Problems, Problems, Problems Workshops

Business

Hon. Steven W. Rhodes
U.S. Bankruptcy Court (E.D. Mich.); Detroit

Hon. Mary Ann Whipple
U.S. Bankruptcy Court (N.D. Ohio); Toledo

Consumer

Hon. Arthur I. Harris
U.S. Bankruptcy Court (N.D. Ohio); Cleveland

Hon. Keith M. Lundin
U.S. Bankruptcy Court (M.D. Tenn.); Nashville

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THE PROOF IS IN THE CLAIM

MassiveMortgageServicer is the latest in a long line of servicers with rights to service Debtors' home mortgage. LargeTrust sends an e-mail to Massive stating that it is owed $257,000 secured by a first mortgage on Debtors' home. The monthly mortgage payment is $1,500 and it adjusts every six months. It will go to $1,700 a month in less than 60 days. The escrow account is short $2,500 and Debtor is three months in arrears ($4,500 + $135 late charges) of regular monthly payments. Insurance may be lapsed, but forced-placed insurance is in effect with a premium advanced by LargeTrust of $3,000 per year. Prepetition attorney fees for interrupted foreclosure are 1% of outstanding balance or $2,570. Massive's flat fee contract with outside counsel pays $50 for filing a proof of claim, $250 for a relief stay motion, $300 for an objection to confirmation and $100 for Rule 3002.1 notices and supplements.

Debtors' Chapter 13 plan cures default in 36 months with payments to the Chapter 13 trustee and maintains payments on the first mortgage by direct payments from the debtor.

- Should Massive file a motion for relief from the stay? Does it matter that LargeTrust can't find the note? Does it matter if the mortgage was separated from the note and is in a warehouse, maybe? What information would you want before you would file a motion for relief from the stay for Massive? What defensive tactics would you use for Debtor if Massive does file a motion for relief from the stay?

- Should Massive file a proof of claim? What should the proof of claim say? What should be attached to the proof of claim? Should it be a real or a "fake" proof? What is debtors' response if proof of claim for arrearages contains all of the amounts stated above plus $500 for "proof of claim and review of plan?"

- What are Massive's obligations during the Chapter 13 case under Bankruptcy Rule 3002.1 with respect to the upcoming payment adjustment? What are Debtors' rights and responsibilities under the rule? What happens if Massive does nothing?

- Chapter 7 case filed on June 1, 2013. Converted to Chapter 13 on February 1, 2014. Plan confirmed on April 1, 2014. On April 1, 2015, Massive files the attached supplemental notice of postpetition fees and expenses. What should debtor do? How should Massive respond?

- During the case Massive discovers that it failed to include forced-placed insurance premiums in its arrearage claim. What can/should it do? Will a notice of fees work? What would be the debtor's response?

- During the case, Massive accrues postpetition fees and expenses until it receives the trustee's notice that all arrears have been cured and the mortgage is current. Was this a good strategy for Massive? What should it do in response to the trustee's notice?

APPLICABLE CASES

In re Taylor, 655 F.3d 274 (3d Cir. Aug. 24, 2011) (Fuentes, Smith, Van Antwerpen) (Sanctions against HSBC Mortgage Corp., its attorneys and their law firm for blind reliance on inaccurate data supplied by HSBC through a computerized system called NewTrak in support of a stay relief motion and in claim litigation. The Third Circuit described the case as "an unfortunate example of the ways in which overreliance on computerized processes in a high-volume practice, as well as a failure on the part of clients and lawyers alike to take responsibility for accurate knowledge of a case, can lead to attorney misconduct before a court." The original proof of claim contained factual errors; the wrong mortgage was attached, debtors' monthly payment was incorrect and the value of the debtors' home was understated by $100,000. Although those errors were corrected in an amended proof of claim, the debtors objected to the claim based on a long running dispute over forced flood insurance. "HSBC does not deign to communicate directly with the firms it employs in its high-volume foreclosure work; rather its uses [the NewTrak system] to assign individual firms discrete assignments and provide the limited data the system deems relevant to each assignment. The firms are selected and the instructions generated without any direct human involvement. The firms so chosen generally do not have the capacity to check the data (such as the amount of mortgage payment or time in arrears) provided to them by NewTrak and are not expected to communicate with other firms that may have done related work on the matter. Although it was technically possible for a firm hired through NewTrak to contact HSBC to discuss the matter on which it has been retained, it is clear from the record that this was discouraged and that some attorneys, including at least one Urden Firm attorney, did not believe it to be permitted. . . . We appreciate that the use of technology can save both litigants and attorneys time and money, and we do not, of course, mean to suggest that the use of databases or even certain automated communications between counsel and client are presumptively unreasonable. However, Rule 11 requires more than a rubber-stamping of the results of an automated process by a person who happens to be a lawyer. Where a lawyer systematically fails to take any responsibility for seeking adequate information from her client, makes representations without any factual basis because they are included in a 'form pleading' she has been trained to fill out, and ignores obvious indications that her information may be incorrect, she cannot be said to have made reasonable inquiry.").

Veal v. American Home Mortg. Servicing, Inc. (In re Veal), 450 B.R. 897 (B.A.P. 9th Cir. June 10, 2011) (Markell, Kirscher, Jury) (Wells Fargo lacked standing to seek stay relief because its documents failed to show a colorable claim that Wells Fargo had interest in underlying note, either as a holder or as an "other person entitled to enforce the note," or that it had ownership or other interest in the note. Debtors' objection to servicer's proof of claim on behalf of Wells Fargo was remanded for fact finding with respect to whether servicer had an agency relationship with a person entitled to enforce the note. Bankruptcy court granted Wells Fargo relief from stay and overruled debtors' objection to proof of claim filed by American Home Mortgage Servicing, Inc. (AHMSI) on behalf of Wells Fargo. "Given the limited nature of the relief obtained through a motion for relief from the stay, the expedited hearing schedule § 362(e) provides, and because final adjudication of the parties' rights and liabilities is yet to occur, this Panel has held that a party seeking stay

relief need only establish that it has a colorable claim to enforce a right against property of the estate. . . . [U]nder the common law generally, the transfer of a mortgage without the transfer of the obligation it secures renders the mortgage ineffective and unenforceable in the hands of the transferee. . . . [T]o show a colorable claim against the Property, Wells Fargo had to show that it had some interest in the Note, either as a holder, as some other 'person entitled to enforce,' or that it was someone who held some ownership or other interest in the Note. . . . None of the exhibits attached to Wells Fargo's papers, however, establish its status as the holder, as a 'person entitled to enforce,' or as an entity with any ownership or other interest in the Note. . . . [W]ithout any evidence tending to show it was a 'person entitled to enforce' the Note, or that it has an interest in the Note, Wells Fargo has shown no right to enforce the Mortgage securing the Note. Without these rights, Wells Fargo cannot make the threshold showing of a colorable claim to the Property that would give it prudential standing to seek stay relief or to qualify as a real party in interest.").

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

Bodrick v. Chase Home Fin., Inc. (*In re Bodrick*), 498 B.R. 793 (Bankr. N.D. Ohio Oct. 8, 2013) (Woods) (Debtor's failure to file motion under Bankruptcy Rule 3002.1(h) within 21 days after lender filed statement disputing trustee's notice of final cure payment does not preclude or waive debtor's postdischarge adversary proceeding challenging lender's postpetition arrearage claim. No final determination of lender's claim occurred for purposes of res judicata analysis. The lender's response is not entitled to any presumption of validity, and Bankruptcy Rule 3002.1(h) does not mandate debtor action to preserve a claim dispute.).

In re Nieves, 499 B.R. 222, 225, 224-25 (Bankr. D.P.R. Sept. 25, 2013) (Godoy) (Creditor disagreeing with trustee's notice of final cure payment issued under Bankruptcy Rule 3002.1(f) must respond using Form 1052 and must state with "'**particularity** the amounts that remain unpaid.'" "Like Rule 3002.1(g), Rule 3002.1(c) requires the holder of the claim to file and serve 'a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence.' . . . And Rule 3002.1(d) requires that the Rule 3002.1(c) notice be prepared using Form 10S2 [Supplement 2 to Official Proof of Claim Form 10]. Form 10S2 requires the claim holder to '[i]temize the fees, expenses, and charges incurred on the debtor's mortgage account after the petition was filed' by providing a description, dates incurred, and amount, item by item. And the form must be signed by the holder under penalty of perjury. . . . So, '[t]he creditor must respond to that notice [of final cure payment] by acknowledging that it is correct, or if it is not, stating **with particularity** the amounts that remain unpaid.' . . . [In addition,] the Rule 3002.1(g) response must be signed by the holder under penalty of perjury.").

In re Rodriguez, No. 08-80025-G3-13, 2013 WL 3430872, at *3-*4 (Bankr. S.D. Tex. July 8, 2013) (Paul) (Mortgage declared cured and current under Bankruptcy Rule 3002.1(h) when Nationstar did not respond to trustee's Notice with respect to postpetition charges, Nationstar did not file all notices required by Bankruptcy Rule 3002.1(c) and Nationstar presented no evidence to support any notice that it did file. Nationstar filed a proof of claim for a prepetition arrearage of $17,733.21. Confirmed plan provided for full payment of that arrearage. On August 3, 2011, trustee filed a "Notice of Bar Date for Asserting Claim for Post-petition Charges Accruing on Residential Mortgage Claims." The notice required Nationstar to supplement its proof of claim if it asserted charges, fees or additional arrearage during the case. Nationstar did not file a supplemental proof of claim. In June and July of 2012, Nationstar filed notices of postpetition mortgage fees, expenses and charges pursuant to Bankruptcy Rule 3002.1(c) totaling $908.28. The debtor did not object to those notices. On January 3, 2013, the trustee filed a Notice of Final Cure Payment together with a motion to deem the mortgage current. Nationstar filed a response asserting postpetition arrearage of $25,798.02. Nationstar claimed that it had paid taxes and insurance for several years, but Nationstar presented no evidence as to any disbursements it may have made. "[T]he Trustee filed a notice on August 3, 2011, which was sufficient to alert Nationstar as to the need to make a claim for those charges. The court concludes that Nationstar is barred from collecting those charges arising prior to August 3, 2011. Bankruptcy Rule 3002.1 took effect on December 1, 2011. . . . [T]he claimant bears the burden of proof under Bankruptcy Rule 3002.1(h). . . . [A]fter December 1, 2011, Nationstar filed two notices of postpetition fees, expenses, and charges, totaling $908.28. Debtor did not object to those notices. The notices were timely filed. However, those notices do not enjoy a presumption of validity. Nationstar presented no evidence of any disbursements, either before or after December 1, 2011. . . . [U]nder Bankruptcy Rule 3002.1(h), on the basis of the evidence before the court, . . . Debtor has cured the default, and paid all required postpetition amounts.").

In re Ortega, No. 10-40698-H3-13, 2013 WL 2099726, at *2 (Bankr. S.D. Tex. May 14, 2013) (Paul) (Mortgage holder not entitled to $50 fee for preparing Bankruptcy Rule 3002.1 notice of mortgage payment change. "[T]he claimant did not sustain its burden of proof as to the reasonableness of a $50 fee. The court concludes that the $50 fee for preparing the Notice of Mortgage Payment Change is not required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.").

In re Tollios, 491 B.R. 886, 888-93 (Bankr. N.D. Ill. May 13, 2013) (Doyle) (Chase violated Bankruptcy Rule 3002.1 by sending debtor notice of increase in escrow payment but failing to file notice with court or to serve counsel or trustee; Bankruptcy Rule 3002.1 applies when confirmed plan pays mortgage directly by debtor notwithstanding that there was no prepetition arrearage. Court will consider awarding attorney fees as sanction but declines to bar evidence of escrow adjustment because debtor was not harmed by Chase's payment of postconfirmation property taxes. "Rule 3002.1 was adopted in December 2011 to address a significant problem caused when mortgage companies applied fees and costs to a debtor's mortgage while the debtor was in bankruptcy without giving notice to the debtor and then, based on these post-petition defaults, sought to foreclose upon the debtor's property after the debtor completed the plan. Rule 3002.1 deals with this problem by requiring notice of payment changes and providing an opportunity for the debtor to contest them during the chapter 13 case. . . . [T]he rule applies in chapter 13 cases to claims secured by the debtor's principal residence and provided for under § 1322(b)(5) . . . . [T]he debtors' plan provides that they will make current monthly payments to Chase's predecessor directly to the creditor instead of through a payment from the trustee. This provision of the plan brings Chase's claim within the scope of Rule 3002.1. . . . [Section] 1325(b)(5) makes it clear that debtors may maintain monthly payments regardless of whether they owe pre-petition arrears. . . . [A]ny plan that pays current monthly payments on a mortgage loan that extends beyond the plan term provides for the mortgage claim under

§ 1322(b)(5) for purposes of Rule 3002.1(a), regardless of whether there are pre-petition arrears. . . . Construing Rule 3002.1 to apply to mortgage claims only when the debtor owes prepetition arrears makes no sense in light of the requirements of the rule. It deals solely with *post[-]petition* changes to the monthly payment and *post-petition* charges the lender imposes under the loan agreement. . . . [T]here is a compelling reason for applying the rule both to debtors who owe pre-petition arrears and those who do not. Both types of debtors have an equal need to know of post-petition changes in the monthly payment and charges imposed by lenders so they can be fully current on their mortgages when they complete the plan. . . . Given that the debtors suffered no harm from Chase's noncompliance with the rule, the court will not bar Chase from presenting evidence of the notice served on the debtors at any future hearing on this issue. . . .[T]he court will consider whether an award of attorneys' fees is appropriate.").

In re Kreidler, No. 5-06-bk-50864-JJT, 2013 WL 1334910, at *2–*3 (Bankr. M.D. Pa. Mar. 29, 2013) (Thomas) (By not appearing to prove postpetition arrearage in response to trustee's Bankruptcy Rule 3002.1(f) notice of final cure payment mortgagee failed to establish any postpetition default in direct payments by debtor and mortgage is declared current. After the debtor completed payments under a five-year plan, the trustee served the mortgagee notice under Rule 3002.1(f) that mortgage arrearages provided for in the plan were fully paid and that postpetition mortgage payments directly by the debtor were current. The mortgagee responded untimely that the debtor owed $7,938.83 in postpetition arrears set forth on a claim supplement. The debtor filed a motion for determination of the status of the mortgage under Rule 3002.1(h). The court scheduled a hearing. The debtor appeared. The mortgagee did not appear. "The filing of the supplement to the claim required by Rule 3002.1(g) does not enjoy the same prima facie presumption set forth in Rule 3001(f) as does the claim itself. Rule 3002.1(g). In order to prevail on its claim for postpetition defaults, the holder was required to appear and establish that fact. Having failed to attend the hearing, the holder has not met its burden to establish the existence of the alleged postpetition default. . . . HSBC argues that Rule 3002.1 does not apply because the postpetition delinquency was not 'provided for' in the plan as required in Rule 3002.1(a). . . . It asserts that only the pre-petition arrearage was provided for and not the payments made directly from the Debtor to the holder of the claim. . . . In discussing the term 'provided for,' our Supreme Court referenced Bankruptcy Code § 1328 by stating that '§ 1328(a) unmistakably contemplates that a plan 'provides for' a claim when the plan cures a default and allows for the maintenance of regular payments on that claim, as authorized by § 1322(b)(5).' *Rake v. Wade,* 508 U.S. 464, 474–475 . . . . [T]he HSBC mortgage was provided for. . . . Since HSBC had the burden to establish its postpetition arrearage, I conclude that, in not pursuing this burden, a postpetition arrearage either did not exist or the holder of the claim has waived the opportunity to advance the claim. Accordingly, I conclude that pre- and postpetition arrearages are satisfied as of the date of the mortgagee's last statement supplementing its proof of claim.").

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

Bankruptcy Rule 2016—Professional Fees Issues

Rule 2016. Compensation for Services Rendered and Reimbursement of Expenses

(a) Application for compensation or reimbursement

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

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

Rule 3001. Proof of Claim

* * * *

(c) Supporting Information

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B 10S2 (Supplement 2) (12/11)

UNITED STATES BANKRUPTCY COURT

In re DEBTOR, Debtor

Case No. _____

Chapter 13

Notice of Postpetition Mortgage Fees, Expenses, and Charges

If you hold a claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any postpetition fees, expenses, and charges that you assert are recoverable against the debtor or against the debtor's principal residence. File this form as a supplement to your proof of claim. See Bankruptcy Rule 3002.1.

Name of creditor: MassiveMortgageServicer

Court claim no. (if known): 001 filed 3/1/2014

Last four digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Does this notice supplement a prior notice of postpetition fees, expenses, and charges?

☑ No

☐ Yes. Date of the last notice: _____ mm/dd/yyyy

Part 1: Itemize Postpetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges incurred on the debtor's mortgage account after the petition was filed. Do not include any escrow account disbursements or any amounts previously itemized in a notice filed in this case or ruled on by the bankruptcy court.

Description	Dates incurred		Amount
1. Late charges	5/13, 8/13, 7/14	(1)	$ 135.00
2. Non-sufficient funds (NSF) fees		(2)	$
3. Attorney fees	foreclosure - stayed	(3)	$ 2,570.00
4. Filing fees and court costs	stay relief 3/14	(4)	$ 176.00
5. Bankruptcy/Proof of claim fees	3/14	(5)	$ 600.00
6. Appraisal/Broker's price opinion fees		(6)	$
7. Property inspection fees	22 @ $18.75 5/13-3/15	(7)	$ 412.50
8. Tax advances (non-escrow)		(8)	$
9. Insurance advances (non-escrow)		(9)	$
10. Property preservation expenses. Specify:		(10)	$
11. Other. Specify: 3002.1 fees	4/15	(11)	$ 250.00
12. Other. Specify: Obj. to plan	3/14	(12)	$ 500.00
13. Other. Specify: redaction of PII	5/14	(13)	$ 500.00
14. Other. Specify:		(14)	$

The debtor or trustee may challenge whether the fees, expenses, and charges you listed are required to be paid. See 11 U.S.C. § 1322(b)(5) and Bankruptcy Rule 3002.1.

Part 2: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number if different from the notice address listed on the proof of claim to which this Supplement applies.

Check the appropriate box.

☑ I am the creditor.

☐ I am the creditor's authorized agent. (Attach copy of power of attorney, if any.)

I declare under penalty of perjury that the information provided in this Notice is true and correct to the best of my knowledge, information, and reasonable belief.

✘ Massive
Signature

Date 04/01/2015
mm/dd/yyyy

Print: Massive Mortgage Servicer
First Name Middle Name Last Name

Title _____

Company UNOWHO

Address Everywhere
Number Street

_____
City State ZIP Code

Contact phone _____

Email _____

Reset Save As... Print

A LITTLE KNOWLEDGE IS DANGEROUS

Ponzi files bankruptcy on April 1. Does not schedule any of his "victims." Section 523(c) complaint deadline is July 1.

Attorney1 reads in newspaper on June 1 that Ponzi has filed bankruptcy. Three years earlier, Attorney1 represented Victim and took large fraud judgment against Ponzi. Attorney1 doesn't like to do collection work and referred Victim to Attorney2 to collect judgment. Attorney1 hasn't heard from Victim since.

Attorney1 runs into Attorney2 in courthouse on June 5 and asks, "How is the Ponzi bankruptcy going?" Attorney2 says, "What bankruptcy?" Attorney2 returns to office and discovers Ponzi bankruptcy notice in file for another client of the firm, Hometown Electric Service, but no notice in Victim's file.

Attorney2 writes Victim on June 15 asking Victim to contact Attorney2 about Ponzi matter. They meet on June 25. Victim knows nothing about Ponzi bankruptcy. Victim retains Attorney2 to file complaint in Ponzi bankruptcy.

Attorney2 files § 523(a)(2) and (a)(6) complaint in Ponzi bankruptcy on August 15.

★ Advise Ponzi, Victim, Attorney1 and Attorney2

APPLICABLE CASES

In re Herman, 737 F.3d 449 (7th Cir. 2013) (Notice to attorney of filing of case was imputed to creditor when attorney had been representing creditor in action against debtor for years and representation had not been terminated when bankruptcy notice was received but misrouted by attorney. Actual notice to creditor 24 days before bar date may be sufficient: "Although this Court's precedent indicates that less than one month of actual notice may not be sufficient notice, no bright-line rule has been established.").

Perle v. Fiero (In re Perle), 725 F.3d 1023 (9th Cir. 2013) (Actual knowledge exception in § 523(a)(3) is not available when attorney learned of bankruptcy three years after representation ended; knowledge attorney gained while representing different client not imputed to client no longer represented with respect to claim against debtor. "[T]he 'contemplated services' that [attorney] performed for [creditor] consisted of handling the arbitration. Once the arbitration ended, [attorney] no longer represented [creditor] with respect to it. He did continue to handle other unrelated matters for [creditor], but this is of little significance considering that a lawyer's representation of a client is subject-matter specific. . . . [Attorney] learned of [debtor's] bankruptcy on behalf of a different client . . . .").

Hathorn v. Petty (In re Petty), 491 B.R. 554 (B.A.P. 8th Cir. 2013) (Notice to attorney six days before bar date did not preclude unscheduled creditor's § 523(a)(3) complaint; 64-day delay in filing complaint after actual notice to attorney was irrelevant because there is no deadline for filing a complaint under § 523(a)(3) when actual knowledge exception is not applicable. "[I]f a creditor with a debt of the kind specified in § 523(a)(2), (4), or (6) did not receive actual knowledge of the bankruptcy case in time for timely filing of a request for determination of dischargeability, the inquiry ends there—the debt is not discharged. . . . . [T]he only consideration for the bankruptcy court was whether six days was sufficient notice to timely file an adversary proceeding. . . . [T]he bankruptcy court determined that six days was not sufficient notice to take meaningful action under the undisputed facts of this case. . . . Since there is no deadline to file a complaint under 11 U.S.C. § 523(a)(3)(B), [creditors] have the right to proceed with their complaint to try to prove that they hold a debt of a kind described in § 523(a)(6).").

Burgraf v. Munion (In re Munion), 487 B.R. 599 (B.A.P. 6th Cir. 2013) (table decision) (Actual notice 25 days before bar date defeats unscheduled creditor's complaint under § 523(a)(3).).

DISPOSE OF THESE ISSUES

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

★ **DEBTOR1:** Debtor1 typically receives an annual bonus in February of each year. The bonuses average $10,000 and Debtor1 anticipates a bonus in approximately that amount in the future. Does CMI change depending upon whether the petition is filed within six months of a previous bonus? Is § 101(10A)(B) implicated?

★ **DEBTOR2:** Debtor2 lives in Denver with his wife and two children but works five days a week at Boeing in Portland, Oregon. Debtor2 owns a home in Denver and rents an apartment in Portland. He has double utilities and many ordinary household expenses are significantly higher.

★ **DEBTOR3:** Debtor3's Spouse receives $1,400 per month from SSI. Does it matter whether Spouse is a joint debtor? What if nonfiling spouse pays $1,000 per month mortgage on house in which Debtor3 lives?

★ **DEBTOR4:** Debtor4 owns Car1 with no debt; Car2 secures a note with a balance of $250; and, Car3 is leased for $750 per month. Should Debtor4 surrender Car2?

★ **DEBTOR5:** Debtor5's gas bill includes $300 per month payment toward a $10,000 furnace financed by the gas company.

★ **DEBTOR6:** Debtor6's actual home mortgage payment is $900 and the Local Standard for housing is $1,100.

★ **DEBTOR7:** Debtor7 has actual monthly rent of $800. The applicable Housing and Utility Local Standard is $1,644.

★ **DEBTOR8:** Debtor8's actual home mortgage payment is $1,100 and the Local Standard for housing is $900.

★ **DEBTOR9:** Debtor9 has a second mortgage that is $1,000 a month but it is wholly unsecured.

★ **DEBTOR10:** Debtor10's spouse is pregnant and her substantial income will be gone when she takes pregnancy leave in four months. She does not plan to return to work for at least six months.

★ **DEBTOR11:** Debtor11's Spouse has children by a previous marriage. Spouse's former spouse is required to pay $1,500 per month to Mortgage holder as a mortgage payment for the house in which Spouse, children and Debtor11 live. How do answers change if Spouse is/is not a joint debtor?

★ **DEBTOR12:** Debtor12's daughter receives a $10,000 scholarship that is credited directly against tuition, room and board at her college.

★ **DEBTOR13:** Debtor13 has a pension loan that will be repaid in 24 months at contractual amount.

★ **DEBTOR14:** Debtor14 received a $2,000 tax refund during the six months before the petition. Debtor14 anticipates receiving a $4,000 tax refund during the current tax year. Does it matter that the larger tax refund is caused by an unreimbursed medical emergency?

★ **DEBTOR15:** Debtor15 with CMI greater than applicable median family income deducts contractual debt secured by bass boat and by vacation home. Plan proposes to surrender bass boat and vacation home mortgage will be paid by former spouse consistent with divorce decree.

★ **DEBTOR16:** Debtor16 averages expenses of $2,000 per month for medical care in excess of any available insurance coverage. Would it matter if half of these medical expenses are for a parent who is not a dependent?

★ **DEBTOR17:** Debtor17's household size changes from two persons to six persons two months after the petition when Debtor17's daughter, son-in-law and two grandchildren move in with the debtor. What if the debtor lost a job a month after the petition? How do these facts change calculation of the applicable commitment period?

★ **DEBTOR18:** At the petition, Debtor18 is unemployed and has been for more than six months. Debtor18 and Spouse have been living off of Spouse's $5,000 per month income. How do CMI and disposable income calculations change depending on whether Debtor18 files separately or jointly with Spouse? How do the calculations change if CMI is above or below applicable median family income?

★ **DEBTOR19:** Debtor19 is a long-haul truck driver on the road 90% of the time. Debtor19's nonfiling Spouse has $5,000 per month of separate income and spends the entire amount on her separate food, clothing, transportation, child support for her separate dependents, credit cards and gambling. How do nonfiling Spouse's income and expenses figure into disposable income calculation?

★ **DEBTOR20:** During the six months before the petition, Debtor20 received a $25,000 distribution from a qualified 401k plan. Is that distribution included in CMI? in disposable income? Does it matter that Debtor20 used the distribution as the down payment on a personal residence?

★ **DEBTOR21:** Debtor21 owns and operates a donut shop as a sole proprietorship. Gross income for the business is $20,000 per month. Average monthly business expenses are $15,000 per month. How do these numbers affect CMI? Does it matter whether Debtor21 has CMI greater than applicable median family income? What if the business expenses include salary to Debtor21? Does it matter that Debtor21 retains the $5,000 net income each month for distribution as a bonus in December? What if the business provides Debtor21 a $500 per month car as a benefit? What if the business pays $600 per month for Debtor21's health insurance?

★ **DEBTOR22:** Debtor22's CMI is $100 above the applicable median family income according to the chart found on the U.S. Trustee's Web page. The Census Bureau's Web page contains links to four charts that produce applicable median family income figures that are as much as $500 above and $500 below the amount shown on the UST's Web page, with a margin of error of $1,000 according to the Census Bureau.

★ **DEBTOR23:** Debtor23 cosigned car note for fiancé. Debtor23 occasionally drives car and occasionally helps with payments but car is primarily driven by fiance and paid for by fiance.

★ **DEBTOR24:** Debtor24 has $165 per month expense for cell phones, $80 a month for cable that includes Internet service and $35 per month for a land telephone line.

★ **DEBTOR25:** Debtor25 makes court-ordered payments to Exspouse in the amount of $600 per month for child support. The child will turn 18 and be emancipated in 24 months. How is this obligation accounted for on B22C? on Schedules I and J? Does accounting change if the debtor's CMI is less than or greater than applicable median family income?

★ **DEBTOR26:** Debtor26 has a qualified 401k plan and could contribute as much as $1,250 per month. Debtor26 consults you before filing Chapter 13 petition and is currently only paying $500 per month into the 401k plan. Should Debtor26 kick up the 401k payment before filing? after filing? Does timing of or change in 401k contribution change CMI or disposable income calculations?

★ **DEBTOR27:** Debtor27's mother died leaving Debtor27 the following:

- House worth $200,000
- Life Insurance proceeds of $100,000
- Annuity that pays $1,000 per month for 10 years

What is treatment of each item for disposable income test purposes: (1) if mother died more than six months before petition; (2) if mother died within six months of petition; and (3) if mother died after the petition. Does it matter whether mother died more or less than 180 days after the petition?

APPLICABLE CASES

Ransom v. FIA Card Servs., N.A., __ U.S.__, 131 S. Ct. 716, 178 L. Ed. 2d 603, 721-26, 725 n.5 (Jan. 11, 2011) ("Congress adopted the means test . . . to help ensure that debtors who *can* pay creditors *do* pay them. . . . For a debtor whose income is above the median for his State, the means test identifies which expenses qualify as 'amounts reasonably necessary to be expended.' The test supplants the pre-BAPCPA practice of calculating debtors' reasonable expenses on a case-by-case basis, which led to varying and often inconsistent determinations. . . . A debtor may claim a deduction from a National or Local Standard table . . . if but only if that deduction is appropriate for him. And a deduction is so appropriate only if the debtor has costs corresponding to the category covered by the table—that is, only if the debtor will incur that kind of expense during the life of the plan. . . . Because Congress intended the means test to approximate the debtor's reasonable expenditures on essential items, a debtor should be required to qualify for a deduction by actually incurring an expense in the relevant category. If a debtor will not have a particular kind of expense during his plan, an allowance to cover that cost is not 'reasonably necessary' within the meaning of the statute. . . . Although the statute does not incorporate the IRS's guidelines, courts may consult this material in interpreting the National and Local Standards; after all, the IRS uses those tables for a similar purpose—to determine how much money a delinquent taxpayer can afford to pay the Government. The guidelines of course cannot control if they are at odds with the statutory language. But here, the Collection Financial Standards' treatment of the car-ownership deduction reinforces our conclusion that, under the statute, a debtor seeking to claim this deduction must make some loan or lease payments." In a footnote: "This interpretation also avoids the anomalous result of granting preferential treatment to individuals with above-median income. Because the means test does not apply to Chapter 13 debtors whose incomes are below the median, those debtors must prove on a case-by-case basis that each claimed expense is reasonably necessary. . . . If a below-median-income debtor cannot take a deduction for a nonexistent expense, we doubt Congress meant to provide such an allowance to an above-median-income debtor—the very kind of debtor whose perceived abuse of the bankruptcy system inspired Congress to enact the means test.").

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

Carroll v. Logan (*In re Carroll*), 735 F.3d 147, 150-51 (4th Cir. Oct. 28, 2013) (Niemeyer, Wynn, Floyd) (Inheritance received more than 180 days after petition is captured by § 1306(a) and included in Chapter 13 estate notwithstanding limitation in § 541(a)(5). "The statutes' plain language manifests Congress's intent to expand the estate for Chapter 13 purposes by capturing the types, or 'kind,' of property described in Section 541 (such as bequests, devises, and inheritances), but not the 180-day temporal restriction. . . . This is because '[t]he kind of property is a distinct concept from the time at which the debtor's interest in the property was acquired.' . . . [A] Chapter 13 debtor makes a multi-year commitment to repay obligations under a court-confirmed plan. . . . The repayment plan remains subject to modification for reasons including a debtor's decreased ability to pay according to plan, as well as the debtor's increased ability to pay. . . . 'When a [Chapter 13] debtor's financial fortunes improve, the creditors should share some of the wealth.'").

Mort Ranta v. Gorman, 721 F.3d 241, 251-53 (4th Cir. July 1, 2013) (Gregory, Agee, Faber) (For debtors with CMI above and below applicable median family income, Social Security income is excluded from current monthly income and from projected disposable income but can be considered to determine feasibility. "Because the Code expressly excludes Social Security income from 'current monthly income,' and thus, 'disposable income,' it follows that Social Security income must also be excluded from 'projected disposable income.'. . . [*Hamilton v. Lanning,* 560 U.S. 505, 130 S. Ct. 2464, 177 L. Ed. 2d 23 (June 7, 2010),] held only that foreseeable changes in the debtor's financial circumstances may be taken into account when calculating 'projected disposable income,' not that the basic formula for 'disposable income' may be ignored. . . . [F]or both above-median income and below-median income debtors, Social Security income is excluded from the calculation of 'projected disposable income' under § 1325(b)(2).").

Drummond v. Welsh (In re Welsh), No. 12-60009, 2013 WL 1192961 (9th Cir. Mar. 25, 2013) (Good-faith analysis under § 1325(a)(3) does not include consideration of Social Security income excluded from CMI by § 101(10A)(B) and does not include consideration of payments on secured debts deductible from CMI to determine projected disposable income under § 707(b)(2)(A)(iii). "We cannot conclude . . . that a plan prepared completely in accordance with the very detailed calculations that Congress set forth is not proposed in good faith. To hold otherwise would be to allow the bankruptcy court to substitute its judgment of how much and what kind of income should be dedicated to the payment of unsecured creditors for the judgment of Congress. Such an approach would not only flout the express language of Congress, but also one of Congress's purposes in enacting the BAPCPA, namely to 'reduce[ ] the amount of discretion that bankruptcy courts previously had over the calculation of an above-median debtor's income and expenses.' . . . Congress has spoken directly, and it explicitly excluded Social Security income from the calculation of disposable income. We thus join every court of appeals that has decided the issue in concluding that, '[w]hen a Chapter 13 debtor calculates his repayment plan payments exactly as the Bankruptcy Code and the Social Security Act allow him to, and thereby excludes [Social Security income], that exclusion cannot constitute a lack of good faith.' . . . In sum, the inquiry focuses on the debtor's motivation and forthrightness with the court in seeking relief. The disposable income requirement, in contrast, focuses on the amount of funds that Congress expects a debtor to devote to paying off unsecured creditors. These two inquiries are, indeed, separate and distinct. Therefore, consideration of disposable income—now defined in great detail by Congress—has no role in the good faith analysis. . . . Again, in the BAPCPA, Congress chose to remove from the bankruptcy court's discretion the determination of what is or is not 'reasonably necessary.' It substituted a calculation that allows debtors to deduct payments on secured debts in determining disposable income. That policy choice may seem unpalatable either to some judges or to unsecured creditors. Nevertheless, that is the explicit choice that Congress has made. We are not at liberty to overrule that choice. . . . BAPCPA requires debtors to subtract their payments to secured creditors from their current monthly income. . . . Congress did not see fit to limit or qualify the kinds of secured payments that are subtracted from current monthly income to reach a disposable income figure. . . . [W]e would not be justified in imposing such a limitation under 'the guise of interpreting 'good faith.''. . . We conclude that Congress's adoption of the BAPCPA forecloses a court's consideration of a debtor's Social Security income or a debtor's payments to secured creditors as part of the inquiry into good faith under 11 U.S.C. § 1325(a)."), *aff'g,* 465 B.R. 843, 849–55 (B.A.P. 9th Cir. Feb. 17, 2012) (Perris, Pappas, Hollowell) (Debtors with CMI greater than applicable median family income are allowed to deduct secured debt payments under § 707(b)(2)(A)(iii) without regard to necessity if debtor determines not to surrender the collateral or to strip the lien. "If the future secured debt payments referred to in § 707(b)(2)(A)(iii)(I) were limited to secured debt payments on property necessary for the debtor's or debtor's dependents' maintenance and support, there would be no reason for § 707(b)(2)(A)(iii)(II) to limit allowable cure payments to cure payments on *necessary* property. . . . [Section] 707(b)(2)(A)(iii) allows deduction as an expense of payments on secured debt, unless the debtor determines that payment on the outstanding amount of the secured claim is unnecessary by either surrendering the property or avoiding the lien securing the claim. The bankruptcy court did not err in allowing debtors in calculating their disposable income to deduct their secured debt payments on the six vehicles

that they intend to retain. . . . Congress has made the policy choice that payments on secured claims are '[a]mounts reasonably necessary to be expended' for the debtor's or the debtor's dependents' maintenance and support. *See* § 1325(b)(3); § 707(b)(2). In making its good faith determination under § 1325(a)(3), the bankruptcy court cannot find lack of good faith based on a debtor's deduction of those allowed expenses in their calculation of disposable income. To do so would be to second-guess the Congressional policy choice about what expenses are reasonably necessary for a debtor's maintenance and support.").

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

Baud v. Carroll, 634 F.3d 327, 345-57 (6th Cir. Feb. 4, 2011) (Cole, Clay, Katz) (To determine projected disposable income for debtors with CMI greater than applicable median family income, the statutory exclusions from income in § 101(10A)—such as Social Security—should not be included and the statutory deductions in § 707(b)(2)(A) and (B) are allowed—for example, a contractually scheduled mortgage expense larger than the Local Standards Housing allowance; applicable commitment period and duration must be the same without regard to whether the debtor has positive, negative or no projected disposable income. Debtors had Social Security benefits of $1,758 per month and a monthly mortgage payment of $1,699.93 in a state in which the IRS Local Standard Housing allowance was $791. "We conclude that benefits received under the Social Security Act . . . should not be included in the calculation of projected disposable income. . . . Neither [*Hamilton v. Lanning,* __ U.S. __, 130 S. Ct. 2464, 177 L. Ed. 2d 23 (June 7, 2010),] nor [*Darrohn v. Hildebrand (In re Darrohn),* 615 F.3d 470 (6th Cir. July 22, 2010) (Suhrheinrich, McKeague, Griffin),] . . . supports the view that a court may disregard the Code's definition of disposable income (which incorporates the income exclusions of § 101(10A)) simply because there is a disparity between the amount calculated using that definition and the debtor's actual available income as set forth on Schedule I. In other words, the discretion *Lanning* affords does not permit bankruptcy courts to alter BAPCPA's formula for calculating disposable income (*i.e.,* does not permit the court to alter the items to be included in and excluded from income). . . . Were we to follow the approach espoused by the Appellant, bankruptcy courts—contrary to what the Supreme Court contemplated in *Lanning* and contrary to the express statutory language—would be permitted to depart from the definition of disposable income set forth in § 1325(b)(2) in virtually every case, given the improbability of a debtor's actual financial circumstances matching perfectly the disposable-income calculation set out by BAPCPA. . . . In sum, it is appropriate to calculate a debtor's projected disposable income using the inclusions and exclusions from disposable income set forth in the Code and the deductions permitted by the Code, supplemented as of the date of confirmation and adjusted to take into account changes during the applicable commitment period that are known or virtually certain at the time of confirmation. . . . [T]he calculation of a debtor's projected disposable income (a) must exclude income—such as benefits received under the Social Security Act—that are excluded from the definition of current[ ] monthly income set forth in § 101(10A) and (b) must deduct 'amounts reasonably necessary to be expended' as defined in § 1325(b)(3) which, for an above-median-income debtor, means that the debtor's average monthly payments on account of secured debts calculated pursuant to § 707(b)(2)(A)(iii) must be subtracted if the debtor intends as of the date of confirmation to continue making those payments.").

In re Hargis, No. 09-64398, 2013 WL 4514090, at *4 (Bankr. N.D. Ohio Aug. 23, 2013) (Kendig) (Life insurance proceeds and 401(k) that debtor inherited upon death of codebtor 37 months into 60-month plan are property of the Chapter 13 estate; confirmation order overcame vesting effect in § 1327(b). "No one can dispute that the life insurance proceeds and 401(k) monies will provide a source of income to Debtor. . . . Additionally, the funds are property of the estate. Property of the estate is defined by 11 U.S.C. § 1306 and includes after-acquired property and post-petition earnings. Under § 1306(a), the life insurance proceeds and the 401(k) funds are property of the estate. . . . [T]he confirmation order contains a contrary provision for after-acquired property that specifically excepts it from vesting in the debtor. . . . Under this plan provision, after-acquired property and post-petition earnings remain property of the bankruptcy estate.").

In re Dye, 495 B.R. 699, 701-03 (Bankr. E.D. Va. Aug. 16, 2013) (Huennekens) (Extending *Mort Ranta v. Gorman,* 721 F.3d 241 (4th Cir. July 1, 2013) (Gregory, Agee, Faber), nonfiling spouse's Social Security income is excluded from projected disposable income. "[T]his Court finds that the Fourth Circuit's rationale in *Mort Ranta* extends to exclude a non-filing spouse's Social Security income from consideration in determining the Debtor's projected disposable income. . . . The Bankruptcy Code's definition of 'current monthly income' 'excludes benefits received under the Social Security Act.' . . . The statutory exclusion is not limited solely to Social Security income received by the Debtor. Accordingly, the Social Security income received by a non-filing spouse should not be included in the calculation of current monthly income. . . . The Trustee maintains that the non-filing spouse should be required to use his Social Security income to pay for his half of the household expenses. . . . The Trustee's argument would circumvent the Fourth Circuit's ruling by considering Social Security income for the purposes of calculating allowable expenses. The result would be tantamount to including the Social Security income in the calculation of projected disposable income.").

In re Nadone, No. 08-36209-D-13L, 2009 WL 9085534, at *3 (Bankr. E.D. Cal. Apr. 30, 2009) (unpublished) (Bardwil) (Current monthly income includes contributions from parents living with debtors notwithstanding that parents' only source of income is Social Security. "There is no indication in the Code or the official form of an exclusion of any particular type of income received by the third party and then contributed to the household. Thus, in this case, to the extent the parents were to be considered as members of the household, for purposes of computing the debtors' expense deductions, their contributions to the household income should also have been included, on line 7. In other words, as to the third party, the income may be Social Security benefits, but as to the debtors, it is not; it is nothing more nor less than contributions from a third party.").

SWEET TALKER

Sweet Talker talked his banker into a $500,000 loan to open a bar and grill. He kept promising a written financial statement, but delivered lots of talk and no paper. Sweet's business partner, Silent, was out of town during the whole affair.

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

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

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

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

- Sweet Talker and Silent filed Chapter 7 cases. You must advise each debtor and the bank with respect to § 523(a)(2) actions.

APPLICABLE CASES

Bullock v. BankChampaign, N.A., __ U.S. __, 133 S. Ct. 1754, 185 L. Ed. 2d 922 (2013) (Defalcation under § 523(a)(4) "includes a culpable state of mind requirement akin to that which accompanies application of the other terms in the same statutory phrase. . . . [T]hat state of mind [is] one involving knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior. . . . In 1878, this Court interpreted the related statutory term 'fraud' in the portion of the Bankruptcy Code laying out exceptions to discharge. . . . '[D]ebts created by 'fraud' are associated directly with debts created by 'embezzlement.' Such association justifies, if it does not imperatively require, the conclusion that the 'fraud' referred to in that section means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality.' *Neal v. Clark*, 95 U.S. (5 Otto) 704, 709, 24 L. Ed. 586 (1878). We believe that the statutory term 'defalcation' should be treated similarly. . . . [W]here 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. . . . That risk 'must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.' . . .").

Sachan v. Huh (In re Huh), 506 B.R. 257 (B.A.P. 9th Cir. Mar. 11, 2014) (Dunn, Pappas, Kirscher, Taylor, Kurtz) (*Kawaauhau v. Geiger,* 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed. 2d 90 (Mar. 3, 1998), and *Bullock v. BankChampaign, N.A.*, __ U.S. __, 133 S. Ct. 1754, 185 L. Ed. 2d 922 (2013), require "culpable state of mind" therefore, not appropriate to impute fraud of agent to principal unless debtor knew or should have known of fraud by agent.).

Jantz v. Karch (In re Karch), 499 B.R. 903 (B.A.P. 10th Cir. 2013) (Acknowledging that *Bullock v. BankChampaign, N.A.*, __ U.S. __, 133 S. Ct. 1754, 185 L. Ed. 2d 922 (2013) reversed BAP's prior decision in *Antlers Roof-Truss & Builders Supply v. Storie (In re Storie)*, 216 B.R. 283 (B.A.P. 10th Cir. 1997), bankruptcy court erred when it found defalcation in the handling of a probate estate without finding wrongful intent. Under *Bullock*, bankruptcy court "must find that the debtor acted with wrongful intent, or, at a minimum, with a conscious disregard of his or her fiduciary duties.").

Heritage Pacific Fin., LLC v. Machuca (In re Machuca), 483 B.R. 726 (B.A.P. 9th Cir. Dec. 14, 2012) (Markell, Hollowell, Pappas) (Award of fees under § 523(d) was appropriate: mortgage lender presented no admissible evidence to overcome unreasonableness of reliance on "stated income" in loan application when corrections officer showed $250,000 of income and application was dated four days after note. "'[S]tated income loans were . . . a convenient excuse by lenders to bypass even the most rudimentary attempt at due diligence of the borrower's income, all in an effort to make the loan and sell it on the secondary market.'" As amended in 1984, § 523(d) was narrowed so as not to "unduly discourage[creditors] from pursing well-founded nondischargeability actions. . . . To support a request for attorneys' fees under § 523(d), a debtor initially needs to prove: (1) that the creditor sought to except a debt from discharge under § 523(a), (2) that the subject debt was a consumer debt, and (3) that the subject debt ultimately was discharged. . . . 'Once the debtor establishes these elements, the burden shifts to the creditor to prove that its actions were substantially justified.' . . . To satisfy the substantial justification standard, [creditor] needed to demonstrate that it had a reasonable factual and legal basis for its claim. . . . 'To avoid a fee award [under § 523(d)], the creditor must show that its challenge had a reasonable basis both in law and in fact. The requirement that the creditor must show that it was substantially justified to avoid a fee award is necessary because it is far easier for the creditor to demonstrate the reasonableness of its action than it is for the debtor to marshal the facts to prove that the creditor was unreasonable. . . . Substantial justification is thus a higher standard than that used to determine whether litigation is frivolous. . . . There is no presumption of a lack of substantial justification just because a debtor prevailed on summary judgment. [However, when creditor neither appealed nor sought reconsideration of a grant of summary judgment in debtor's favor] the doctrine of issue preclusion estops [creditor] from arguing that the bankruptcy court was wrong, or that [creditor] had an undisclosed basis in law and fact for its reliance claim. . . . [Therefore,] [i]ts position was . . . not substantially justified.").

Bandi v. Becnel (In re Bandi), 683 F.3d 671 (5th Cir. 2012) (Misrepresentations regarding ownership of a commercial building, a condominium development, and a residence—while intended to convey impression that debtors owned valuable real property and that their personal guarantees would be backed by some measure of wealth—were not statements respecting financial condition for purposes of § 523(a)(2). "[T]he phrase 'a statement respecting the debtor's or an insider's financial condition' as used in § 523(a)(2) was meant to embody terms commonly understood in commercial usage rather than a broadly descriptive phrase intended to capture any and all misrepresentations that pertain in some way to specific assets or liabilities of the debtor. The term 'financial condition' has a readily understood meaning. It means the general overall financial condition of an entity or individual, that is, the overall value of property and income as compared to debt and liabilities. A representation that one owns a particular residence or a particular commercial property says nothing about the overall financial condition of the person making the representation or the ability to repay debt. . . . We find support for construing 'financial condition' in § 523(a)(2) to connote the overall net worth of an entity or individual in other provisions of the Bankruptcy Code. The term 'financial condition' is part of the definition of the term 'insolvent.' The words 'financial condition' are used three times to define 'insolvent' with respect to three classes of entities. In each instance, 'insolvent' is a 'financial condition.' In the first two instances, the financial condition of insolvency is defined by reference to debts as compared to property. With respect to the third instance, which pertains to municipalities, the financial condition of insolvency is defined by reference to 'generally not paying

its debts as they become due' or 'unable to pay its debts as they become due.' . . . [S]tatements within the meaning of th[is] section 'are those that purport to present a picture of the debtor's overall financial health.'").

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

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

Duncan v. Fidelity Nat'l Title Co. (In re Duncan), No. NC-09-1372-KiSaH, 2011 WL 3300162, *6-*7 (B.A.P. 9th Cir. Feb. 4, 2011) (unpublished) (Intentional omissions and false representations regarding liens on property rendered damages on title insurance nondischargeable under § 523(a)(2)(A). That title company failed to update search before closing—relying instead on search it conducted three months prior and on debtor's representations—did not preclude justifiable reliance. "[C]ourts apply a subjective 'justifiable' reliance standard, which turns on a person's knowledge under the particular circumstances. 'Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases.' '[A] person is justified in relying on a representation of fact although he might have ascertained the falsity of the representation had he made an investigation.' . . . [N]egligence in failing to discover an intentional misrepresentation is no defense for the fraudulent party. . . . [D]ebtor's nondisclosure of a material fact in the face of a duty to disclose can establish the requisite reliance and causation for actual fraud under the Bankruptcy Code. A party to a business transaction is under a duty to disclose to the other party facts basic to the transaction before the transaction is consummated, if he or she knows that the other is about to enter into the transaction under a mistake as to them and that

the other party, because of the relationship between them, would reasonably expect disclosure of such facts. Reliance may also be presumed when 'the case can be characterized as one that primarily alleges omissions.' . . . In order to determine whether the presumption applies, the court must analytically characterize the action as either primarily a nondisclosure case or a positive misrepresentation case. . . . [Plaintiff] Fidelity's contributory negligence of not conducting a title search . . . , which likely would have revealed the . . . first deed of trust, is no bar to recovery because [debtor's] fraudulent conduct constitutes an intentional tort. Although Fidelity is a sophisticated party in the business of investigating and insuring titles, no obvious 'red flags' existed on the face of the . . . loan documents to alert Fidelity of possible fraud and that it should have investigated further. No red flags could have existed because [debtor] intentionally omitted the . . . first deed of trust on all of the pertinent . . . loan documents . . . . The bankruptcy court correctly determined that Fidelity's reliance was established by [debtor's] intentional omissions, which proximately caused Fidelity's loss[.]").

Prim Capital Corp. v. May (In re May), 368 B.R. 85 (B.A.P. 6th Cir. July 19, 2007) (unpublished) (Aug, Latta, Parsons) (Neither debtor's statement as to why he needed a loan, how he expected to repay the loan, nor an intention to pledge home for security amounted to statements respecting financial condition for purposes of 11 U.S.C. § 523(a)(2). "Two views have emerged on the proper interpretation of the phrase 'respecting the debtor's . . . financial condition.' The 'broad interpretation' includes any communication that has a bearing on the debtor's financial position. In other words, any communication addressing the status of a single asset or liability qualifies. . . . The 'strict interpretation,' on the other hand, limits statements 'respecting the debtor's . . . financial condition' to communications that purport to state the debtor's overall net worth, overall financial health, or equation of assets and liabilities. . . . The strict interpretation, limiting statements concerning the debtor's financial condition only to those that actually claim to state the debtor's overall financial health, net worth or assets and liabilities, is most consistent with the text and structure of the Bankruptcy Code. . . . A broad interpretation simply brings too many statements under the rubric 'concerning the debtor's financial condition,' rendering the limitation meaningless. . . . There is support in the Bankruptcy Code for a narrow construction of the phrase 'concerning the debtor's . . . financial condition' that would define the term as relating only to information on the debtor's overall financial condition. The term 'insolvent,' as defined in the Code, refers to the 'financial condition such that the sum of [an] entity's debts is greater than all of such entity's property . . . exclusive of [certain types] of property.' . . . The use of the term financial condition to describe insolvency suggests that the term financial condition 'relates to a debtor's net worth or overall financial condition.' . . . Thus, a narrow interpretation, defining financial condition as statements that are made regarding a debtor's overall net worth, assets and liabilities, best adheres to the meaning and purpose of the Bankruptcy Code and is the interpretation that we adopt. . . . [At issue are] three oral statements that the Debtor allegedly made to Prim: (1) that the Debtor needed the loan to satisfy a large tax assessment; (2) that the Debtor would be able to repay the loan with proceeds from an expected large settlement; and (3) that the Debtor promised to pledge his own house as collateral. . . . [N]either of the first two statements is in respect of the Debtor's financial condition as we strictly interpret that phrase. Regarding the first statement, no conclusions can be drawn about the Debtor's net worth, overall financial health or equation of assets or liabilities from the simple statement that a loan is needed to satisfy a tax obligation. That is a statement about only one of the Debtor's liabilities and not the Debtor's overall financial condition. Similarly, the second statement is not related to the Debtor's overall financial health but is again related to a single debt and the potential of one source of income. . . . [Similarly,] Debtor['s] promise[] to pledge his own house as collateral is not related to the Debtor's overall financial condition.").

TO STRIP OR NOT TO STRIP

Debtors have personal residence worth $300,000 subject to three mortgages:

- First mortgage $250,000 secured by residence (only)
- Second mortgage $100,000 secured by residence and business inventory/receivables
- Third mortgage $25,000 secured by residence (only)

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

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

APPLICABLE CASES

Branigan v. Davis (*In re Davis*), 716 F.3d 331, 335-39 (4th Cir. May 10, 2013) (Niemeyer, Keenan, Diaz) (BAPCPA does not prevent Chapter 20 debtors from stripping off wholly unsecured third mortgage because discharge is not a condition for modification under § 1322(b)(2) and § 1325(a)(5) is not applicable to wholly unsecured *in rem* claim. "[*Nobelman v. American Savings Bank,* 508 U.S. 324, 113 S. Ct. 2106, 124 L. Ed. 228 2d (June 1, 1993),] notwithstanding, . . . courts have generally permitted a 'strip off' of completely valueless liens in Chapter 13 cases because, unlike the lienholder in *Nobelman,* holders of such liens are not 'holders of secured claims' and, therefore, are not entitled to the protection of section 1322(b)(2). . . . [W]e hold that the Bankruptcy Code permits the stripping off of valueless liens in Chapter 13 proceedings. . . . [T]he debtors' junior liens in this case are worthless and, therefore, unsecured claims under section 506(a). While [*Dewsnup v. Timm,* 502 U.S. 410, 112 S. Ct. 773, 116 L. Ed. 2d 903 (Jan. 15, 1992),] admittedly requires that section 506 operate in tandem with another statutory provision to effectuate lien-stripping, section 506 has always operated in tandem with section 1322(b) to strip liens in Chapter 13 cases. BAPCPA did not amend sections 506 or 1322(b), so the analysis permitting lien-stripping in Chapter 20 cases is no different than that in any other Chapter 13 case. . . . [T]he law already provides a mechanism for preventing abuse of the bankruptcy process without the creation of a per se rule against lien-stripping, . . . good faith . . . . [C]reditors are also protected by section 349(b)(1)(C), which provides that a lien springs back if the case is dismissed. . . . [T]he unavailability of a discharge in the Chapter 20 context is not determinative."), *aff'g* No. PJM 11-1270, 2012 WL 439701 (D. Md. Jan. 12, 2012) (unpublished) (Messite), *aff'g* 447 B.R. 738, 745-51 (Bankr. D. Md. Mar. 30, 2011) (Lipp) (Rejecting *In re Jarvis,* 390 B.R. 600 (Bankr. C.D. Ill. July 9, 2008) (Gorman), and *In re Fenn,* 428 B.R. 494 (Bankr. N.D. Ill. May 17, 2010) (Cox), debtors ineligible for discharge because of § 1328(f) can strip off wholly unsecured third lien; new lien retention provisions in § 1325(a)(5) are not applicable to wholly unsecured creditor, and plan was proposed in good faith. "The Court acknowledges but declines to follow the weight of authority that favors TD Bank's argument that lien stripping pursuant to Section 506 is contingent on a debtor's eligibility to receive a Chapter 13 discharge. . . . This Court . . . agrees with the current minority of decisions holding that the Bankruptcy Code does not condition a Chapter 13 debtor's right to strip off a wholly unsecured junior lien on the debtor's eligibility for a discharge. . . . Once it is determined that the claim is not an allowed secured claim pursuant to Section 506(a), by its terms, Section 1325(a)(5)(B) is inapplicable. . . . [T]he Debtors are not 'serial filers' in the abusive sense of the term.").

Woolsey v. Citibank, N.A. (*In re Woolsey*), 696 F.3d 1266, 1274-79 (10th Cir. Sept. 4, 2012) (Gorsuch, Holmes, Matheson) (Until Supreme Court retreats from *Dewsnup v. Timm*, 502 U.S. 410, 112 S. Ct. 773, 116 L. Ed. 2d 903 (Jan. 15, 1992), Chapter 13 debtor cannot void a wholly unsecured junior mortgage using *only* § 506(d). Repudiating "the only possible winning argument they may have had," debtors' plan proposed to strip off wholly unsecured junior lien, relying only on lien-voiding language in § 506(d). "*Dewsnup* has created more than a little 'methodological confusion[]'. . . . [T]he Dewsnuppian departure from the statute's plain language is the law. . . . [E]very federal court of appeals to consider the question has already refused to extend Dewsnup's definition of the term 'secured claim' to other statutory provisions using that term in Chapter 13, where the focus is on reorganization rather than liquidation. . . . So it is that *Dewsnup* has lost every away game it has played: its definition of 'secured claim' has been rejected time after time elsewhere in the code and seems to hold sway only in § 506(d). . . . [O]f all the circuit courts approving of lien stripping in reorganization cases, not a single one has taken up the Woolseys' invitation to do so using § 506(d). Instead, they have relied exclusively on other statutory provisions particular to those chapters. . . . [M]any courts have already identified one apparently promising candidate in § 1322(b)(2). . . . [N]o fewer than six circuits have already read [*Nobelman v. American Savings Bank,* 508 U.S. 324, 113 S. Ct. 2106, 124 L. Ed. 228 (June 1, 1993),] this way and held a debtor may invoke § 1322(b)(2) to remove a wholly unsecured lien, even if that lien is secured against the debtor's principal residence. . . . [T]he Woolseys didn't choose to pursue this line of argument . . . . [W]e opt today against forcing a § 1322(b)(2) argument onto the unwilling Woolseys and leave that statute and its meaning for another day when a bankruptcy petitioner actually wants to pursue the question."), *aff'g* 438 B.R. 432, 437-38 (Bankr. D. Utah Oct. 8, 2010) (Thurman) (Plan stripping off wholly unsecured junior lien must provide that lien will be retained until full payment under nonbankruptcy law or until debtors receive discharge. Interpretation of allowed secured claim in § 1325(a)(5) must be consistent with the way the Supreme Court read § 506(d) in *Dewsnup v. Timm,* 502 U.S. 410, 416, 112 S. Ct. 773, 116 L. Ed. 2d 903 (Jan. 15, 1992). Mortgage creditor filed proof of claim to which no objection had been filed. Allowed claim is also "secured" and must be treated in manner consistent with § 1325(a)(5) requirement that lien

be retained until debtor makes full payment or receives discharge. "The Court believes this outcome is not only demanded by the statutory language as explained by the Supreme Court, but is also the best outcome to prevent debtors from avoiding or satisfying a lien in chapter 13 without completing a plan in chapter 13. . . . The Court sees nothing prohibiting a debtor from treating a mortgage as unsecured pursuant to § 506(a) and then avoiding or deeming it satisfied upon receipt of a discharge at the completion of the plan. Such relief being available at the completion of the plan provides an incentive for debtors to fulfill their plans.").

McNeal v. GMAC Mortg., LLC (In re McNeal), 735 F.3d 1263 (11th Cir. May 11, 2012) (Carnes, Emondson, Tjoflat) (per curiam) (Notwithstanding *Dewsnup v. Timm,* 502 U.S. 410, 112 S. Ct. 773, 116 L. Ed. 2d 903 (Jan. 15, 1992), Chapter 7 debtor can strip off wholly unsecured, junior mortgage).

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

Orkwis v. MERS (In re Orkwis), 457 B.R. 243, 249-50 (Bankr. E.D.N.Y. Sept. 19, 2011) (Grossman) (Debtors can strip off wholly unsecured junior mortgage without violating protection from modification in § 1322(b)(2), but § 506 does not void lien; because § 1325(a)(5)(B)(i)(I) applies, lien is not removed until entry of discharge. "Courts considering this issue generally fall within two schools of thought. According to one position, which has been referred to as the majority position, the lien is removed only upon entry of the debtor's discharge. *See In re Gerardin,* 447 B.R. 342 (Bankr. S.D. Fla. 2011); *In re Erdmann,* 446 B.R. 861 (Bankr. N.D. Ill. 2011); *In re Victorio,* 454 B.R. 759 (Bankr. S.D. Cal. 2011); *In re Fenn,* 428 B.R. 494 (Bankr. N.D. Ill. 2010); *In re Lindskog,* 451 B.R. 863 (Bankr. E.D. Wis. 2011); *In re Mendoza,* No. 09-22395 HRT, 2010 WL 736834 (Bankr. D. Col. Jan. 21, 2010); *In re Blosser,* No. 07-28223-svk, 2009 WL 1064455 (Bankr. E.D. Wis. Apr. 15, 2009)[;] and *In re Jarvis,* 390 B.R. 600, 604-06 (Bankr. C.D. Ill. 2008). A growing number of courts have taken the opposite position, finding that the lien is removed upon completion of the plan payments in the Chapter 13 case, regardless of whether the debtor is entitled to a discharge. *See In re Fisette,* 455 B.R. 177 (8th Cir. BAP [Aug. 29,] 2011); *In re Davis,* No. 09-26768-WIL, 2011 WL 1237638 (Bankr. D. Md. Mar. 30, 2011); *In re Jennings,* 454 B.R. 252 (Bankr. N.D. Ga. [July 11,] 2011); *In re Okosisi,* 451 B.R. 90 (Bankr. D. Nev. 2011); *In re Fair,* 450 B.R. 853 (E.D. Wis. 2011); *In re Waterman,* 447 B.R. 324 (Bankr. D. Colo. 2011); *In re Tran,* 431 B.R. 230 (Bankr. N.D. Cal. 2010); and *In re Hill,* 440 B.R. 176 (Bankr. S.D. Cal. 2010). . . . This Court finds that the Defendant's lien is not removed until entry of the debtor's discharge. . . . [T]he lien against the Property exists as of the date the Debtors' case was filed, and remains a lien against the Property as of the date of confirmation of the Plan. This is true in what is commonly called a Chapter 20 case as well, where the *in personam* obligation of the debtor has been previously discharged, leaving only the *in rem* lien as a claim pursuant to [*Johnson v. Home State Bank,* 501 U.S. 78, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (June 10, 1991)]. . . . Because § 1325(a)(5) governs lien retention in Chapter 13 cases, a discharge is required pursuant to subsection (B)(i)(I) before the lien is removed. The *Gerardin* court cited *Fenn* with approval, finding that a 'discharge under Chapter 13 is a necessary condition for stripping off an unsecured lien' based on the express language of § 1325(a)(5). . . . This Court agrees with the reasoning of the *Fenn* and *Gerardin* courts.").

In re Gomez, 456 B.R. 574, 576-77 (Bankr. M.D. Fla. Feb. 8, 2011) (Briskman) (Under §§ 727(d) and 727(e)(1), debtor cannot vacate Chapter 7 discharge entered two years earlier to overcome effect of § 1328(f) on lien stripping in current Chapter 13 case. Debtor was not eligible for discharge in current Chapter 13 case under § 1328(f)(1) because of Chapter 7 discharge two years earlier. Debtor moved to reopen prior Chapter 7 case and to revoke or vacate discharge. In current Chapter 13 case, debtor sought to cram down liens on investment property and to strip off wholly unsecured liens. "Chapter 13 allows for the modification [of] secured claims, with certain exceptions, but a Chapter 13 discharge is required to be able to permanently modify such claims. . . . Where a debtor is ineligible to receive a discharge in a

Chapter 13, any modifications to the creditor's rights are not permanent and have no binding effect once the plan ends. . . . A debtor does not have standing to seek revocation of her discharge pursuant to the plain and unambiguous language of Section 727(d). . . . Aurora seeks to reopen her Chapter 7 case and vacate her Chapter 7 discharge because it prevents her from receiving a discharge in her Chapter 13 case pursuant to 11 U.S.C. Section 1328(f). Aurora requires a Chapter 13 discharge to carry out her intended cramdown and strip off of the mortgage liens encumbering her real property. The relief Aurora seeks is not authorized by the Bankruptcy Code and is contrary to the fundamentals of bankruptcy.").

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

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

In re Okosisi, 451 B.R. 90, 93-102 (Bankr. D. Nev. May 16, 2011) (Markell) (Wholly unsecured junior lien on principal residence can be stripped off notwithstanding that debtors are not eligible for discharge when Chapter 13 case was filed in good faith, conditioned that debtors complete payments under plan. "[T]he antimodification protection of Section 1322(b)(2) only operates to benefit creditors who may be classified as secured creditors after operation of Section 506(a). *See Zimmer v. PSB Lending Corp. (In re Zimmer),* 313 F.3d 1220, 1226 (9th Cir. [Dec. 24,] 2002) [(D.W. Nelson, T.G.

Nelson, Schwarzer)]. . . . [I]t is permissible for a debtor to provide that a lien will be avoided through a chapter 13 plan, making such avoidance permanent upon successful completion of the chapter 13 plan and so long as confirmation of the plan is not subsequently set aside. . . . [T]he discharge itself has no affect [sic] on liens. . . . [A] prerequisite to the application of Section 1325(a)(5)(B) is that the claim first be classified as 'an allowed secured claim' within the meaning of Section 1325(a)(5). Under [*Nobelman v. American Savings Bank,* 508 U.S. 324, 113 S. Ct. 2106, 124 L. Ed. 2d 228 (June 1, 1993),] and *Zimmer,* . . . when a creditor is wholly unsecured after application of Section 506(a), the creditor has only an unsecured claim for purposes of Section 1322(b)(2). . . . Section 1325(a)(5) . . . applies only to secured claims . . . . BAPCPA added Section 1328(f), and thus opened up the possibility of a fourth option, the completion of all plan payments without a discharge. In this post-BAPCPA regime, lien avoidance actions are still undone if the chapter 13 case is converted or dismissed . . . . At the successful completion of all payments in a no-discharge chapter 13 case, . . . the proper result is for the court to close the case without discharge. . . . Because the no-discharge case is closed without discharge, rather than dismissed, the code sections that reverse any lien avoidance actions contained within a chapter 13 plan upon conversion or dismissal are not implicated, and, thus, do not act to prevent the permanence of the lien avoidance. . . . Once a debtor successfully completes all plan payments required by a chapter 13 plan, the provisions of the plan become permanent, and the lien avoidance is, similarly, permanent. Support for this conclusion is found in Section 1327 . . . . [C]onfirmation of a chapter 13 plan 'vests all of the property of the estate in the debtor,' . . . 'free and clear of any claim or interest of any creditor provided for by the plan.' . . . [I]nterest encompasses liens on real property. . . . [L]iens avoided through a confirmed chapter 13 plan remain avoided so long as the plan and the order confirming it remain in effect. . . . The Debtors have a valid bankruptcy purpose in filing the present chapter 13 case, as the plan accomplishes a reorganization that was not possible in their previous chapter 7 and 'represents their best effort[s] to pay creditors.'").

In re Gerardin, 447 B.R. 342, 345-52 (Bankr. S.D. Fla. Feb. 17, 2011) (Mark, Isicoff, Cristol) (Rejecting *In re Tran,* 431 B.R. 230 (Bankr. N.D. Cal. June 25, 2010) (Jellen), and embracing *In re Fenn,* 428 B.R. 494 (Bankr. N.D. Ill. May 17, 2010) (Cox), debtors not eligible for discharge because of § 1328(f) must satisfy lien retention requirement in § 1325(a)(5)(B)(i)(II) and cannot strip off wholly unsecured junior liens. "In [*Dewsnup v. Timm,* 502 U.S. 410, 112 S. Ct. 773, 116 L. Ed. 2d 903 (Jan. 15, 1992)], the Supreme Court held that § 506(d) did not mean that a lien would be modified based solely upon a § 506(a) valuation. Instead, it held that § 506(d) acts to avoid liens only if the underlying claim is disallowed. . . . *Dewsnup* does not preclude lien stripping in chapter 13 cases. However, a chapter 13 debtor may not *strip down* a lien secured solely by a debtor's principal residence. 11 U.S.C. § 1322(b)(2); *Nobelman v. American Savings Bank,* 508 U.S. 324, 113 S. Ct. 2106, 124 L. Ed. 2d 228 [(June 1,]1993). Nonetheless, in the Eleventh Circuit, as well as several other circuits, a debtor may *strip off* a lien even if it is secured solely by a debtor's principal residence, if the creditor's claim is completely unsecured because the property is worth less than the senior liens. *Tanner v. First-Plus Financial, Inc. (In re Tanner),* 217 F.3d 1357 (11th Cir. [July 13,] 2000) [(Black, Carnes, Kravitch)]. . . . However, *Tanner* is inapposite. The Eleventh Circuit focused its attention on the interplay between section 506(a) and section 1322(b)(2) in light of the *Nobelman* holding. It did not consider how section 1325(a) and a prior bankruptcy discharge might impact the treatment of a lien. . . . [A] § 506(a) valuation must be implemented in conjunction with another provision of the Bankruptcy Code to accomplish the strip down or strip off of a lien. . . . [Section] 1325 is the applicable section . . . lien stripping may not be accomplished under § 1325 when a debtor is ineligible to receive a discharge. . . . In *Johnson v. Home State Bank,* 501 U.S. 78, 11 S. Ct. 2150, 115 L. Ed. 2d 66 ([June 10] 1991), the Supreme Court ruled that a creditor with an obligation secured by a lien on a debtor's property, but which creditor has no *in personam* claim against a debtor due to a prior bankruptcy discharge, nonetheless has a claim against a debtor in a subsequent chapter 13 case. . . . [T]he Court interprets that ruling to mean that the claim that exists after the Debtors' chapter 7 discharge is a secured claim. . . . For debtors to strip off a lien in a chapter 13 case, their proposed treatment of the secured claim must comply with 11 U.S.C. § 1325(a)(5). . . . This Court rejects the analysis of *Tran* and its progeny and agrees with the many other courts which have held that a debtor's inability to receive a discharge in a 'Chapter 20' case prevents a debtor from stripping wholly unsecured liens in a Chapter 13 plan as the actual strip off or lien avoidance only occurs at discharge. . . . The Court believes the *Fenn* court got it right. . . . [A] debtor who is ineligible for a chapter 13 discharge may not strip down or strip off a lien.").

In re Tran, 431 B.R. 230, 235, 236-37 (Bankr. N.D. Cal. June 25, 2010) (Jellen) ("[T]he Bankruptcy Code does not condition a chapter 13 debtor's right to strip off a wholly unsecured junior lien on the debtor's eligibility for a discharge, . . . such right is conditioned on the debtor's obtaining confirmation of, and performing under, a chapter 13 plan that meets all of the statutory requirements[; however,] . . . if a chapter 13 case is filed primarily to avoid a junior lien in an effort to skirt the Supreme Court's holding in [*Dewsnup v. Timm,* 502 U.S. 410, 112 S. Ct. 773, 116 L. Ed.

2d 903 (Jan. 15, 1992)], then such a filing would not be in good faith, and such a case should be dismissed." If totality of circumstances demonstrated that debtor filed Chapter 13 solely to avoid second deed of trust when avoidance was not available in Chapter 7, and when no independent reason exists for Chapter 13 filing, lack of good faith in filing case would be cause for dismissal under § 1307(c). In decision involving two unrelated debtors: one debtor lacked good faith and case was dismissed because filing was solely for purpose of avoiding lien that would be unavoidable in Chapter 7 and debtor was ineligible for discharge; but second case was not dismissed because debtor had justifications for filing Chapter 13 other than lien avoidance. Section 109 does not condition eligibility for Chapter 13 on debtor's eligibility for discharge, nor does it preclude Chapter 13 relief to debtor who has received recent Chapter 7 discharge. Section 1325(a) and (b) do not condition confirmation on debtor's being eligible for discharge. Under § 349(b)(1)(C), dismissal of bankruptcy case reinstates lien that had been avoided under § 506(d), but Chapter 13 case in which confirmed plan is completed is not dismissed at conclusion of plan; rather, case is closed under § 350(a). Section 1325(a)(5)(B)(i)(II) conditions lien modification of a secured claim on completion of the plan rather than on discharge. "Permitting a chapter 13 debtor in a no-discharge case to strip off a junior lien would not deprive the lienholder of its right of redemption during the course of the chapter 13 proceeding, if for example, the holder of a senior lien were to obtain relief from § 362(a)'s automatic stay. This is so because, as stated above, the court can condition any permanent modification or stripping on the debtor's performance and completion of the debtor's chapter 13 plan. And if such a chapter 13 case is dismissed or converted to chapter 7 prior to full plan performance, the lien would remain intact, under § 349(b)(1)(C) in the case of a dismissal, or under *Dewsnup* in the case of a conversion to chapter 7.").

Problems, Problems, Problems
Business Cases

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Case No. 1 The Case of the Recourse Nonrecourse Debt

Second Mortgages Inc. holds a second mortgage in a shopping center owned by Shopping Centers Inc., which has filed a chapter 11 bankruptcy case. The loan secured by that lien is a nonrecourse loan. The first mortgage is for $10 million and the shopping center is, by stipulation, worth $5 million.

SCI filed an objection to SMI's proof of claim contending that because SCI's claim is avoidable under 11 U.S.C. § 506(a), § 1111(b)(1)(A) does not apply to convert its nonrecourse claim into a recourse claim because SMI's claim is not "secured by a lien on property of the estate."

You represent SMI. What is your response?

Case No. 2 The Case of the Debtor's Tax Payment for Its Principal

Business Inc., a chapter 11 debtor, filed a fraudulent transfer complaint against the United States. It asserted that a $50,000 payment that it made to the IRS for estimated taxes owed by its principal, George Slick, was a constructive fraudulent transfer under applicable state law. BI alleged that it is a subchapter S corporation, that therefore its income is taxed to Slick, the sole shareholder, that the estimated tax payment was made in anticipation of a resulting tax liability on its income, that in fact BI had no net income and so Slick had no tax liability, that the IRS refunded the money back to Slick but Slick never transferred the money back to BI.

You represent the IRS. Discovery has forced you to concede that the transfer to the IRS was without reasonably equivalent value and while BI was insolvent. What else can you come up with? Hint: You have two winning defenses available.

Case No. 3 The Easy Case of the Postpetition Transfer

Tina Tough filed a complaint against Big Bank to avoid a postpetition transfer. Tough alleged that BB loaned the debtor, Little Business Inc., $400,000 after LBI purchased a certificate of deposit from BB for $500,000, and that after LBI filed its chapter 7 bankruptcy, BB claimed a setoff and transferred $400,000 from LBI's account to itself in payment of the debt. Tough also alleged that BB knew about the bankruptcy and that it did not advise her of the transfer wither before or after it was executed.

You represent BB. What is your defense?

Case No. 4 The Case of the Successor Liability Nightmare

In 2010, Chemicals Acquisitions Inc. purchased the assets of Chemicals Inc. The parties were are then aware of claims that certain claimants were making against CI arising from their exposure to its chemical products. The asset purchase agreement specifically stated that CAI was not assuming those liabilities.

In 2011, CI filed chapter 7 bankruptcy. The trustee, Tom Tough, then commenced a fraudulent transfer action against CAI, which the parties then settled. CAI paid the settlement amount and the trustee agreed to release CAI from "all causes of action that are property of the estate." The bankruptcy court approved the settlement.

Several of the claimants then filed their personal injury claims against CAI in state court on a state-based successor liability theory.

CAI then returned to bankruptcy court and filed a motion to enforce the order approving the settlement, contending that the claimants' claims are property of the estate and therefore were released by the trustee.

You represent the claimants. How do you respond?

Case No. 5 The Case of the Changed Vote

In its chapter 11 plan, Debtor Inc. has proposed to cram down the secured claim of Big Bank. To prevent confirmation, BB has purchased an unsecured claim of a creditor that had already voted in favor of the plan. BB's admitted strategy is to change that vote and turn the unsecured creditors class from an accepting class to a rejecting class.

BB has filed a motion under F.R.Bankr.P. 3018(a) to change the vote.

Your are the bankruptcy judge. Do you find the necessary "cause" for BB to change the vote?

Case No. 6 The Case of the Time Barred Preference

Law Is Us, a law firm, filed a motion for relief from the stay so that it could file a lawsuit claiming that an interest in certain assets that John Shark, a former client, pledged to the firm shortly before he filed bankruptcy in 2011. Tim Tough, the trustee, opposes the motion on the grounds that the pledge was a preference.

In response, LIU argues that under 11 U.S.C. § 546(a)(1)(A), the trustee's preference claim is time barred and that therefore it should be permitted to pursue its claim to the pledged assets.

You are the bankruptcy judge. Do you grant relief from the stay?

Case No. 7 The Case of the Easy Preference, or Not

Livestock Inc. was in the business of selling livestock in its cattle auction market. On October 1, 2013 sold $1 million worth of cattle on behalf of rancher James Moo. On October 15, 2013, LI sent a check to Moo for $900,000, deducting $100,000 for its fee.

On November 1, 2013, LI filed a chapter 7 bankruptcy. Tony Tough, the trustee, then filed a preference action against Moo seeking to recover the $900,000 payment.

You represent Moo. What defenses can you assert?

Case No. 8 The Case of the "I Got Nothing" Preference Action

On the first of every month, DQ Inc. made its payments on its first and second mortgages on its building - $5,000 to First Mortgages Inc. and $2,000 to Second Mortgages Inc. DQUI's building is worth $500,000. The first mortgage is $400,000 and the second mortgage is $300,000.

On March 2, 2014, DQI filed chapter 7 bankruptcy. Tammy Tough, the trustee then filed a preference action against SMI, seeking to recover all of the payments that DQI made to both SMI and to FMI during the 90 days before DQI filed.

You are the bankruptcy judge. Who wins and why?