

The Nuts and Bolts of 11 U.S.C. §§ 523 and 727

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**THE NUTS and BOLTS OF DISCHARGE:
CODE SECTIONS 523 and 727**

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I. DISCHARGE

A. The Effects of discharge. The obtaining of a discharge is the goal of every individual debtor in a bankruptcy case. Section 524 of the Bankruptcy Code describes the effect of discharge. It provides:

§ 524. Effect of Discharge-

(a) A discharge in a case under this title—

(1) voids any judgment at any time obtained, to the extent such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1) of this title, or that would be so excepted, determined in accordance with the provisions of section 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claims is waived.

II. OBJECTIONS TO DISCHARGE

A. Grounds for Objecting to Discharge. Objections to the general discharge of the debtor should be rare, and may arise as a result of the status of the debtor, or as the result of conduct of the debtor. It is useful to divide the exceptions to discharge into those resulting from the status of the debtor, those resulting from conduct before the bankruptcy petition is filed, and those resulting from conduct of the debtor after the bankruptcy petition is filed. The exceptions to discharge are set out at section 727(a). Those concerning the **status** of the debtor are the following:

§ 727. Discharge.

(a) The court shall grant the debtor a discharge, unless—

(1) the debtor is not an individual; . . .

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within eight years before the date of the filing of the petition; . . .

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least—

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort.

The exceptions to discharge concerning the conduct of the debtor **before** the filing of the petition are the following:

§ 727. Discharge.

(a) The court shall grant the debtor a discharge, unless—

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; . . .

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case; . . .

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities; . . .

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider.

The exceptions to discharge concerning the conduct of the debtor **after** the filing of the petition are the following:

§ 727. Discharge.

(a) The court shall grant the debtor a discharge, unless—

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(B) property of the estate, after the date of the filing of the petition; . . .

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the

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debtor's property or financial affairs; . . .

(6) the debtor has refused, in the case—

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify; . . .

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter; . . .

(11) after filing the petition, the debtor failed to complete an instructional course concerning personal financial management described in section 111, except that this paragraph shall not apply with respect to a debtor who is a person described in section 109(h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional courses under this section (The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in this paragraph shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter.); or

(12) the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is reasonable cause to believe that—

(A) section 522(q)(1) may be applicable to the debtor; and

(B) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).¹

¹ (q)(1) As a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of an interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1) which exceeds in the aggregate \$155,675 [Amount subject to adjustment under 11 U.S.C. 104] if—

(A) the court determines, after notice and a hearing, that the debtor has been convicted of

The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of section 727. 11 U.S.C. § 727(c)(1).

B. Procedure for Objecting to Discharge. The time for filing the objection is set forth in FED. R.

BANKR. P. 4004(a), which provides:

Rule 4004. Grant or Denial of Discharge.

(a) Time for Filing Complaint Objecting to Discharge; Notice of Time Fixed. In a chapter 7 case, a complaint, or a motion under § 727(a)(8) or (a)(9) of the Code, objecting to the debtor's discharge shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). In a chapter 11 case, the complaint shall be filed no later than the first date set for the hearing on confirmation. In a chapter 13 case, a motion objecting to the debtor's discharge under § 1328(f) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). At least 28 days' notice of the time so fixed shall be given to the United States trustee and all creditors as provided in Rule 2002(f) and (k) and to the trustee and the trustee's attorney.

(b) Extension of Time

(1) On motion of any party in interest, after notice and hearing, the court may for cause extend the time to object to discharge. Except as provided in subdivision (b)(2), the motion shall be filed before the time has expired.

(2) A motion to extend the time to object to discharge may be filed after the time for objection has expired and before discharge is granted if (A) the objection is based on facts that, if learned after the discharge, would provide a basis for revocation under §

a felony (as defined in section 3156 of title 18), which under the circumstances, demonstrates that the filing of the case was an abuse of the provisions of this title; or

(B) the debtor owes a debt arising from—

(i) any violation of the Federal securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934), any State securities laws, or any regulation or order issued under Federal securities laws or State securities laws;

(ii) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934 or under section 6 of the Securities Act of 1933;

(iii) any civil remedy under section 1964 of title 18; or

(iv) any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding 5 years.

(2) Paragraph (1) shall not apply to the extent the amount of an interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1) is reasonably necessary for the support of the debtor and any dependent of the debtor.

727(d) of the Code, and (B) the movant did not have knowledge of those facts in time to permit an objection. The motion shall be filed promptly after the movant discovers the facts on which the objection is based.

Cause for granting an extension of time to file a complaint objecting to discharge would include the failure or refusal of the debtor to cooperate in discovery.

An objection to discharge is commenced by the filing of an adversary complaint and is governed by Part VII of the Federal Rules of Bankruptcy Procedure, except that an objection to discharge under Code sections 727(a)(8), (a)(9), or 1328(f), each having to do with ineligibility for discharge due to discharge in a prior case, are commenced by motion and governed by Federal Rule of Bankruptcy Procedure 9014. *See* FED. R. BANKR. P. 4004(d); 7001(4).

C. Significant Cases Concerning Objection to Discharge

1. Section 727 - Burden of Proof

Barclays/American Business Credit, Inc. v. Adams (In re Adams), 31 F.3d 389 (6th Cir. 1994). Burden of proof for a creditor proceeding under section 727 is the preponderance of the evidence standard.

2. Section 727(a)(2)(A)

Keeney v. Smith (In re Keeney), 227 F.3d 679 (6th Cir. 2000). Section 727(a)(2)(A) encompasses two elements: (1) a disposition of property, such as a concealment, and (2) a subjective intent on the debtor's part to hinder, delay or defraud a creditor through the act of disposing of the property. The doctrine of continuing concealment applies to cases brought under this section such that a transfer made and recorded more than one year prior to the filing may serve as evidence of the requisite act of concealment where the debtor retains a secret benefit of ownership in the transferred property within the year prior to filing.

Buckeye Retirement Co. v. Swegan (In re Swegan), 383 B.R. 646, 654 (B.A.P. 6th Cir. 2008). Concealment for purposes of section 727(a)(2)(A) includes "the withholding of knowledge or information required by law to be made known" and does not require disposition of property.

3. Section 727(a)(3)(A)

Dolin v. Northern Petrochemical Co. (In re Dolin), 799 F.2d 251 (6th Cir. 1986). Neither chemical dependency nor compulsive gambling excused debtor's failure to keep records from which debtor's financial condition could be ascertained.

Turoczy Bonding Co. v. Strbac (In re Strbac), 235 B.R. 880 (B.A.P. 6th Cir. 1999). Party seeking to deny debtor a discharge under record keeping provision has burden of proving the inadequacy of debtor's records. Once debtor's records are shown to be inadequate, burden shifts to debtor to establish any justification therefor.

Allied Business Brokers, Inc. v. Amro (In re Amro), 326 B.R. 901 (Table), 2005 WL 1513115,

*3 (B.A.P. 6th Cir. 2005). The court should apply an objective standard to determine whether a debtor is justified in failing to preserve financial records and assess the debtor's conduct with respect to how a reasonable person would have acted under similar circumstances. The courts should consider the following factors to determine if the debtor has shown such a justification: (1) the debtor's intelligence, education and sophistication; (2) the debtor's experience in business matters; (3) the volume and complexity of the debtor's business; (4) the extent of the debtor's involvement in the business; (5) the extent of the indebtedness; (6) the extent to which the debtor has relied on others to keep records; (7) the extent to which such reliance was reasonable and in accordance with non-bankruptcy law.

4. Section 727(a)(4)(A)

Keeney v. Smith (In re Keeney), 227 F.3d 679 (6th Cir. 2000). Section 727(a)(4)(A) contains five elements: (1) the debtor made a statement under oath; (2) the statement was false; (3) the debtor knew the statement was false; (4) the debtor made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy case. Reckless disregard as to whether a statement is true will satisfy the element of intent. Accord, *Stamat v. Neary*, 635 F.3d 974 (7th Cir. 2011); *The Cadle Co. v. Duncan (In re Duncan)*, 562 F.3d 688 (5th Cir. 2009).

5. Section 727(a)(5)

Dolin v. Northern Petrochemical Co. (In re Dolin), 799 F.2d 251 (6th Cir. 1986). General unsubstantiated statements of chemical addiction and dependence and compulsive gambling in the year preceding bankruptcy did not 'explain satisfactorily' the debtor's loss of assets in the three years preceding bankruptcy.

Powers v. Ottoson-King (In re Ottoson-King), 3 Fed. Appx. 147, 151 (4th Cir. 2001). Under section 727(a)(5), "all an objecting creditor need do is identify missing assets; once that is done, the debtor must explain in a satisfactory manner the loss of those assets."

6. Section 727(a)(6)

Standiferd v. U.S.Trustee (In re Standiferd), 641 F.3d 1209, 1212 (10th Cir. 2011); *Smith v. Jordan (In re Jordan)*, 521 F.3d 430, 433 (4th Cir. 2008); *Sicherman v. Rivera (In re Rivera)*, 338 B.R. 318, 329 (Bankr. N.D. Ohio 2006), aff'd at 356 B.R. 186 (Table), 2007 WL 130415 (B.A.P. 6th Cir. 2007). In order to deny chapter 7 discharge based on the debtor's refusal to obey a lawful court order, court must find that the debtor's non-compliance was willful and intentional.

III. DISCHARGEABILITY OF PARTICULAR DEBTS

A. Distinguished from Objections to Discharge. The determination of the dischargeability of a particular debt should be carefully distinguished from the objection to the general discharge. The determination of the dischargeability of a particular debt arises with respect to the status or conduct of the debtor giving rise to a particular debt. It is a dispute between the debtor and one creditor. If a particular debt is determined to be nondischargeable, the debtor will receive a discharge, but the

discharge will not prevent the creditor holding a nondischargeable debt from proceeding with collection of that debt.

The objection to discharge, on the other hand, is, in effect, a dispute between the debtor and all of his or her creditors. If the trustee, the United States trustee, or a particular complaining creditor prevails on an objection to discharge, the debtor does not receive a discharge of any of his or her debts. This can work to the disadvantage of creditors holding nondischargeable debts because they, together with all other creditors, are left to their non-bankruptcy remedies.

A single creditor should think carefully before filing a complaint objecting to discharge. Unlike the complaint to determine the dischargeability of a particular debt, the complaint objecting to the general discharge cannot be settled between the complaining creditor and the debtor. Rather, notice must be given to all creditors of the terms and conditions of any settlement. A bankruptcy judge will not approve the “buying” of a discharge by the debtor agreeing to make payment to a particular complaining creditor.

B. Bankruptcy Court’s Jurisdiction to Enter a Money Judgment. Until *Stern v. Marshall*, ___ U.S. ___, 131 S. Ct. 2594, 180 L. Ed. 2d. 485 (2011), it was widely accepted that the bankruptcy court had subject matter jurisdiction to enter a money judgment in a Section 523(c) proceeding. See, e.g., *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 965-66 (6th Cir.1993). Other courts held either that entry of a money judgment was outside the bankruptcy courts’ jurisdiction or that such awards raised other issues appropriate only to a non-bankruptcy forum. See, *In re Cambio*, 353 B.R. 30 (B.A.P. 1st Cir. 2004); *In re Hamilton*, 282 B.R. 22 (Bankr. W.D. Okla. 2002).

Even prior to *Stern*, there was some disagreement on this point. Since the *Stern* decision, however, more courts have questioned whether the bankruptcy court has jurisdiction to enter a money judgment. In *Condon Oil v. Wood (In re Wood)*, 503 B.R. 705 (Bankr. W.D. Wis. 2013), the court held that it lacked the constitutional authority to enter a money judgment on a nondischargeable debt where the underlying debt was based on a claim arising under state law. Other courts have found that *Stern* does not apply to Section 523(c) actions. For example, the court in *In re Wen Jing Huang*, 2014 WL 56053, *10 (Bankr. D. Mass. 2014), reasoned that “the determination of the validity and amount of a nondischargeable debt [is] not only prescribed by the Bankruptcy Code and relevant jurisdictional statute, but [is] also directly intertwined with the dischargeability determination.” Similarly, in a recent case involving determination of the dischargeability of a debt under Code sections 523(a)(2)(A) and (6), a three member panel of the Sixth Circuit Bankruptcy Appellate

Panel “note[d] that the bankruptcy court has concurrent jurisdiction with the state court to determine the amount of damages.” *Kraus Anderson Capital, Inc. v. Bradley (In re Bradley)*, ___ B.R. ___, 2014 WL 1229777, *14, n. 6 (B.A. P. 6th Cir. March 26, 2014).

C. Grounds for Excepting a Particular Debt from Discharge. The grounds for excepting a particular debt from discharge are set forth at section 523(a) of the Bankruptcy Code. These exceptions may be divided into those exceptions that operate without the need for any action on the part of a creditor or the debtor and those that require the filing of a complaint. The following exceptions operate without the need for the filing of a complaint:

§ 523. Exceptions to Discharge.

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

(A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, or equivalent report or notice, if required—

(i) was not filed; or

(ii) was filed or given after the date on which such return, report or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax; . . .

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time

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for such timely filing and request; . . .

(5) a domestic support obligation [defined at 101(14A)]; . . .²

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty—

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—

(A)(i) an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or

(ii) an obligation to repay funds received as an educational benefit, scholarship or stipend, or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

(9) for death or personal injury caused by the debtor's operation of a motor vehicle, vessel or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

² 11 U.S.C. § 101(14A) The term “domestic support obligation” means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—

(A) owed to or recoverable by-- (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or (ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of-- (i) a separation agreement, divorce decree, or property settlement agreement; (ii) an order of a court of record; or (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act;

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union;

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency; or

(13) for any payment of an order of restitution issued under title 18, United States Code;

(14) incurred to pay a tax to the United States that would be non-dischargeable pursuant to paragraph (1);

(14A) incurred to pay a tax to a governmental unit, other than the United States that would be nondischargeable pursuant to paragraph (1);

(14B) incurred to pay fines or penalties imposed under Federal election law;

(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record; or determination made in accordance with State or territorial law by a governmental unit;

(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a dwelling unit that has condominium ownership, in a share of a cooperative housing corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the

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order for relief in a pending or subsequent bankruptcy case;

(17) for a fee imposed on a prisoner by any court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under subsection (b) or (f)(2) of section 1915 of title 28 (or a similar non-Federal law), or the debtor's status as a prisoner, as defined in section 1915(h) of title 28; (or a similar non-Federal law)

(18) owed to a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, under—

(A) a loan permitted under section 408(b)(1) of the Employee Retirement Income Security Act of 1974, or subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title; but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title; or

(19) that—

(A) is for

(i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or

(ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and

(B) results, before, on, or after the date on which the petition was filed, from—

(i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;

(ii) any settlement agreement entered into by the debtor; or

(iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

Even though these exceptions operate without the need for filing a complaint, it is frequently the case that a complaint for declaratory judgment is filed so that there will be a judicial determination that a particular debt will survive or did survive the discharge. Such complaints technically need not be filed in the bankruptcy court while the bankruptcy case is pending, but it is often true that state judges are hesitant to decide issues of dischargeability.

With respect to the remaining exceptions to discharge, a timely complaint must be filed, in the bankruptcy court, or the exception is lost. 11 U.S.C. § 523(c). The exceptions for which a timely complaint must be filed are the following:

§ 523. Exceptions to Discharge.

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of

this title does not discharge an individual debtor from any debt— . . .

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C)(i) for purposes of subparagraph (A) —

(I) consumer debts owed to a single creditor and aggregating more than \$650 for luxury goods or services incurred by an individual debtor on or within 90 days be-

fore the order for relief under this title are presumed to be nondischargeable; and

(II) cash advances aggregating more than \$925 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and

(ii) for purposes of this subparagraph –

(I) the terms “consumer”, “credit”, and “open end credit plan” have the same meanings as in section 103 of the Truth in Lending Act; and

(II) the term “luxury goods or services” does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor; . . .

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny; . . .

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

C.1. Completion Discharge in Chapter 13. In Chapter 13 cases, the debtor generally does not receive a discharge until all payments have been made under the plan. 11 U.S.C. § 1328(a). Section 1328(a) provides:

§ 1328. Discharge

(a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—

(1) provided for under section 1322(b)(5);

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(2) of the kind specified in section 507(a)(8)(C) or in paragraph (1) (B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a);

(3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime; or

(4) for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual. . . .

(d) Notwithstanding any other provision of this section, a discharge granted under this section does not discharge the debtor from any debt based on an allowed claim filed under section 1305(a)(2) of this title if prior approval by the trustee of the debtor's incurring such debt was practicable and was not obtained. . . .

(f) Notwithstanding subsections (a) and (b), the court shall not grant a discharge of all debts provided for in the plan or disallowed under section 502, if the debtor has received a discharge—

(1) in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter, or

(2) in a case filed under chapter 13 of this title during the 2-year period preceding the date of such order.

(g)(1) The court shall not grant a discharge under this section to a debtor unless after filing a petition the debtor has completed an instructional course concerning personal financial management described in section 111.

(2) Paragraph (1) shall not apply with respect to a debtor who is a person described in section 109(h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional course by reason of the requirements of paragraph (1).

(3) The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in paragraph (2) shall review such determination not later than 1 year after the date of such determination, and not 11 U.S.C.A. § 1328 less frequently than annually thereafter.

(h) The court may not grant a discharge under this chapter unless the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is no reasonable cause to believe that—

- (1) section 522(q)(1) may be applicable to the debtor; and
- (2) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1) (A) or liable for a debt of the kind described in section 522(q)(1) (B).

A claim is “provided for by the plan” when the plan contains some provision describing the treatment of the claim or of the class of claims to which the claim belongs, and no exception to the Chapter 13 discharge applies. See, e.g., *In re Reichartz*, 498 B.R. 217 (E.D. Wis. 2013); *In re Monahan*, 497 B.R. 642 (B.A.P. 1st Cir. 2013); *In re Thomas*, 497 B.R. 188 (Bankr. E.D. Penn. 2013); *In re Harvey*, 88 B.R. 863 (Bankr. N.D. Ill. 1988). A plan that provides zero percent payment to a class of claims provides for those claims. *Matter of Gregory*, 705 F.2d 1118, 1122 (9th Cir. 1983). A claim is not considered “provided for by the plan if a creditor does not receive proper notice of the proceedings. *Ellett v. Stanislaus*, 506 F.3d 774, 777 (9th Cir. 2007); *In re Hairopoulos*, 118 F.3d 1240, 1244 (8th Cir. 1997). Note that a Code section 523(a)(15) obligation is not excepted from a chapter 13 completion discharge. This puts a burden on the creditor with such a debt to carefully review the chapter 13 plan provisions concerning marital debts and timely object to confirmation if the plan proposes less than full payment or risk being bound by the confirmed plan. See William Houston Brown, *BANKRUPTCY AND DOMESTIC RELATIONS MANUAL* § 7:2 (2008).

2. Hardship Discharge in Chapter 13. A debtor who is unable to complete all payments under a chapter plan may nonetheless receive a discharge if the requirements of section 1328(b) are met. Section 1328(b) and (c) provide:

(b) Subject to subsection (d), at any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if—

- (1) the debtor’s failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
 - (2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and
 - (3) modification of the plan under section 1329 of this title is not practicable.
- (c) A discharge granted under subsection (b) of this section discharges the

debtor from all unsecured debts provided for by the plan or disallowed under section 502 of this title, except any debt—

(1) provided for under section 1322(b)(5) of this title; or

(2) of a kind specified in section 523(a) of this title.

The hardship discharge is an extraordinary measure. The temporary loss of a job or a temporary physical disability is not sufficient cause for granting a hardship discharge. Circumstances indicating a true hardship will be permanent, not caused by conduct of the debtor, and arise after the filing of the case. See *In re Young*, 370 B.R. 799 (Bankr. E.D. Wisc. 2007); *In re Grice*, 319 B.R. 141 (Bankr. E.D. Mich. 2004).

D. Procedure for Determining the Dischargeability of a Particular Debt. The procedure for filing a complaint to determine the dischargeability of a particular debt is set forth in FED. R. BANKR. P. 4007, which provides:

Rule 4007. Determination of Dischargeability of a Debt.

(a) **Persons Entitled to File Complaint.** A debtor or any creditor may file a complaint to obtain a determination of the dischargeability of any debt.

(b) **Time for Commencing Proceeding Other than under § 523(c) of the Code.** A complaint other than under § 523(c) may be filed at any time. A case may be reopened without payment of an additional filing fee for the purpose of filing a complaint to obtain a determination under this rule.

(c) **Time for Filing Complaint under § 523(c) in a Chapter 7 Liquidation, Chapter 11 Reorganization, or Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case; Notice of Time Fixed.** Except as otherwise provided in subdivision (d), a complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). The court shall give all creditors no less than 30 days notice of the time so fixed in the manner provided in Rule 2002. On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

(d) **Time for Filing Complaint under § 523(a)(6) in a Chapter 13 Individual's Debt Adjustment Case; Notice of Time Fixed.** On motion by a debtor for a discharge under § 1328(b), the court shall enter an order fixing the time to file a complaint to determine the dischargeability of any debt under § 523(a)(6) and shall give no less than 30 days notice of the time fixed to all creditors in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired. *Note that the §523(a)(6) exception to discharge is only applicable*

in chapter 13 where the Debtor seeks a hardship discharge.

(e) Applicability of Rules in Part VII. A proceeding commenced by a complaint filed under this rule is governed by Part VII of these rules.

It cannot be emphasized enough that the exceptions to discharge set forth at section 523(a)(2), (4), and (6) will be lost, no matter the underlying facts, if a timely complaint is not filed.

E. Significant Cases Concerning the Dischargeability of a Particular Debt.

1. Burden of Proof

Grogan v. Garner, 498 U.S. 279, 111 S. Ct. 654 (1991). The preponderance of the evidence standard, rather than the clear and convincing evidence standard, applies to all exceptions to discharge under section 523(a).

2. Timing

In re Walls, 496 B.R. 818 (Bankr. N.D. Miss. 2013). A complaint to determine the dischargeability of debt under most of the dischargeability exceptions may be filed at any time except those arising under Code sections 523(a)(2), (4) and (6).

3. Collateral Estoppel

Bay Area Factors v. Calvert (In re Calvert), 105 F.3d 315 (6th Cir. 1997). Principles of collateral estoppel apply in nondischargeability actions. See discussion at, *Livingston v. Transnation Title Insurance Co. (In re Livingston)*, 372 Fed. Appx. 613 (6th Cir. 2010).

4. Section 523(a)(1)

Young v. U.S., 535 U.S. 43, 122 S. Ct. 1036 (2002). The lookback period which determines the priority and nondischargeability of income taxes is tolled during the pendency of a prior bankruptcy case.

5. Section 523(a)(2)

Field v. Mans, 516 U.S. 59, 116 S. Ct. 437, 133 L. Ed. 2d 351 (1995). The standard for excepting a debt from discharge as a fraudulent representation within the meaning of § 523(a)(2)(A) is not reasonable reliance but the less demanding one of justifiable reliance on the representation.

Cohen v. de la Cruz, 523 U.S. 213, 118 S. Ct. 1212 (1998). The fraud exception to dischargeability includes compensatory damages, punitive damages, and treble damages authorized by state statute.

Archer v. Warner, 538 U.S. 314, 123 S. Ct. 1462 (2003). The settlement of a fraud claim with a promissory note was not a novation and thus the note is not dischargeable.

Rembert v. AT&T Universal Card Serv. Inc. (In re Rembert), 141 F.3d 277 (6th Cir.), cert. denied, 119 S. Ct. 438, 142 L. Ed. 2d 357 (1998). For purposes of fraud discharge exception, use of a credit card represents either actual or implied intent to repay debt incurred. Use

of a credit card does not imply a representation that the debtor has the ability to repay the debt. The proper inquiry to determine the debtor's fraudulent intent with respect to the use of a credit card is whether the debtor subjectively intended to repay the debt.

Mellon Bank v. Vitanovich (In re Vitanovich), 259 B.R. 873 (B.A.P. 6th Cir. 2001). "Actual fraud" as used in §523(a)(2)(A) is not limited to misrepresentations and misleading omissions. Check-kiting falls within the broad definition of "actual fraud" as used in the discharge exception.

Prim Capital Corp. v. May (In re May), 368 B.R. 85 (Table), 2007 WL2052185, *7 (B.A.P. 6th Cir. 2007). For purposes of section 523(a)(2), the phrase "respecting the debtor's . . . financial condition" should be interpreted narrowly as relating only to information regarding the debtor's overall financial condition.

6. Section 523(a)(4)

Commonwealth Land Title Co. v. Blaszkak (In re Blaszkak), 397 F.3d 386, 390-391 (6th Cir. 2005). "In sum, ... the defalcation provision of § 523(a)(4) is limited to only those situations involving an express or technical trust relationship arising from placement of a specific res in the hands of the debtor." quoting, *R.E. America, Inc., v. Garver (In re Garver)*, 116 F.3d 176, 180 (6th Cir. 1997).

Bullock v. BankChampaign, N.A., ___ U.S. ___, 133 S. Ct. 1754 (2013). Defines defalcation for purposes of § 523(a)(4):

Thus, where the conduct at issue does not involve bad faith, moral turpitude, or other immoral conduct, the term requires an intentional wrong. We include as intentional not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent. Thus, we include reckless conduct of the kind set forth in the Model Penal Code. Where actual knowledge of wrongdoing is lacking, we consider conduct as equivalent if the fiduciary "consciously disregards" (or is willfully blind to) "a substantial and unjustifiable risk" that his conduct will turn out to violate a fiduciary duty. AL I, Model Penal Code §2.02(2) (c), p. 226 (1985). See *id.*, § 2.02 Comment 9, at 248 (explaining that the Model Penal Code's definition of "knowledge" was designed to include "willful blindness").

133 S. Ct. at 1759-1760.

7. Section 523(a)(5).

Long v. Calhoun (In re Calhoun), 715 F.2d 1103 (6th Cir. 1983). Court established four-prong test: (1) intent of the court or parties at the time the agreement was made, (2) present necessity, (3) practical effect of the payment of discharge upon the dependent spouse's ability to sustain daily needs, and (4) reasonableness of the amount of support so that it is not so excessive that it is manifestly unreasonable under traditional concepts of support. The inquiry ends and the debt is dischargeable when the first negative response is found at any prong. The court further stated that the bankruptcy court has a duty to examine the divorce decree to make an independent determination whether the liabilities in question are in fact alimony, maintenance or support. The label is not the determinative factor. See also, *In*

re Boller, 393 B. R. 569, 575 (Bankr. E.D. Tenn. 2008). Post-BAPCPA, *Calhoun* remains the seminal case in the Sixth Circuit for determination of whether an obligation incurred in divorce in the nature of support.

In re Singer, 787 F.2d 1033 (6th Cir. 1986). Debt is support payment and nondischargeable even if characterized as property settlement where no other provisions has been made for spousal support and circumstances indicate that recipient spouse needs support.

Fitzgerald v. Fitzgerald, 9 F.3d 517 (6th Cir. 1993). Court has no duty to review orders where an obligation is denominated as alimony and is clearly alimony, as opposed to a property settlement. Such an obligation is strictly nondischargeable, without further modification or analysis by the bankruptcy court.

Sorah v. Sorah (In re Sorah), 163 F.3d 397 (6th Cir. 1998). If the state court designates a spousal award as support and shows indicia consistent with support obligation, then it should be conclusively presumed to be a support obligation by the bankruptcy court. Accord., *In re Rugiero*, 502 Fed. Appx. 436 (6th Cir. 2012). Attorney fee award against chapter 7 debtor for fees incurred by mother of debtor's children during a custody dispute is nondischargeable as a domestic support obligation.

Bailey v. Bailey (In re Bailey), 254 B.R. 901 (B.A.P. 6th Cir. 2000). Determination of whether obligation is "support" obligation, for dischargeability purposes, is not limited to traditional indicia of support, but may include the following: (1) disparity of earning power between the parties; (2) need for economic support and stability; (3) presence of minor children; and (4) marital fault.

8. Section 523(a)(6)

Kawaauhau v. Geiger, 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998). Only acts done with the actual intent to cause injury fall within the scope of the section 523(a)(6) exception. The word "willful" modifies injury, indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. Section 523(a)(6)'s formulation triggers in the lawyer's mind the category of intentional torts, which generally require that the actor intend the consequences of the act, not simply the act itself.

Markowitz v. Campbell (In re Markowitz), 190 F.3d 455 (6th Cir. 1999). "[U]nless 'the actor desires to cause consequences of his act, or ... believes that the consequences are substantially certain to result from it,' ... he has not committed a 'willful and malicious injury' as defined under § 523(a)(6)." *Id.* at 464 (quoting Restatement (Second) of Torts § 8A, at 15 (1964)).

Gonzalea v. Moffitt (In re Moffitt), 252 B.R. 916 (B.A.P. 6th Cir. 2000). Doctrine of collateral estoppel applies in nondischargeability proceedings. A person is deemed to have acted maliciously when that person acts in conscious disregard of his duties without just cause or excuse. Ohio judgment for intentional infliction of emotional distress held nondischargeable as willful and malicious injury to person.

Kennedy v. Mustaine (In re Kennedy), 249 F.3d 576 (6th Cir. 2001). Defamation action for lack of chastity is *per se* injurious under Michigan law; therefore, the debt resulted from "willful and malicious injury to the debtor," and was nondischargeable.

In re Young, 425 B.R. 811, 815-816 (Bankr. E.D. Tex. 2012) A claim under § 523(a)(6) is not ripe for decision in a chapter 13 case unless and until the debtor files a motion for hardship discharge.

9. Section 523(a)(8)

Hood v. Tennessee Student Assistance Corporation (In re Hood), 262 B.R. 412 (B.A.P. 6th Cir. 2001). TSAC not immune from suit under section 523(a)(8) on the basis of sovereign immunity. The States ceded their sovereignty over the bankruptcy discharge as a part of the plan of the Constitutional Convention.

Oyler v. Educ. Credit Managemt. Corp. (In re Oyler), 397 F.3d 382 (6th Cir. 2005). The court of appeals for the Sixth Circuit adopted the Second Circuit's three part "*Brunner* test" for application by bankruptcy courts within the Sixth Circuit to determine whether a debtor's student loan is dischargeable. The *Brunner* undue hardship test requires the following three part analysis to determine whether repayment of student loan would impose an undue hardship on the debtor and the debtor's dependents:

- (1) that the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans;
- (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
- (3) that the debtor has made good faith efforts to repay the loans.

Brunner v. New York State Higher Educ. Serv. Corp., 831 F.2d 395, 396 (2d Cir. 1987).

Tirch v. Penn. Higher Educ. Assistance Agency (In re Tirch), 409 F.3d 677 (6th Cir. 2005). To satisfy the second prong of the *Brunner* test, the debtor must precisely identify her problems and explain how her condition would impair her ability to work in the future. A debtor's decision not to take advantage of the William D. Ford Federal Direct Consolidation Program's income contingent repayment (ICR) plan is not a per se indication of a lack of good faith under the third prong of the *Brunner* test, but it is probative of her intent to repay her student loans.

Barrett v. Educ. Credit Managemt. Corp. (In re Barrett), 487 F.3d 353 (6th Cir. 2007). Debtor who relies on a medical condition to satisfy the second prong of the *Brunner* test does not necessarily have to present expert medical evidence to corroborate his condition although the costs of copying medical records are reasonable costs that a debtor may be required to bear in order to substantiate a claim of undue hardship based on a medical condition. A debtor's decision not to take advantage of the William D. Ford Federal Direct Consolidation Program's income contingent repayment (ICR) plan is not a per se indication of a lack of good faith under the third prong of the *Brunner* test, but it is probative of the debtor's intent to repay his student loans.

Miller v. Penn. Higher Educ. Assistance Agency (In re Miller), 377 F.3d 616 (6th Cir. 2004). While a partial discharge of student loan indebtedness may be granted, the requirement of undue hardship as to the amount discharged applies.

Benson v. Corbin (In re Corbin), 506 B.R. 287 (Bankr. W.D. Wash. 2014). A judgment

creditor who had co-signed the debtor's application for a student loan from a federally insured lender and subsequently paid off the loan provided an "educational benefit" within the meaning of Code section 523(a)(8)(A)(i) making the debtor's obligation to repay the funds to him nondischargeable absent a showing of undue hardship.

10. Section 523(a)(9).

Henney v. Rumfield (In re Henney), 451 B.R. 724 (Bankr. W.D. Mich. 2011). In deciding whether debt is nondischargeable as one for death or personal injury caused by a debtor's unlawful operation of a motor vehicle because the debtor was intoxicated, bankruptcy courts should adopt the relevant state law definition of "intoxicated."

11. Section 523(a)(15).

Steele v. Heard (In re Heard), 487 B.R. 302, 308 (Bankr. S.D. Ala. 2013) Obligations incurred by a debtor in connection with a divorce, whether they are domestic support obligations or not, are not dischargeable in chapter 7. Such obligations that are not domestic support obligations are dischargeable in a chapter 13 completion discharge, however. See also, *In re Boller*, 393 B.R. 569, 575 (Bankr. E.D. Tenn. 2008).

In re Asberry, 2006 WL 2548184 (Bankr. E.D. Va. 2006); *In re Douglas*, 369 B.R. 462 (Bankr. E.D. Ark. 2007). A complaint to determine the dischargeability of a claim under Code section 523(a)(15) may be filed at any time under Federal Rule of Bankruptcy Procedure 4007.

IV. REVOCATION OF DISCHARGE

A discharge in a chapter 7 case may be revoked upon request by the United States trustee, a creditor, or the chapter 7 trustee if the debtor committed certain fraudulent or willful acts set forth in section 727(d) of the Bankruptcy Code. That section provides:

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if--

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee; or

(3) the debtor committed an act specified in subsection (a)(6) of this section; or

(4) the debtor has failed to explain satisfactorily--

(A) a material misstatement in an audit referred to in section 586(f) of title 28; or

(B) a failure to make available for inspection all necessary accounts, papers, documents, financial records, files, and all other papers, things, or property belonging to the debtor that are requested for an audit referred to in section 586(f) of title 28.

The time for filing a complaint to revoke the discharge of a Chapter 7 debtor is set out in section 727(e), which provides:

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge—

(1) under subsection (d)(1) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of—

(A) one year after the granting of such discharge; and

(B) the date the case is closed.

Similarly, a chapter 13 discharge may be revoked under Code section 1328(e) which provides that:

On request of a party in interest before one year after a discharge under this section is granted, and after notice and a hearing, the court may revoke such discharge only if—

(1) such discharge was obtained by the debtor through fraud; and

(2) the requesting party did not know of such fraud until after such discharge was granted.

A. Significant Cases Concerning Revocation of Discharge

1. Section 727(d) and (e)

Sicherman v. Rivera (In re Rivera), 338 B.R. 318, 329 (Bankr. N.D. Ohio 2006) aff'd at 356 B.R. 186 (Table), 2007 WL 130415 (B.A.P. 6th Cir. 2007). Revocation was proper under 727(d)(2) where debtor failed to turn over settlement proceeds of \$80,000 to the trustee when he knew that he should.

Humphreys v. Stedham (In re Stedham), 327 B.R. 889 (Bankr. W.D. Tenn. 2005). Revocation was denied for a creditor who had knowledge that the debtor “with intent to hinder, delay or defraud a creditor or officer of the estate” was concealing property in time to object to

the debtor's discharge but who failed to act until sometime after the discharge was granted by filing a revocation request under section 727(d)(2).

Stewart v. Black (In re Black), 19 B.R. 468 (Bankr. M.D. Tenn. 1982). Revocation proper under section 727(d)(2) where debtor failed to list automobile on schedules and used auto as collateral to obtain secured loan while bankruptcy was pending.

In re Caldwell, 67 B.R. 296 (Bankr. E.D. Tenn. 1986). Chapter 7 debtor allowed revocation of his chapter 7 discharge and conversion of his case to chapter 13. Section 706(a) gives a debtor an absolute right to convert a case under chapter 7 to one under chapter 13. Debtor's discharge was "meaningless," since his only unsecured debts were nondischargeable and the debtor had not incurred any postpetition debts, so subsequent creditors were not affected.

In re Jones, 111 B.R. 674 (Bankr. E.D. Tenn. 1990). Chapter 7 debtors not allowed to revoke the chapter 7 discharge and convert to chapter 13 because there was a high potential for harm to the creditors if debtors were allowed to revoke and convert. The court must give deference to section 727(d) and (e), but it cannot completely ignore equitable considerations.

Karr v. Pankey (In re Pankey), 122 B.R. 710 (Bankr. W.D. Tenn. 1991). An action to revoke a discharge must be commenced by a timely filed adversary complaint, pursuant to Bankruptcy Rules 7001(4) and 9024(2). A motion to reopen does not satisfy this requirement.

Miller v. Miller (In re Miller), 246 B.R. 559 (Bankr. E.D. Tenn. 2000). Ex-wife of debtor, whose debt was established upon execution of post-petition marital dissolution agreement, was not a "creditor" and therefore lacked standing to bring an action to revoke discharge pursuant to section 727(d)(2).

Wyss v. Fobber (In re Fobber), 256 B.R. 268 (Bankr. E.D. Tenn. 2000). Trustee did not meet burden of proof in adversary proceeding brought under section 727(d)(2) where he failed to allege "knowing and fraudulent conduct."

2. Section 1328(e).

Beskin v. Knupp; In re Knupp, 461 B.R. 351 (Bankr. W.D. Va. 2011). Chapter 13 discharge revoked where debtor failed to disclose to post-petition inheritance.

AMERICAN BANKRUPTCY INSTITUTE

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

In re

_____,
Debtor.

Case No. _____
Chapter 7

**MOTION TO EXTEND DEADLINE TO FILE
COMPLAINT UNDER 11 U.S.C. §§ 523(c) AND 727(a)**

COMES NOW, _____ and, in accordance with the provisions of FED. R. BANKR. P. 4004(b) and 4007(b) file this motion for an extension of time to file complaints under 11 U.S.C. §§ 523(c) and 727(a). In support of said Motion, the Movant would show to the Court as follows:

1. On _____ (the day before he was faced with a Motion for Default Judgment and to Compel and for Sanction in a state court action) the Debtor filed a voluntary chapter 7 petition.
2. The Meeting of Creditors was originally set for _____ at 12:00 p.m.
3. The current bar date for filing Complaints under 11 U.S.C. §§ 523(c) and 727(a) is _____.
4. The Meeting of Creditors was continued at the request of the Debtor until _____.
5. By and through counsel, Movant appeared at the Meeting of Creditors and questioned the Debtor, however, there were several critical documents and information which were not available at the meeting.
6. Subsequently, Movant filed a Motion for an examination of the Debtor pursuant to FED. R. BANKR. P. 2004 (the "Rule 2004 Motion") and on _____, the Court entered an Order granting that motion.
7. The Order Granting Motion for Rule 2004 Examination (the "Order") ordered the Debtor to Produce the documents requested in Appendix A attached to the "Notice of Examination

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of Debtor Pursuant to FED. R. BANKR. P. 2004” (which was attached as Exhibit 1 to the Rule 2004 Motion) within 30 days of entry of the Order and to appear for an examination within 30 days after the production of the documents requested.

8. The Debtor has not produced the documents to date and there has been no Rule 2004 Examination, however, the parties are in continuing discussions over a consensual resolution of the case.

9. As such, Movant requests that the deadline for filing complaints under 11 U.S.C. §§ 523(c) and 727(a) be extended for an additional period of approximately 60 days from _____ to permit him to continue settlement discussions and to conduct his examination of the financial affairs of the Debtor and, if appropriate, file such a complaint.

WHEREFORE, the Movant requests an extension up to and including _____ to file complaints under 11 U.S.C. §§ 523(c) and 727(a) and for such other, further and general relief to which he may be entitled.

**Respectfully submitted,
BUTLER SNOW LLP**

/s/ James E. Bailey III
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Attorneys for _____

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served on the Case Trustee, the United States Trustee, and the Debtor’s Attorney this February 3, 2011 via first class U.S. mail, postage prepaid or electronically via the Court’s CM/ECF system.

/s/ James E. Bailey III

AMERICAN BANKRUPTCY INSTITUTE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT TENNESSEE
WESTERN DIVISION

In re:

Debtor.

Case No. _____
Chapter 7

Chapter 7 Trustee,

Plaintiff,

v.

Adv. Proc. No. _____

Defendant.

COMPLAINT TO REVOKE DISCHARGE

COMES NOW, _____, Esq. (the “Trustee” or “Plaintiff”), duly appointed chapter 7 trustee for the above named chapter 7 estate of _____ (the “Debtor”), and, pursuant to 11 U.S.C. § 727(d) and FED. R. BANKR. P. 7001(4), seeks to revoke the discharge granted to the Debtor and would state as follows:

JURISDICTION AND VENUE

1. On _____ (the “Petition Date”), the Debtor filed a Voluntary Petition for Relief under Chapter 7 (the “Petition”) of the United States Bankruptcy Code.

2. On _____, _____, Esq. was appointed interim trustee and became the permanent case trustee after the first meeting of creditors held _____.

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3. This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §1334(b), 11 U.S.C. §§ 727(d), FED. R. BANKR. P. 7001(4), 28 U.S.C. § 157(a) and the standing order of reference entered July 11, 1984, by the district court – Misc. Order No. 84-30 (W.D. Tenn).

4. Venue is proper in this Court pursuant to 28 U.S.C. §1409.

5. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), (J) and (O).

FACTUAL BACKGROUND

6. On the Petition Date Debtor owned certain real property locally known as _____, Memphis, Tennessee (the “Property”).

7. Debtor listed the value of the Property in his Schedule A as \$647,900.00 and the debt secured by said property as \$735,700.00.

8. On _____, the Debtor received a discharge of all debts.

9. Debtor later identified the value of the Property in his Verified “Answer to Plaintiff’s Second Set of Interrogatories” in a separate Adversary Proceeding, Adv. Proc. No. _____ as \$1,175,000.00.

10. On or about _____, without approval of this Court and without notice to the Trustee, Debtor transferred his interest in the Property to _____.

11. Upon information and belief, the affidavit of value given in connection with the closing of said sale reflects a value of \$1,175,000.00.

12. Upon information and belief, the Debtor received the net proceeds of the sale at closing and has failed and refused to tender the proceeds to the Trustee upon demand.

COUNT I

REVOCAION OF DISCHARGE PURSUANT TO 11 U.S.C. § 727(d)

13. Plaintiff realleges Paragraphs 1 through 12 and incorporates them herein as if set forth verbatim.

14. The Property was property of the bankruptcy estate on the Petition Date.

15. The Property was never abandoned by the Trustee.

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16. On or about _____, without approval of this Court and without notice to the Trustee, Debtor transferred his interest in the Property to _____.

17. The proceeds of the Property are property of the bankruptcy estate.

18. The Debtor has acquired property that is property of the estate and knowingly and fraudulently failed to report the acquisition of, or entitlement to, such property to the Trustee.

19. The Debtor has knowingly and fraudulently failed to deliver or surrender such property to the Trustee.

WHEREFORE, premises considered, the Trustee prays that the Court enter a judgment:

- A. revoking the Debtor's discharge pursuant to 11 U.S.C. § 727(d); and
- B. granting such other, further and general relief to which the Trustee may be entitled.

Respectfully submitted,

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