharge injunction by moving for summary judgment on Chapter 7 debtor's guaranty of mortgage debt owed by debtor's wholly-owned LLC, with minimal actual damages and \$5,000 attorney fees to debtor.).

Conversion

Conversion denied for bad faith failure to disclose asset. The Chapter 7 trustee successfully objected to the debtors' conversion to Chapter 13. Applying *Marrama*, bad faith was found in failure for two years to disclose one debtor's interest in realty that he owned with his father. Debtors were also denied amendment of exemptions to claim that interest as exempt. *In re Hale*, ___ B.R. ___, 2014 WL 2922347 (Bankr. W.D. Mich. June 27, 2014).

Dismissal

High income doctor's case not filed in bad faith. The creditor's motion to dismiss on grounds of bad faith, or to convert to Chapter 11, was denied. The debtor was a medical doctor, age 63, currently earning \$290,000 per year, and the creditor, a physician's group that formerly employed the debtor, had obtained a prebankruptcy judgment for \$170,854. The debtor had a 401K account, worth about \$120,000, and the debtor credibly testified that he was worried about retirement and ability to save enough. The debtor owned no real estate and no non-exempt property, except for his wife's jewelry that could be community property (the debtor paid \$30,000 to the trustee to settle any claim of estate to jewelry). Agreeing with the narrow approach to bad faith as a factor for dismissal under § 707(a), bad faith could be cause for dismissal but is limited to extreme cases. Under totality of circumstances, the debtor's ability to pay creditors is not enough to support bad faith finding. The only unsecured creditor relied on the debtor's high income and failure to try to pay or settle, but high income itself is not enough to support bad faith. Although the creditor had judgment, it was by default in another state and the debtor could not afford at the time to defend it. Filing bankruptcy rather than pay a disputed debt is not in itself bad faith. "With his retirement looming and only \$120,000 saved, the Debtor's decision to file a Chapter 7 case so he could save for retirement rather than pay Movant was not bad faith." *In re Snyder*, 509 B.R. 945 (Bankr. D. N.M. 2014).

Reopening

Reopening closed Chapter 7 not prerequisite to creditor's filing dischargeability complaint. The bankruptcy court had ordered the clerk to reject a complaint when the plaintiff/creditor had not moved to reopen the closed case, but the Bankruptcy Appellate Panel concluded that reopening a case to initiate the dischargeability proceeding is a managerial act, with no immediate impact of any substance on the underlying case. Filing

of the adversary proceeding is a new docket entry, and reopening the closed case is not a prerequisite to filing the dischargeability complaint. Even if the complaint is untimely, reaching the merits on a motion to dismiss is not appropriate, unless the complaint is “completely lacking in merit.” The bankruptcy court’s refusal to allow filing of the complaint was reversed. *Goldstein v. Diamond (In re Diamond)*, 509 B.R. 219 (BAP 8th Cir. 2014). See also *In re Steward*, 509 B.R. 123 (Bankr. W.D. Mich. 2014) (Cause for reopening to allow § 523(a)(3) determination of scope of discharge.); *In re Wilson*, ___ B.R. ___, 2014 WL 2465134 (Bankr. E.D. Mich. May 30, 2014) (Reopening granted to allow scheduling of omitted creditor and for that creditor to file § 523(a)(3) complaint.).

Chapter 13 Issues

Eligibility

Same sex debtors legally married in one state were eligible spouses. Debtors who were legally married in a state that recognized validity of same-sex marriages were deemed to be “spouses” for filing in a state that did not recognize such marriages. Under *United States v. Windsor*, 133 S.Ct. 2675 (2013), DOMA’s requirement that the word “spouse” referred only to opposite-sex couples was invalidated. Therefore, for purposes of federal law, the debtors who were legally married under the laws of Iowa were eligible to file as spouses in Wisconsin, even though Wisconsin did not recognize same-sex marriages. *In re Matson*, 509 B.R. 860 (Bankr. E.D. Wis. 2014).

Postpetition Property of Estate

Life insurance proceeds received by debtor on wife’s postpetition death not included in property of estate. Discussing the split of authority, the court held that § 1306(a)(1) does not include property that § 541(a)(5) does not include—“the specific date restriction set forth in § 541(a)(5) controls and § 1306(a)(1) does not eliminate that restriction.” The debtor/husband received \$250,000 from life insurance on his debtor/wife, who died two years after the Chapter 13 was filed. The husband disclosed this in an amendment to schedules and claimed it as exempt. The debtor then proposed modification of the confirmed plan to pay \$15,000 from the proceeds to unsecured creditors, and the trustee objected, asserting that the insurance proceeds would pay all claims in full. The effect of § 348, in the event of conversion to Chapter 7, would be that the postpetition insurance proceeds would not be property of the estate; therefore, in the absence of bad faith conversion, the proceeds would not be included in a hypothetical Chapter 7 liquidation, and the best interests of creditors test does not come into play. The court agreed with others who have held that the disposable income test does not apply to postconfirmation modification, since after BAPCPA, “a debtor’s receipt of a postconfirmation asset cannot possibly be ‘disposable income’ under its statutory definition because the debtor did not receive it during the six months preceding the filing of the petition.” The proposed modification did not run afoul of the projected disposable income test; however, the “ability to pay” test still applies to post-BAPCPA modifications, requiring consideration of a debtor’s postconfirmation property that materially changes

ability to pay debts. Nevertheless, under Eleventh Circuit authority, in the absence of a sustained objection to a claim of exemption, exempt property could not be disposable income. Under the facts of this case, the ability to pay test led to finding that the debtor could not use all insurance proceeds to pay creditors in full without impairing his future needs and fresh start. The debtor's modification was approved. *In re McAllister*, 510 B.R. 409 (Bankr. N.D. Ga. 2014).

Applicable Commitment Period

Self-employed debtor could not deduct business expense in determining applicable commitment period. The debtors proposed a three-year plan, in which unsecured creditors would not be paid in full, and the trustee objected, with the court concluding that § 1325(b)(4) does not mention "ordinary and necessary business expenses." And, § 101(10A)'s definition of current monthly income does not mention those expenses; although Form 22C does allow subtraction of those expenses to arrive at current monthly income. Section 1325(b)(2)(B) does provide for deduction of business expenses in arriving at disposable income, but the court agreed with other courts, holding that a self-employed debtor may not deduct business expenses in calculating current monthly income for purposes of determining the applicable commitment period. *In re Hoffman*, ___ B.R. ___, 2014 WL 2118435 (Bankr. D. Minn. May 19, 2014). See also *In re Kuwik*, ___ B.R. ___, 2014 WL 2619657 (Bankr. N.D. Ga. May 28, 2014) (For purposes of applicable commitment period, above median self-employed debtor and his spouse could not deduct allowable business expenses, but must use self-employed debtor's gross business income, with the court discussing the conflicting views of the gross receipts approach.).

Projected Disposable Income

Above-median debtor could not deduct \$200 for old car expense. Operating expenses that are deductible for purposes of determining projected disposable income are governed by § 707(b)(2), which does not include a deduction for an "old car." That deduction is found in the IRS Manual that aids agents in offers to compromise, but not in the part of Manual that identifies Local and National Standards used in the disposable income calculation. Also, the debtor may not deduct ownership costs of a vehicle when those costs are for a loan unrelated to purchase or lease of the vehicle. The debtor attempted to deduct as ownership cost monthly payments on a non-purchase money loan. *In re Sires*, ___ B.R. ___, 2014 WL 2567921 (Bankr. S.D. Ga. June 4, 2014). See also *Drummond v. Luedtke (In re Luedtke)*, 508 B.R. 408 (BAP 9th Cir. Apr. 9, 2014) (\$200 monthly older vehicle operating expense was not included in Local or National Standards for deduction in calculating projected disposable income, adopting plain meaning to § 707(b)(2)(A)(ii)(I). *Ransom* does not support such a deduction, nor does *Lanning*.).

Cure and Maintain

Direct payments to mortgagee were part of cure and maintain plan. Under the confirmed plan, debtors were to pay directly the ongoing, postpetition mortgage payments, and those payments were “under the plan” for purposes of § 1322(b)(5), citing Fifth Circuit authority. The debtors’ failure to make those payments was a material default under the plan and prevented entry of discharge. Rather than deny discharge, the trustee’s motion to dismiss the case was granted, subject to the debtors having time to convert the case to Chapter 7. *In re Heinzle*, ___ B.R. ___, 2014 WL 2442261 (Bankr. W.D. Tex. May 30, 2014).

Lien Stripping

Eleventh Circuit agrees that discharge-ineligible debtor may strip wholly unsecured junior lien. BAPCPA’s amendments did not alter the ability of a debtor to use §§ 506(a) and 1322(b)(2) to strip off in a plan the wholly unsecured junior mortgage, despite the debtor’s inability to obtain discharge because of her recent Chapter 7 discharge. The opinion found the majority view more persuasive. Section 1325(a) was not involved and the debtor’s ineligibility for discharge was irrelevant in a Chapter 20 case. BAPCPA did not amend §§ 506(a) or 1322(b)(2), as they affect such lien stripping. *Wells Fargo Bank, N.A. v. Scantling (In re Scantling)*, ___ F.3d ___, 2014 WL 2750349 (11th Cir. June 18, 2014). *See also Monroe v. Seaway Bank & Trust (In re Monroe)*, 509 B.R. 613 (Bankr. E.D. Wis. 2014) (Although debtors could not avoid wholly unsecured lien under § 506(d), they could strip the lien in a plan under §§ 506(a) and 1322(b)(2), and no Code provisions restrict this right to debtors eligible for discharge. If the creditor does not hold a secured claim, § 1325(a)(5)(B)(i) is not applicable. If the plan is fully performed, the lien may be stripped.).

Antimodification provision in Code protected due-on-sale clause. The debtors had quit-claimed residential property to their son, so that he would obtain a mortgage loan, for which the parents did not qualify, and then reconvey the property to the parents. The loan had a due-on-sale provision, accelerating the loan in the event of transfer, and the debtors could not modify that clause because of § 1322(b)(2). The mortgagee had not waived its right to assert default. *In re Espanol*, 509 B.R. 422 (Bankr. D. Conn. 2014).

Condominium association’s liens could be stripped. The debtor owned two condominium units, and after the debtor’s failure to pay obligations under the condominium documents, the association obtained state court receiver and judgment for foreclosure. The receiver had collected and was holding rental funds. These units were not the debtor’s residence and the association’s liens were not protected by § 1322(b)(2). The association was wholly unsecured, except as to the money being held by the receiver, but the amount of its secured claim was to be determined, and the association was bound by its agreement with the debtor that it would not file a claim for more than \$50,000. *In re Forde*, 507 B.R. 509 (Bankr. S.D. N.Y. 2014).

Plan Modification

Modified plan failed to satisfy best interests of creditors test. Debtors had sold their Texas homestead but failed to reinvest the proceeds within six months in another homestead, as required by Texas exemption for proceeds. The proposed modified plan sought to allow the debtors to retain those proceeds, but the trustee objected on grounds that the modification violated the best interests test and was not proposed in good faith. Citing *In re Frost*, 744 F.3d 384 (5th Cir. 2014), for holding that failure of Chapter 13 debtor to reinvest sale proceeds in a new homestead within six months results in loss of exemption in proceeds, the bankruptcy court's denial of the plan modification was affirmed, finding that the modification would not distribute to unsecured creditors what they would receive in Chapter 7. *Garcia v. Bassel*, 507 B.R. 907 (N.D. Tex. 2014). See also *In re McAllister*, 510 B.R. 409 (Bankr. N.D. Ga. 2014), under Postpetition Property of Estate, for substantial discussion of modification when debtor received postpetition life insurance proceeds.

Projected disposable income requirement not applicable to modification. The trustee sought modification to increase payments due to the increase in debtors' income, and the dispute was whether § 1325(b) was applicable to determine the amount of the plan increase. Discussing the split of authority over whether § 1325(b)'s projected disposable income test applies to postconfirmation modifications, the court concluded that it did not apply. The court concluded that it was not likely that the Fourth Circuit would apply § 1325(b) to a proposed plan modification, and "a review of *Hamilton v. Lanning*, . . . leads to the conclusion that the Supreme Court would also recognize the impracticality of applying the strict standards imposed by § 1325(b) to plan modifications after BAPCPA, particularly given the absence of a clear intent on the part of Congress." These debtors had filed an amended Schedules I and J, reflecting substantial increase in average monthly income and expenses since confirmation, and those Schedules established the feasible amount of increase in plan payments for the balance of the plan term, as proposed by the debtors. *In re Swain*, 509 B.R. 22 (Bankr. E.D. Va. 2014). See also *In re McAllister*, 510 B.R. 409 (Bankr. N.D. Ga. 2014), under Postpetition Property of Estate, for conclusion that disposable income test does not apply to postconfirmation modification.

Conversion

Attorney for former Chapter 7 trustee had standing to object to confirmation and join motion to reconvert. After the Chapter 7 case had been converted post-discharge to Chapter 13, former Chapter 7 trustee and attorney for that trustee moved for reconsideration and then objected to confirmation. The attorney had standing as the holder of an administrative claim to participate in the confirmation process. Finding that the debtors violated court orders related to production of all bank statements for accounts opened postpetition and accounting of certain funds, there was cause to reconvert the case to Chapter 7. Further, the court found that the debtor's motion to convert to Chapter 13 was filed in bad faith, as well as their second amended plan. The court found cause

to reconsider its prior denial of the former Chapter 7 trustee's motion to reconvert, citing Tenth Circuit interpretation of Rule 60(b). *In re McDonald*, 508 B.R. 187 (Bankr. D. Colo. 2014).

Undistributed money under confirmed plan must be paid to creditors on conversion to Chapter 7. The debtors moved to convert their case to Chapter 7, and the trustee had \$1,683.46 on hand. The debtors sought to have those funds refunded to them, but the court found a local rule and the confirmation order to be controlling. The local rule provides that after confirmation, any funds received by the trustee before dismissal or conversion would be disbursed to creditors pursuant to the plan's terms, and the confirmation order had a similar provision. Conversion terminates the Chapter 13 estate, but it does not revoke what the confirmed plan lawfully ordered. Further, the court found that § 1326(a)(2) dictated that the funds be disbursed to creditors. The court held that undistributed money did not vest in the debtors, with the effect of confirmation dictating otherwise in this case. *In re Smith*, ___ B.R. ___, 2014 WL 1873419 (Bankr. W.D. Mo. May 8, 2014).

Dismissal

Undistributed money under confirmed plan must be returned to debtors on dismissal. Affirming, the district court considered the interplay of §§ 349(b)(3) and 1326, concluding that § 1326 was no longer applicable upon dismissal, since the confirmed plan was no longer enforceable. Section 349 controlled, with § 349(b)(3) revesting property of the estate in the debtor. The trustee was required to return undistributed funds to the debtors upon their voluntary dismissal. *Williams v. Marshall*, ___ B.R. ___, 2014 WL 1457828 (N.D. Ill. Apr. 11, 2014).

Fraud not required for bad faith finding. Under a totality of circumstances examination of good faith, while fraud is a factor, it is not necessary to a bad faith finding. The debtor exhibited a pattern of deliberately misleading the court and trustee by misrepresentations of tax returns and financial affairs. Finding cause to dismiss, the dismissal was with bar to refiling for 365 days. *LaBarge v. Rotellini (In re Rotellini)*, 510 B.R. 241 (Bankr. E.D. Mo. 2014).

Deduction of secured debt on surrendered collateral cause for dismissal. On the United States trustee's motion to dismiss case as abusive, the court reviewed the two lines of authority on whether a secured debt for collateral that the debtor intends to surrender should be scheduled as "contractually due" and deducted for purposes of § 707(b)(2)(A)'s means test. There was no controlling precedent in the Fifth Circuit, and the court adopted the forward-looking approach. As a result, "phantom expenses" for secured debt that will not be paid in the plan are not to be deducted, and the presumption of abuse was not rebutted when the debtors did deduct such payments in their means test calculation. The case was dismissed. *In re White*, ___ B.R. ___, 2014 WL 2960428 (Bankr. N.D. Miss. July 2, 2014).

Discharge and Exceptions

Section 1328(f)'s phrase "in a case filed under" interpreted. The court construed § 1328(f)'s phrase "in a case filed under" to refer to the bankruptcy chapter under which the case was initially filed, rather to the chapter to which a case was subsequently converted. A case was initially filed under Chapter 13 and then converted before entry of a Chapter 7 discharge. The debtors subsequently filed their new Chapter 13. The trustee objected to discharge in the current case, arguing that "it is the Bankruptcy Code chapter under which the Debtors ultimately received a discharge and not the chapter under which the Debtors filed their prior bankruptcy that determines the discharge eligibility waiting period under § 1328(f)." The court concluded otherwise, under § 348's provision that conversion does not constitute a new case nor change the petition date. The chapter under which the prior case was filed determined the lookback period under § 1328(f), disagreeing with *In re Finney*, 486 B.R. 177 (BAP 9th Cir. 2013). Since the first case was initially filed under Chapter 13, the two-year look-back applied, and the debtors were eligible for Chapter 13 discharge in the current case. *In re Wilkinson*, 507 B.R. 742 (Bankr. D. Kan. 2014).

Debtor's willful failure to deliver insurance proceeds was exception from discharge. The children and former wife of decedent sought determination that Chapter 13 debtor, the widow of decedent, had failed to pay them life insurance proceeds as ordered by the state court, and that failure was found to be nondischargeable debt under § 523(a)(2)(A). The decedent had been ordered in a divorce and settlement with his former wife to maintain their children as beneficiaries of his life insurance policies, but he changed the beneficiary to his second wife, the Chapter 13 debtor. At the time of his death, the life insurance proceeds were paid to the debtor. The state court ordered turnover of the proceeds, after the debtor misrepresented that the proceeds would be held in escrow. In contempt of the state court's order, the debtor invaded the proceeds, transferring some to her daughter and spending some. The debtor's deceptive behavior continued in her bankruptcy case. The debt resulting from the state court judgment was excepted from discharge under § 523(a)(2)(A), plus the plaintiffs were entitled to nondischargeable judgment for attorney fees related to the debtor's contemptuous conduct in state court. In addition, under Rule 9011(c), the plaintiffs' postpetition attorney fees were awarded. The Chapter 13 was dismissed with prejudice to refiling for two years. *Henri v. Wheeler (In re Wheeler)*, ___ B.R. ___, 2014 WL 2580059 (Bankr. N.D. N.Y. June 9, 2014).

Claims

Chapter 7 debtors were not creditors and ineligible to file claims. In settlement of the Chapter 7 trustee's objection to their homestead claim to 80 acres, the debtors sold 20 acres of the property, with those funds going to the estate. The debtors then filed a proof of claim for delinquent real estate taxes on the entire acreage, for attorney fees related to litigating the trustee's objection, and for satisfaction of judgment liens against the property. The claim was late, but on a substantive basis, the claim was disallowed.

The debtors were not “governmental units” for purposes of filing a priority tax claim, and the debtors were not eligible to receive priority status. The judgment creditor did not file a claim related to its lien. The attorney fees were for services directly to the debtors, not on behalf of the estate, and the debtors were not eligible to file a proof of claim, since they were not creditors—the Code offers no basis on which a debtor may file a proof of claim against himself or herself. *In re Oliver*, ___ B.R. ___, 2014 WL 2601977 (Bankr. W.D. Wis. June 10, 2014).

Obligation to former wife for one-half of second mortgage was domestic support.

Affirming, the Bankruptcy Appellate Panel found no clear error in the findings of domestic support obligations. The debtor and his former wife were married and divorced twice. In the first consent divorce decree, the wife agreed to hold the husband harmless on a first and second mortgage, but in the second consent decree, the husband agreed, in return for reduction of child support from the first decree, to pay one-half of the second mortgage. Upon the sale of the home, any deficiency was to be divided equally, but if there was a net recovery, it would go to the wife. The property was sold, and the former wife filed a priority claim in the Chapter 13 case for one-half of the second mortgage and for a judgment lien that had to be satisfied at sale. The bankruptcy court applied the Sixth Circuit’s test of *In re Calhoun*, 715 F.2d 1103 (6th Cir. 1983), for determination of whether a debt is support in nature, and the husband’s agreement to pay one-half of the second mortgage was intended as support, since, among other factors, it protected the children’s home. Also, the wife had insufficient income at the time of the decree to cover both mortgages. As to the judgment lien, since the former wife’s receipt of proceeds for the sale would be support for the children, its satisfaction reduced the amount of support, and case law supports that a debt to a third party may qualify as support. *In re Thomas*, ___ B.R. ___, 2014 WL 2460003 (BAP 6th Cir. June 3, 2014). *See also In re Gambale*, ___ B.R. ___, 2014 WL 2801313 (Bankr. D. N.H. June 19, 2014) (Obligation to contribute \$900 for replacement of furnace was domestic support obligation, serving function of support for ex-wife and children, but contribution of \$400 every two weeks to ex-wife toward joint marital debt was not actually in nature of support and was not priority claim. Court discusses multi-factor test for whether an obligation is in nature of support.).

Chapter 7 debtor had standing to object to claim but objection overruled. In a case with expected surplus after all claims were paid, the debtor had standing to file a claim objection, and the trustee had standing to respond to and object to the claim even though the creditor did not respond to the debtor’s objection. The debtor’s claim objection was defective, due to improper service. *In re Quintero*, ___ B.R. ___, 2014 WL 2781141 (Bankr. D. N.M. June 19, 2014).

90-day deadline for claims did not apply to secured creditor seeking to participate in Chapter 13 distribution, but did apply to that creditor’s deficiency claim. On the Chapter 13 debtor’s objection to untimely claims filed by mortgage lender, the court held that the creditor was not required to file a proof of claim in order preserve lien rights but must file a claim if it wished to participate in distribution under the plan. As long as the

secured creditor's claim is filed before confirmation, even though after Rule 3002(c)'s 90-day deadline, it may be allowed, applying Seventh Circuit authority. However, as to any deficiency unsecured claim, the proof of claim must be filed within that 90 days, or an objection based on untimeliness will be sustained. The lender's response to the debtor's prior motion to extend the stay did not serve as an informal proof of claim. *In re Pajian*, 508 U.S. 708 (Bankr. N.D. Ill. 2014).