Consumer Session: Case Law Update

Hon. Keith M. Lundin
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CONSUMER LAW UPDATE

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Automatic Stay

State law discovery citation established lien and justified stay relief. Under Illinois law, when the judgment creditor had served a citation to discover assets, a lien was created on the value of the debtor's bank account. Applying a state decision on point, the bankruptcy court's granting of stay relief to allow collection from that account was affirmed. The bankruptcy court properly decided that the value of a bank account was "personal property" for purposes of the citation's lien. *In re Porayko,* 705 F.3d 703 (7th Cir. 2013).

Mistake in overbidding did not justify stay relief. When the bank made unilateral mistake in bidding the entire amount of its debt on foreclosure of first parcel, it was not entitled to stay relief to foreclose on another parcel. Under applicable state law, there was no debt remaining to justify foreclosure. *State Bank of Florence v. Miller (In re Miller),* 2013 WL 425342 (6th Cir. Feb. 5, 2013), slip copy.

Petition filing did not stay appeal of tax court decision. After IRS issued its notice of deficiency, the taxpayer filed a petition in the tax court, which found the taxpayer liable for tax deficiencies, and the taxpayer filed an appeal to the Tenth Circuit, which held that § 362(a)(1) did not stay appeal. Discussing the split between the Fifth and Ninth Circuits on the issue, the Circuit Court held that a tax court petition filed by the debtor is "an independent judicial proceeding initiated by the debtor, not the continuation of an administrative proceeding against the debtor;" therefore, § 362(a)(1) did not apply. *Schoppe v. Commissioner of Internal Revenue,* ___ F.3d ____, 2013 WL 1239935 (10th Cir. Mar. 28, 2013).

Stay relief properly granted based on consensual adequate protection order. Following prepetition default and a stay relief motion by the mortgagee, the debtors entered into an adequate protection order to resolve that motion, but they fell into default of the agreed order. Stay relief was affirmed. *Russell v. Aurora Bank FSB (In re Russell)*, 2013 WL 831165 (BAP 9th Cir. Feb. 28, 2013), slip copy.

Considering cause for retroactive stay relief. In considering motion for retroactive relief from the stay, the bankruptcy court could limit its analysis to stay relief factors in *Grady v. A.H. Robbins Co, Inc.,* 839 F.2d 198 (4th Cir. 1998): "(1) whether the case involves only state law so that the expertise of the bankruptcy court is unnecessary; (2) whether modifying the stay will promote judicial economy and whether there would be greater interference with the bankruptcy case if the stay were not lifted because matters would have to be litigated in the bankruptcy court; and (3) whether the estate can be protected properly by a requirement that creditors seek enforcement of any judgment through the bankruptcy court." There was no Fourth Circuit authority requiring consideration of other factors, such as extreme circumstances. *Kadlecek v. Schwank USA, Inc.,* 486 B.R. 336 (M.D. N.C. 2013). *See also In re Grason,* 486 B.R. 448 (Bankr. C.D. Ill. 2013), finding that foreclosure sale purchaser lacked standing to seek retroactive stay relief, when the real party in interest was the foreclosing creditor. The purchaser chose to make improvements to the property when the purchase was

clouded by a pending bankruptcy and an appeal of a state court order, and the purchaser could not assert rights of the third-party mortgagee. The purchaser also lacked standing to question whether the debtor had complied with prebankruptcy credit counseling requirement.

Debtor failed to rebut presumptive lack of good faith for § 362(c)(3)(B). Although the debtor, who had previously filed an unsuccessful Chapter 11, was found to have filed the Chapter 13 in good faith for purposes of § 1325(a)(7), the plan was not filed in good faith under § 1325(a)(3), and the debtor did not overcome the presumption of lack of good faith for purposes of § 362(c)(3)(B), which requires clear and convincing evidence. The focus of §§ 1325(a)(7) and 362(c)(3) is different. The opinion points out that although the stay was not extended, the objecting ex-wife could be bound by a confirmed plan; however, confirmation of the first plan was denied because it would discharge debt resulting from the debtor's misappropriation of retirement benefits in which the ex-wife had been granted an interest in a divorce. *In re Rodriguez,* 487 B.R. 275 (Bankr. D. N.M. 2013).

Property of Estate

Judicial estoppel applied. Without deciding whether the Chapter 13 debtor had standing to file a postpetition employment termination suit, the debtor had a continuing duty to disclose that cause of action, and her failure to disclose justified application of judicial estoppel to bar the suit. Ki*mberlin v. Dollar General Corp.,* 2013 WL 1136563 (6th Cir. Mar. 20, 2013), slip copy.

Tax refund erroneously sent to debtor was not property of estate. IRS erroneously sent $86,512.32 prepetition refund check to the debtor postpetition, which the debtor had returned to IRS, and the debtor never had a legal or equitable interest sufficient to make the check property of the Chapter 7 estate. Since the debtor was not entitled to the refund, the trustee was not entitled to turnover. *Winters v. IRS (In re Winters),* 485 B.R. 375 (Bankr. M.D. Tenn. 2013).

Exemptions and Lien Avoidance

More time to amend exemptions properly disallowed. The bankruptcy court did not abuse its discretion in denying debtor's motion for more time to amend exemptions, when the debtor had two years already to amend to claim exemption in a large settlement. *In re Hecker*, 703 F.3d 11121 (8th Cir. 2013).

Realtor could avoid lien on vehicle, if established as tool of trade. Under California's exemptions, a motor vehicle could be claimed as exempt under the wildcard's "any property and the Ninth Circuit affirmed the district court's remand to factually determine if the Chapter 7 realtor's vehicle was a tool of the trade. *Orange County's Credit Union v. Garcia (In re Garcia),* 709 F.3d 861 (9th Cir. 2013).

Under Massachusetts law, holder of remainder interest was not entitled to homestead. A remainder interest holder is not an "owner" of a home, for purposes of the Massachusetts homestead. *Gordon v. Pappalolado (In re Gordon),* ___ B.R. ___, 2013 WL 987768 (BAP 1st Cir. Mar. 13, 2013).

Kansas bankruptcy-only exemption constitutional. Affirming the bankruptcy court and incorporating that court's legal reasoning and conclusions, Kansas state-law exemption in earned income tax credit, which was available only to debtors in bankruptcy, is constitutional. *Williamson v. Westby (In re Westby),* 486 B.R. 509 (BAP 10th Cir. 2013).

Failure to maintain continuous interest prevented judicial lien avoidance. In a matter of first impression in the circuit, the Bankruptcy Appellate Panel held that § 522(f) required that the debtor maintain a continuous interest in the homestead in order to avoid a judicial lien. When the debtor conveyed the homestead after a judgment lien was recorded and then reacquired the property, the debtor had acquired a new interest, failing to have a continuous interest in the property. The lien attached before the debtor acquired the new interest, preventing lien avoidance. *McCoy v. Kuiken (In re Kuiken),* 484 B.R. 766 (BAP 9th Cir. 2013).

Debtors entitled to homestead in residence previously rented. Applying Tennessee law, debtors were entitled to homestead in the residence that they had previously rented, after the tenant had moved out, since the law does not require actual residence, only the right to present occupancy. This was the only property to which the Chapter 7 debtors had such a present right of occupancy. *In re Patterson,* 487 B.R. 485 (Bankr. W.D. Tenn. 2013).

Debtors must specify monetary value of exempt assets. Under North Carolina's exemptions, the asset itself is not exempt, only a specific dollar maximum amount and Chapter 7 debtors must identify the monetary value of the assets being claimed as exempt. The debtors' language on Schedule C that they were claiming "100% of Debtors' interest and 100% fair market value in each and every item listed, irrespective of the actual value claimed as exempt" was disapproved, and counsel was warned that continued use of that language could result in sanctions. *In re Gregory,* 487 B.R. 444 (Bankr. E.D. N.C. 2013).

Dollar amount increases April 1, 2013. Along with other dollar amounts subject to automatic adjustment every three years, the various exemption amounts under § 522 increased on April 1, 2013.

Code Section Number	Former Dollar Amount (2010)	Adjusted Dollar Amount (2013)
11 U.S.C.A. § 522(d)(1) homestead exemption	$21,625	$22,975
11 U.S.C.A. § 522(d)(2) vehicle exemption	$3,450	$3,675
11 U.S.C.A. § 522(d)(3) personal property exemption	$550 $11,525	$575 $12,250
11 U.S.C.A. § 522(d)(4) jewelry exemption	$1,450	$1,550
11 U.S.C.A. § 522(d)(5) wildcard exemption	$1,150 $10,825	$1,225 $11,500
11 U.S.C.A. § 522(d)(6) tools of trade exemption	$2,175	$2,300
11 U.S.C.A. § 522(d)(8) life insurance exemption	$11,525	$12,250
11 U.S.C.A. § 522(d)(11)(D) personal injury exemption	$21,625	$22,975
11 U.S.C.A. § 522(f)(3)(B) lien avoidance cap	$5,850	$6,225
11 U.S.C.A. § 522(f)(4)(B) household goods cap	$600 (each time it appears)	$650 (each time it appears)
11 U.S.C.A. § 522(n) IRA cap	$1,171,650	$1,245.475
11 U.S.C.A. § 522(p)(1) homestead exemption cap	$146,450	$155,675
11 U.S.C.A. § 522(q)(1) homestead exemption cap	$146,450	$155,675

Chapter 7 Issues

Discharge Exceptions and Objections

Issue preclusion not applied when debtor did not substantially participate in state action. Applying Arizona's issue preclusion law, when the debtor had not answered, filed responsive pleadings or participated in discovery in state court action, the debtor did not participate to any substantial degree, and preclusive effect should not be given to the Arizona judgment. *Child v. Foxboro Ranch Estates, LLC (In re Child),* 486 B.R. 168 (BAP 9th Cir. 2013).

Bank reasonably relied on false financial statement. Under prior circuit authority, "[r]easonable reliance connotes the use of the standard of ordinary and average person," and evidence supported that bank reasonably relied on Chapter 7 debtor's materially false financial statement. Bank asked questions about the statement and actually relied on it, as was its customary banking practice. *Davenport v. Frontier Bank (In re Davenport),* 2013 WL 530842 (11th Cir. Feb. 13, 2013), slip copy.

Casino failed to prove § 523(a)(2)(A), but bankruptcy court did not abuse discretion in denying debtor's attorney fees. Evidence supported bankruptcy court's finding that debtor had intention to repay casino's markers for $550,000, but although debt was dischargeable, there was no abuse in denying the debtor's fees. Under § 523(d), the trial court's decision on whether the creditor was substantially justified in filing the complaint is reviewed under the abuse of discretion standard. *Adamar of New Jersey v. Innerbichler (In re Innerbichler),* 2013 WL 659078 (BAP 10th Cir. Feb. 25, 2013).

Only part of state judgment given collateral estoppel effect. When applying collateral estoppel, the bankruptcy court properly looked to the entire state court record, not just to the judgment, and Colorado judgment for $513,000 was only partially based on fraud ($171,000), with balance based on breach of contract and negligent misrepresentation. Only fraud portion was exception from discharge under § 523(a)(2). *Hogan v. George (In re George),* 2013 WL 135274 (BAP 6th Cir. Jan. 11, 2013), unpublished.

Unscheduled creditor had actual knowledge of bankruptcy. When evidence established that the unscheduled creditor had actual knowledge of the Chapter 7 filing in time to file a timely complaint, the § 523(a)(2), (3), (4) and (6) complaint was untimely and properly dismissed. *Burgraf v. Munion (In re Munion),* 2013 WL 135294 (BAP 6th Cir. Jan. 11, 2013), slip copy.

Willfulness satisfied by state standard. Willfulness requires subjective motive to inflict injury or subjective belief of injury substantially certain to occur, and applying Nevada preclusion law, abuse of process claim required willfulness, essentially the same as required under § 523(a)(6). Also, state judgment based on nuisance in Nevada was "an *intentional* interference with the use and enjoyment of land," satisfying the willfulness requirement. *Black v. Bonnie Springs Family Ltd. Partnership,* 487 B.R. 202 (BAP 9th Cir. 2013).

Attorneys settling personal injury claims committed willful and malicious injury to other attorneys. Two attorneys worked with other attorneys in thousands of suits on behalf of medical providers against an insurance company. Without notifying the other attorneys, the two future Chapter 7 debtors settled claims with the insurance company, structured to give them large attorney fees. Their actions were willful and malicious, intentionally designed to increase the debtors' attorney fees, causing injury to other attorneys and acting with "animosity" toward them. *Kane v. Stewart Tilghman Fox & Bianchi, P.A.,* 485 B.R. 460 (S.D. Fla. 2013).

Loans from former spouse were excepted from discharge under § 523(a)(15). A debt entered into between the parties before they married was excepted from discharge under § 523(a)(15), with the state divorce court having found that the debt was "more than a mere contractual obligation unrelated to the marriage." The former spouse had loaned the debtor $23,675.50 before the marriage and another $20,000 during the marriage, for his business. *Kincade v. Kincade (In re Kinkade)*, 707 F.3d 546 (5th Cir. 2013).

Discharge Revocation

Postpetition bonus was not property of estate and its dissipation not grounds for discharge revocation. Applying Minnesota law, when employer retained discretion to award employee bonus, the Chapter 7 debtor did not have legal or equitable interest in future bonus at time of petition filing, and the postpetition bonus did not become property of the estate. Consequently, discharge should not have been revoked on the basis that the debtor had dissipated the bonus or failed to deliver it to the trustee. *Seaver v. Klein-Swanson (In re Klein-Swanson),* ___ B.R. ___, 2013 WL 1164430 (BAP 8th Cir. Mar. 22, 2013).

Discharge Injunction

Refusal to foreclose after surrender did not violate discharge injunction. Affirming, the mortgage lender's refusal to foreclose or release its lien after the Chapter 7 debtor surrendered the home did not violate the § 524 discharge injunction. The discharge injunction "does not enjoin a secured creditor from recovering on valid prepetition liens, which, unless modified or avoided, ride through bankruptcy unaffected and are enforceable in accordance with state law." Surrender in the context of § 521(a)(2) means that the debtor makes the collateral available to the secured creditor, but the creditor "has the prerogative to decide whether to accept or reject the surrendered collateral." The creditor may not use its decision to coerce payment of the discharged debt, but the evidence did not suggest such coercion. *Canning v. Beneficial Maine, Inc. (In re Canning),* 706 F.3d 64 (1st Cir. 2013).

Collection of postpetition incarceration costs did not violate discharge injunction. The State of Missouri did not violate the discharge injunction by automatically deducting from the discharged debtor's account, partially collecting the State's care costs incurred postpetition. The prepetition costs of incarceration had been discharged. *Smith v. State of Missouri (In re Smith),* ___ B.R. ____, 2013 WL 425452 (BAP 8th Cir. Feb. 5, 2013).

Conversion and Dismissal

Inaccuracies in schedules and bad faith denied conversion to Chapter 13. The debtor failed to disclose a co-owner of property and the payment received from other property shortly before filing Chapter 7, as well as the postpetition purchase of a motorcycle for $8,000 cash and the fact that he was married. These and other inaccuracies contributed to a bad faith finding and denial of conversion to Chapter 13. *Nordin v. Galaba (In re Nordin),* 2013 WL 936370 (BAP 10th Cir. Mar. 12, 2013), slip copy.

Case dismissed for presumption of abuse. Although U.S. trustee was obligated by § 704 to file statement of whether case is presumed abusive within ten days of conclusion of meeting of creditors, failure to file timely did not prevent later move to dismiss case for abuse under means test. Nondebtor spouse's regular payment of private school tuition for debtor's dependent children was payment of "household expense," included in income for means test calculation. Fact that most income was earned by nondebtor spouse did not create "special circumstances" rebuttal to presumption of abuse. *In re Persaud,* 486 B.R. 251 (Bankr. E.D. N.Y. 2013).

Chapter 13 Issues

Eligibility

Dollar amounts increased April 1, 2013. Along with other dollar amounts subject to automatic adjustment every three years, the maximum amounts for Chapter 13 eligibility increased on April 1, 2013.

Code Section Number	**Former Dollar Amount (2010)**	**Adjusted Dollar Amount (2013)**
11 U.S.C.A. § 109(e) Chapter 13 debt limits	$360,475 unsecured $1,081,400 secured (each time they appear)	$383,175 $1,149,525 (each time it appears)

Debtor lacked regular income. The debtor's unemployment compensation had terminated, and his only income was support gratuitously paid by his girlfriend, who could stop paying at any time; therefore, the debtor lacked the required "regular income" to qualify for Chapter 13. Missing here was a commitment by the nondebtor party to continue to contribute the required income to fund the plan. *In re Loomis,* 487 B.R. 296 (Bankr. N.D. Okla. 2013).

Debtor lacked good faith in scheduling deficiency debt as "unknown." The debtor, who was a mortgage broker, scheduled a deficiency debt on a residential mortgage as "unknown," but the debtor was aware of the foreclosure sale and that the deficiency was at least $250,000, which added to other unsecured debt made the

debtor ineligible. Scheduling the debt in that manner was effort to conceal ineligibility, and the case was filed in bad faith. The debtor was given opportunity to convert to Chapter 7 or the case would be dismissed. *In re Kwiatkowski,* 486 B.R. 409 (Bankr. E.D. Mich, 2013).

Good faith filing requirement applied in Chapter 24 petition. After debtor filed and obtained confirmation in Chapter 11 case, subsequent and simultaneous Chapter 13 petition was not filed in good faith. Filing was effort to frustrate secured creditor in confirmed Chapter 11, and debtor had § 1127 modification available if necessary, to resolve dispute with bank. *In re McMahan,* 481 B.R. 901 (Bankr. S.D. Tex. 2012).

Confirmation Issues

Proceeds of personal injury settlement not projected disposable income. Under *Hamilton v. Lanning,* when personal injury suit was pending at filing of Chapter 13, settlement proceeds were not known or virtually certain at that time; therefore, those proceeds were not projected disposable income. *Connor v. Carroll,* 2013 WL 150150 (6th Cir. Jan. 15, 2013), slip copy.

Social Security benefits and payments to secured creditors not part of good faith inquiry. Reviewing the history of good faith under § 1325's confirmation requirements, the Ninth Circuit affirmed its BAP, holding that BAPCPA's means test eliminated consideration of Social Security income in the good faith analysis—"consideration of disposable income—now defined in great detail by Congress—has no role in the good faith analysis." Also, Congress did not "limit or qualify the kinds of secured payments that are subtracted from current monthly income to reach a disposable income figure;" therefore, the bankruptcy court did not need to consider payments to "luxury" secured creditors in its good faith inquiry. *Drummond v. Welsh (In re Welsh),* ___ F.3d ____, 2013 WL 1192961 (9th Cir. Mar. 25, 2013). *See also In re Scott,* ___ B.R. ____, 2013 WL 765691 (Bankr. M.D. Ga. 2013), holding that neither Social Security income payable to debtor nor to nondebtor spouse was included in projected disposable income. Failure to include that income did not deprive the plan of good faith.

Above-median income debtors with no disposable income have applicable commitment period. The proposed plan would terminate before the applicable commitment period for above-median income debtors, payments decreasing after paying trustee commission and attorney fees, with the court concluding that *Lanning*'s forward-looking approach was "totally contradictory to the concept of a plan which includes an early termination provision." The debtors must either amend the plan to pay for the full 60 months or prove "that it is known or virtually certain they are unable to continue payments. . .for sixty (60) months." The trustee's request for certification of the issue for direct appeal to the Fourth Circuit was granted. *In re Pliler,* ___ B.R. ___, 2013 WL 153846 (Bankr. E.D. N.C. Feb. 21, 2013). *See also In re Boyd,* ___ B.R. ___, 2013 WL 145751 (Bankr. E.D. N.C. Jan. 14, 2013).

Marital agreement to hire ex-wife as consultant until eligible for Social Security was domestic support obligation. Confirmation of a plan that did not provide for full payment of a domestic support obligation was denied, when the parties' agreement that

the husband would hire the former wife as a consultant to the family business until she became eligible for Social Security benefits was found to be a domestic support obligation. *In re Ashby,* 485 B.R. 567 (Bankr. W.D. Ky. 2013).

Postpetition voluntary contributions to retirement plan excluded from projected disposable income. Disagreeing with minority view, § 541(b)(7) excludes the debtor's voluntary contributions postpetition to retirement plans and annuities, so long as made in good faith. Even though these debtors were not making such contributions when the petition was filed, there was a history of similar contributions prepetition, which had been temporarily interrupted by circumstances beyond the debtors' control. *In re Drapeau,* 485 B.R. 29 (Bankr. D. Mass. 2013).

Lien Stripping and Modification

Strip of IRS lien not controlled by § 506(d). Agreeing with *In re Woolsey,* 696 F.3d 1266 (10th Cir. 2012), "*Dewsnup* applies in Chapter 13 to the extent a debtor relies solely on § 506(d) to void a lien unsupported by value in the collateral," but the debtor may seek to strip IRS's lien under § 1322(b)(2) through the plan, with the stripping contingent on confirmation, plan completion and discharge. Although the lien will not be avoided before discharge, debtor's complaint was not premature, since Rule 7001(2) and (9) require an adversary proceeding to determine the validity and extent of the lien. *Brinson v. United States of America (In re Brinson),* 485 B.R. 890 (Bankr. N.D. Ill. 2013). *See also Brisco v. United States of America (In re Brisco),* 486 B.R. 422 (Bankr. N.D. Ill. 2013). Under § 506(d)(2), a lien may not be avoided simply for failure to file a proof of claim, and when SBA did not file a claim, it did not have an "allowed claim" for purposes of determining secured status under § 506(a). Since § 506(a) was not triggered, modification of SBA's lien was not possible under § 1322(b)(2).

Debtor ineligible for discharge could strip wholly unsecured junior mortgage. Although an unsecured lien is not void under § 506(d), the Chapter 13 debtors could use § 1322(b)(2) to avoid the wholly unsecured junior mortgages, treating them as unsecured in the plan. The fact that the debtors were not eligible for discharge, because of prior Chapter 7 discharges, did not prevent this result, agreeing with those courts holding that § 1325(a)(5) "does not apply to a claim that is unsecured pursuant to Section 506(a)." *Wong v. Green Tree Servicing, LLC (In re Wong),* ___ B.R. ___, 2013 WL 1088620 (Bankr. E.D. N.Y. Mar. 14, 2013).

Shifting burden of proof for § 506(a) valuation. Discussing the burden of proof in plan confirmation context and use of § 506(a), the court adopted the view of *In re Heritage Highgate,* 679 F.3d 132 (3d Cir. 2012), which placed the initial burden on the party (debtor) challenging a secured claim's value, and if that party establishes with sufficient evidence that the proof of claim overvalues collateral, the creditor then has an ultimate burden of persuasion, by preponderance of evidence, to prove its collateral value. This standard was applied in the Chapter 13 case in which value of the debtor's residence was at issue, and the bank failed, through its appraisal evidence, to carry its ultimate burden. *Rosinski v. ANB Bank (In re Rozinski),* 487 B.R. 549 (Bankr. D. Colo. 2013).

Mortgage on former rental property could not be modified. Although the debtors' property was rental when petition was filed, because they intended to move into it and reside there, while surrendering more expensive residence, the mortgage was protected from modification by § 1322(b)(2). Examining the split of authority on the controlling point in time, the court found "nothing in either the statute or the legislative history that requires the determination of what property is the debtor's principal residence to be linked solely to the date on which a secured creditor's claim in bankruptcy arises. . . .[T]he more important temporal consideration is not where debtors reside on the one day they file their petition (a date which may be subject to manipulation) but rather where debtors intend to reside during and after their bankruptcy." Factors are discussed for consideration under this "hybrid" approach. *In re Kelly,* 486 B.R. 882 (Bankr. E.D. Mich. 2013).

Reverse mortgage accelerated on mother's death could be paid over plan life. The debtor's mother executed a reverse mortgage, which was accelerated on her death, but the debtor resided in that property and was co-heir to the decedent's estate; therefore, the debtor could utilize §§ 1322(c)(2) and 1325(a)(5) to decelerate the mortgage and pay it over the plan life. The fact that there was co-ownership with another heir did not prevent the treatment, since the debtor resided in the home—"outcomes in bankruptcy frequently have an impact on non-debtors." *Federal Nat'l Mortgage Assoc. v. Griffin (In re Griffin),* ___ B.R. ___, 2013 WL 1123826 (Bankr. D. Md. Mar. 18, 2013).

Postconfirmation Issues

Review of standards for modification. Reviewing the four-part framework for § 1329 modification, under *Barbosa v. Solomon,* 235 F.3d 3 (1st Cir. 2000), debtors' attempt to modify confirmed plan to retain and exempt proceeds from prepetition personal injury was denied. "New law" argument, based on application of *Hamilton v. Lanning,* was rejected, since it was decided two months before debtors' bankruptcy filing, and debtors did not attempt to exclude prospective proceeds from disposable income, resulting in their being bound by confirmed plan that dedicated proceeds to plan. *In re Murphy,* 487 B.R. 86 (Bankr. D. R.I. 2013).

Trustee could move to modify to obtain tax refunds. In a review of the various views of vesting and postconfirmation property of estate, and adopting the "estate reconciliation" approach, although postconfirmation tax refunds were property of the estate, they were not subject to turnover to the trustee, since debtors remained in possession of property of the estate, but the trustee could move to modify confirmed plans to obtain those refunds. However, "if prior to confirmation a debtor disclosed his expectation of a tax refund but made no provision for the refund in his plan, a court might well determine that there were no changed circumstances that would justify plan modification," citing *In re Meza,* 467 F.3d 874 (5th Cir. 2006). *In re Hymond,* 2012 WL 6692196 (Bankr. N.D. Tex. Dec. 21, 2012), slip copy.

Revocation of Confirmation

Failure to disclose pending criminal case not fraud for purposes of revocation. Discussing the high standard required under *In re Nikoloutsos,* 199 F.3d 233 (5th Cir. 2000), the debtor's failure to disclose a pending criminal case, involving theft, did not rise to the level of fraud necessary to revoke confirmation. The criminal case was not a contingent claim to be scheduled on Schedule F, and the trustee failed to show that knowledge of the criminal case would have changed confirmation outcome. *In re Leverett,* 486 B.R. 391 (Bankr. W.D. Tex. 2013).

Conversion

Conversion to Chapter 7 was in bad faith and reopening allowed. When the Chapter 13 debtor converted to Chapter 7, she did not disclose a medical malpractice claim that arose postpetition, and the debtor's cause of action was dismissed by the state court for lack of capacity to sue, finding that the action belonged to the bankruptcy estate. The debtor had received Chapter 7 discharge and the case had been closed with no distribution. On the debtor's motion to reopen the case to allow the trustee to pursue the cause of action, the court found that conversion was in bad faith and that under § 348(f)(2), the cause of action was property of the estate. The debtor's bad faith in not scheduling the cause of action did not weigh in the decision to reopen, since reopening would benefit the creditors. The cost-benefit analysis favored reopening to allow the trustee to pursue the cause of action, with defendant's objection to reopening rejected. *In re Easley-Brooks,* 487 B.R. 400 (Bankr. S.D. N.Y. 2013). *See also In re James,* 487 B.R. 587 (Bankr. N.D. Ga. 2013), allowing reopening by Chapter 13 debtor to schedule previously undisclosed cause of action and finding, under particular facts, that judicial estoppel did not prevent reopening. *See also Lenz v. Myers (In re Myers),* 2013 WL 587311 (Bankr. S.D. Miss. Feb. 14, 2013), slip copy, finding that debtors converted from Chapter 13 to 7 in bad faith and that property of the Chapter 7 estate included property held on the date of conversion.

Conversion was based on unfeasible plan, failure to disclose and prejudicial delay. The bankruptcy court did not deny the debtor substantive due process and had cause to convert the case to Chapter 7, when the proposed plan did not address secured claims, was unfeasible, and the debtor had not disclosed all property of the estate, unreasonably delaying to prejudice of creditors. *Onyeabor v. Centennial Pointe Owners Assoc (In re Onyeabor),* 2013 WL 819726 (BAP 10th Cir. Mar. 6, 2013), slip copy.

Dismissal

Appeal of dismissal not timely. The debtor's failure to timely file notice of appeal of case dismissal prevented the bankruptcy appellate panel's review, but the bankruptcy court properly denied the debtor's motion for Rule 60(b) relief from the dismissal order. *Rivera v. ASUME (In re Rivera),* 486 B.R. 574 (BAP 1st Cir. 2013).

Termination of stay under § 362(c)(3) did not justify case dismissal and denial of confirmation. Although the automatic stay terminated under § 362(c)(3)(A), the

presence of the stay is not a *per se* Code requirement for confirmation or continuation of the case, and when no one objected to confirmation, the bankruptcy court should not have denied confirmation and dismissed the case solely because the stay had terminated. Also, the bankruptcy court should not have ordered disgorgement of attorney fees on the basis that failure to move for extension of the stay required denial of confirmation and dismissal. *In re Dyer,* 2013 WL 987729 (BAP 6th Cir. Mar. 14, 2013), slip copy.

Discharge

Debtor not eligible for discharge. Construing § 1328(f), in a case filed originally under Chapter 13 and then converted to Chapter 7, in which the debtor received a discharge, the case "can be characterized as 'filed under' both chapter 13 and chapter 7," resulting in application of § 1328(f)(1)'s 4-year look-back for subsequent discharge eligibility. Section 1328(f) must be read in conjunction with § 348(a), which "effectively converts the First Case to 'filed under' chapter 7," making the debtor ineligible for discharge in the subsequent Chapter 13 filed within four years. *Leavitt v. Finney (In re Finney),* 486 B.R. 177 (BAP 9th Cir. 2013). *See also In re Johnson,* ___ B.R. ___, 2013 WL 951832 (Bankr. D. Mass. Mar. 11, 2013) (Agreeing with Fourth and Sixth Circuits and First Circuit BAP, filing date to filing date standard applied to § 1328(f), and agreeing with *Finney,* case was considered filed under converted Chapter 7, making debtor ineligible for Chapter 13 discharge. "Where a case starts in chapter 7 but converts to chapter 13 and results in a chapter 13 discharge the debtor is 'rewarded' with a 2 year disability before being eligible for another chapter 13 discharge. When a case starts as a chapter 13 (even with the best intentions) but is unsuccessful and converts to chapter 7, the debtor must endure a 4-year discharge disability."

Pension-sharing obligation was not domestic support. The former spouse's agreement as part of their divorce for the husband to make periodic payments to the wife as a settlement of her interest in his pension was not a domestic support obligation, but rather a property settlement; consequently, the obligation was dischargeable in Chapter 13, in which § 523(a)(15) is not discharge exception. Also, the former wife's property interest was not sufficiently vested to make the pension settlement her sole and separate property; rather, the pension was property of the debtor's bankruptcy estate. Also, the former spouse's constructive trust argument was rejected. *Steele v. Heard,* 487 B.R. 302 (S.D. Ala. 2013).

Although creditor did not file formal proof of claim, bankruptcy court had authority to adjudicate § 523(a)(2) complaint, which constituted informal proof of claim. Affirming judgment of nondischargeability for $88,500 against Chapter 13 debtor, bankruptcy court had authority to enter final judgment, including monetary judgment, in core proceeding under § 523(a)(2)(A). The adversary proceeding constituted an informal proof of claim. *Carroll v. Farooqi,* 486 B.R. 718 (N.D. Tex. 2013).

Debtor was in fiduciary capacity to spouse, under § 523(a)(4). When debtor unilaterally liquidated and spent community 401K account, for purposes other than

support of community, debtor committed defalcation, and under Washington common law, the debtor was a fiduciary over community account, a status coming into existence at time of marriage. Trust relationship between spouses in Washington satisfied § 523(a)(4)'s fiduciary requirement. *Mele v. Mele (In re Mele),* ___ B.R. ___, 2013 WL 878634 (Bankr. W.D. Wash. Mar. 8, 2013).

Attorney Fees

Fees properly reduced in "run of the mill" case. Although the attorney's hourly rate was reasonable, request for $9,000 fee was properly reduced to $3,500, with many of the hours unnecessary. The attorney's "starting point was not a function of real world concerns for the plan's practicality; rather, it was an unrealistic indulgence of the [debtors'] predispositions toward work and entertainment." *In re Little,* 484 B.R. 506 (BAP 1st Cir. 2013).

Mortgage Issues

Mortgage creditor bound by Rule 3002.1(g) response. When the lender responded to the trustee's Rule 3002.1(f) notice of final cure payment with its response and attachment itemizing postpetition amounts not paid, the lender was equitably bound by that response; it was not able to proceed in state court foreclosure, asserting different amounts unpaid. *In re Baca,* 2012 WL 6647733 (Bankr. D. N.M. Dec. 20, 2012), slip copy.

Debtors had standing to challenge mortgage validity based on assignee's lack of right to foreclose. Applying Massachusetts law on validity of assignment and foreclosure, the Chapter 13 debtors had standing to challenge validity of the assignment, which provided basis for right to foreclose. *Lopez v. Mortgage Electronic Registration Systems, Inc.,* 486 B.R. 221 (Bankr. D. Mass. 2013).

Trustee Avoidance

Trustee had statutory authority to file avoidance proceeding. Overruling creditor's objection to trustee's avoidance action, Chapter 13 trustee had statutory authority under §§ 103, 323, and 548 to file fraudulent transfer action, and the facts that debtor did not assert avoidance claim in prior litigation with the defendant or schedule the cause of action did not preclude the trustee's action. *In re Cecil,* ___ B.R. ____, 2013 WL 837592 (Bankr. M.D. Fla. Mar. 7, 2013).

Claims

Remand required for pattern of filing meritless claim objections. The bankruptcy court had denied debtors' objection to a proof of claim for lack of documentation, finding that debtors' scheduling of the credit card debt was an evidentiary admission, and the court had sanctioned debtor's attorney $3,000 for a "persistent pattern of filing meritless claim objections" in this and other cases. The Bankruptcy Appellate Panel remanded for a more detailed explanation of the basis for the sanction, and to explain how Rule 9011's safe harbor requirement had been satisfied by the moving creditor. *Haines &*

Krieger, L.L.C. v. National Capital Management LLC (In re Hernandez), 2013 WL 829106 (BAP 9th Cir. Mar. 4, 2013), slip copy.

Failure to attach documentation not grounds for disallowance. Reviewing prior case law on the effect of a credit card creditor's failure to attach documentation to its proof of claim, the plan provided for payment of the debtors' attorney fees and $114,243.92 in scheduled credit card debt, with twenty-eight proofs of claim filed, to which the debtor objected to twenty, 94% in amount of the unsecured claims filed, for lack of sufficient documentation. None of the objected claims had been scheduled as disputed, and the claims were in almost the same amounts as scheduled, with the last four digits of social security number the same as on debtor's schedules. The court reviewed the split in judicial view on effect of lack of documentation for claims, suggesting that Bankruptcy Rule 3001(c)'s amendment may resolve the judicial disagreement. The court concluded that a plain reading of § 502(b) established that insufficient documentation was not grounds for claim disallowance. *In re Brunson,* 486 B.R. 759 (Bankr. N.D. Tex. 2013).

Amended claim did not cure defect in original claim. When an original proof of claim was filed by Bank of America after it had transferred its interest in note and mortgage, the transferee (which was not a successor bank) could not cure that defect by amending the claim. The confirmed plan provided for full payment of the note, resulting in the current holder of note and mortgage being a secured creditor. Even without an allowed secured claim, the bank's lien would survive the bankruptcy, under § 506(d). *In re Moehring,* 485 B.R. 571 (Bankr. S.D. Ohio 2013).

Although proof of claim untimely, confirmed plan allowed late claim. When the confirmed plan specifically set time beyond § 502(b)(9) and Rule 3002(c) for creditors to file unsecured deficiency claims, debtor was bound by the provision, preventing use of Code or Rule time bar as basis for disallowance. *In re Shiver,* 484 B.R. 468 (Bankr. N.D. Fla. 2012).

CONSUMER LAW UPDATE

Cases reported from April 1, 2013 through June 30, 2013

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Automatic Stay

Refusal to return vehicle was willful stay violation. Under state law, the debtor retained an equitable interest in repossessed vehicle, with a redemption right that was property of the estate, and the creditor's refusal to return the vehicle was a willful stay violation. *Weber v. SEFCU (In re Weber),* ___ F.3d ___, 2013 WL 1891371 (2d Cir. May 8, 2013).

Debtor not party to lease had no possessory interest. Affirming, the Third Circuit held that the stay was not violated by the debtor's eviction and arrest for criminal trespass when she was not a party to the lease and the property at issue never became part of the bankruptcy estate. In a footnote, the court observed that even if the debtor had been a party to the lease, § 362(b)(22) would permit the landlord to proceed with eviction, since it had a prepetition judgment for possession. *In re Mason,* ___ Fed. Appx. ___, 2013 WL 2423893 (3d Cir. June 3, 2013), per curiam.

Probate court order violated stay. Section 362(b)(2) exceptions from the stay did not protect a probate court's order requiring the debtor to use postpetition income to pay alimony, when the order did not refer to wage garnishment or other withholding that would be covered by § 362(b)(2)(C). Section 362(b)(2)(B)'s exception for collection from non-bankruptcy estate property was not applicable. The debtor's spouse violated the stay by seeking collection of alimony in this manner, and the debtor's incarceration for failure to pay alimony was a stay violation. *In re Desouza,* ___ B.R. ___, 2013 WL 2991034 (BAP 1st Cir. June 14, 2013).

Non-debtor spouse's property, including debtor's "arguable" interest, not protected by stay. Affirming, the Bankruptcy Appellate Panel held that the non-debtor spouse's property, which was titled only in her name, was not protected by the stay or the debtor's plan. The spouse alone was liable on the debt; therefore, the co-debtor stay did not apply, and the bankruptcy court did not abuse discretion in granting stay relief to allow unlawful detainer action to proceed against the spouse. California law, including community property law, determined that the debtor had no interest, and the property did not come into the bankruptcy estate. The panel rejected *Brown v. Chestnut (In re Chestnut),* 422 F.3d 298 (5th Cir. 2005), in which the Fifth Circuit adopted a rule that the automatic stay applied to property "arguably" owned by the debtor, with the panel concluding that such a rule "would essentially render the recording system in California (and many other Ninth Circuit states) nugatory, and it conflicts with California's policy that creditors and other interested parties can rely on title." *Fadel v. DCB United LLC (In re Fadel),* ___ B.R. ___, 2013 WL 2369998 (BAP 9th Cir. May 31, 2013).

No abuse of discretion in annulling stay, and bankruptcy court had "arising under" jurisdiction in dismissed case. Although annulment of the stay was granted by the bankruptcy court after case dismissal, the court had "arising under" jurisdiction, which is not dependent on existence of an active bankruptcy case. The bankruptcy court had reopened the case but did not vacate the dismissal order; nevertheless, "[t]o the extent the bankruptcy court retains jurisdiction to address stay violations and sanctions, it follows that the bankruptcy court also retains jurisdiction to annul the stay retroactively." The debtor had filed bankruptcy three weeks after receiving a partial interest in property that was subject to foreclosure, with no consideration for the transfer, and although the creditors were scheduled, they had no knowledge of the transfer to the debtor. The borrower was not in bankruptcy, and the bankruptcy court did not abuse its discretion in annulling the stay. *Sinclair v. Bank of America, N.A. (In re Sinclair),* 2013 WL 2303729 (BAP 9th Cir. May 28, 2013), slip copy.

Standing for stay relief. Citing *In re Veal,* 450 B.R. 897 (BAP 9th Cir. 2011), and other prior authority, the panel reviewed standing, holding that bank/purchaser of property at a prepetition foreclosure had standing to seek stay relief, and the debtor's contentions concerning substantive rights of the bank did not undermine the bank's standing under the "colorable claim" concept. As the holder of legal title after foreclosure, the bank established cause for stay relief to pursue possession. *Lucore v. US Bank, NA (In re Lucore),* 2013 WL 2367800 (BAP 9th Cir. May 30, 2013), slip copy.

Stay relief as to fully matured mortgage. The mortgage had fully matured prepetition and the debtor did not show financial ability to pay the mortgage note, as required by § 1322(c)(2); therefore, the court did not abuse discretion in granting § 362(d)(1) stay relief for cause. However, the court did abuse discretion in granting § 362(d)(2) relief, when there was equity in the property and the court did not make findings why property was not necessary for effective reorganization. *Palacios v. Upside Investments LP (In re Palacios),* 2013 WL 1615790 (BAP 9th Cir. Apr. 15, 2013), slip copy.

Mailing notice required by Rule 3002.1 not stay violation, but maybe Rule violation. Lender's mailing of notice of escrow changes, as required by Bankruptcy Rule 3002.1, could not violate automatic stay, even though allegedly demanding payment, but complaint sufficiently alleged facts supporting defendants as debt collectors, with potential liability under California's Fair Debt Collection Practices Act. *Landry v. Bank of America, N.A. (In re Landry),* ___ B.R. ___, 2013 WL 2211628 (Bankr. E.D. Cal. May 15, 2013). *But compare In re Tollios,* ___ B.R. ___, 2013 WL 1944438 (Bankr. N.D. Ill, May 13, 2013), holding that mailing the debtor notice of escrow increase without filing it with the court or serving it on debtor's attorney or trustee was violation of Rule 3002.1, with potential sanction of debtor's attorney fees. *See also In re Holman,* 2013 WL 1100705 (Bankr. E.D. Ky. Mar. 15, 2013), slip copy,

holding that Rule 3002.1 requirements continued to have value after stay relief was granted.

Enforcement of restitution orders exempt from automatic stay. Reversing the bankruptcy court's conclusion, the district court held that 18 U.S.C. § 3613 served to exempt enforcement of criminal restitution orders from the automatic stay, including as to property of the bankruptcy estate. *United States v. Robinson,* ___ B.R. ___, 2013 WL 2950598 (W.D. Tenn. June 14, 2013).

Avoidance Actions

Appointment of interim trustee did not extend avoidance limitations. Construing § 546(a), the Seventh Circuit held that the appointment of an interim trustee one day short of the two-year limitations period for filing avoidance complaints did not extend that period. The Chapter 11 case was converted to Chapter 7 one day before expiration of the two-year limitations for filing avoidance complaints, and on that same day an interim Chapter 7 trustee was appointed, but a permanent trustee was not put into place until after that two-year period had expired. Section 546(a)(1)(B) extends the limitation period for a year if a trustee is "appointed or elected" under § 702 within the two-year period, but § 701, under which an interim trustee is appointed, is not mentioned in § 546(a)(1)(B). *Fogel v. Shabat (In re Draiman),* 714 F.3d 462 (7th Cir. 2013).

Bankruptcy court had constitutional authority to enter final order on fraudulent transfer and debtor had standing. Discussing the conflicting views on a Chapter 13 debtor's standing to bring a § 548 cause of action, the debtor was found to have authority under § 362(h) to pursue a fraudulent transfer action, related to prepetition foreclosure, when the debtor had claimed the home as exempt. Reviewing the split of judicial authority after *Stern v. Marshall,* the court applied the narrow view to that decision, concluding that bankruptcy courts had core jurisdiction and constitutional authority to enter final orders. At a minimum, the court could submit findings and conclusions to the district court. *Tyler v. Bruce Banks (In re Tyler),* ___ B.R. ___, 2013 WL 2477274 (Bankr. N.D. Ga. June 6, 2013). See also *Still v. Hopkins (In re Hopkins),* ___ B.R. ___, 2013 WL 2154354 (Bankr. E.D. Tenn. May 17, 2013) (Regardless of constitutional authority to enter final orders on trustee's state-law fraudulent transfer complaint, court could enter proposed findings and conclusions.).

Bankruptcy Petition Preparers

Petition preparer engaged in unauthorized practice of law. Examining the advice given and other actions taken by petition preparers, the court found that the preparers engaged in unauthorized practice of law under Massachusetts law and prohibited activity under § 110, with preparers permanently enjoined from preparing petitions. One prohibited act was referring to a nonattorney's legal education, using "J.D." in

advertisement and business cards. *United States Trustee v. Burton, et al.,* ___ B.R. ___, 2013 WL 2338244 (Bankr. D. Mass. May 29, 2013).

Property of Estate

Alimony interest was property of estate. At commencement of Chapter 7 case, the debtor had a claim against her former spouse for alimony, and that interest became property of the estate, subject to turnover to the trustee. It was not § 541(a)(5)(B) that controlled; rather, the expansive language of § 541(a)(1) caught all property interests, and the debtor held a prebankruptcy judgment for alimony under the divorce decree, giving her $200 monthly alimony until a minor child reached 18. The debtor did not claim the alimony as exempt. Applicable South Dakota law does not treat the alimony award as anything other than an interest in property. *Mehlhaff v. Allred (In re Mehlhaff),* ___ B.R. ____, 2013 WL 2402435 (BAP 8th Cir. June 4, 2013).

Exemptions

***Certiorari* granted on surcharge.** The Supreme Court has granted *certiorari*, at 2013 WL 292137 (June 17, 2013), from the Ninth Circuit's decision affirming the Chapter 7 trustee's surcharge of the debtor's homestead. The circuit had approved the remedy "because the surcharge was calculated to compensate the estate for the actual monetary costs imposed by the debtor's misconduct, and was warranted to protect the integrity of the bankruptcy process." *Law v. Siegel (In re Law),* 435 Fed. Appx. 697 (9th Cir. 2011). The Ninth Circuit's brief *Law* decision had cited its prior opinion in *Latman v. Burdette,* 366 F.3d 774 (9th Cir. 2004).

Boilerplate lien required to open IRA account did not destroy exemption. Reversing lower courts, the Sixth Circuit concluded that the Chapter 7 debtor had not lost exemption of his $66,000 IRA under § 522(b)(3)(C) when he executed a Client Relationship Agreement with Merrill Lynch, which contained a boilerplate provision that Merrill Lynch would have a lien on the IRA for any debt owed to the brokerage firm. The trustee argued that this lien triggered 26 U.S.C. § 4975(c), which destroyed tax exempt status of an IRA for "any direct or indirect. . .lending of money or other extension of credit." The Circuit Court found that the debtor never opened any other account with Merrill Lynch and was not a debtor to the brokerage firm; therefore, the tax exempt status was not destroyed by a lien that never came into existence. The opening of the IRA was not an extension of credit. Moreover, IRS had announced in 2011 that such lien provisions in themselves would not destroy tax exempt status, citing IRS Announcement 2011-81, 2011-52 I.R.B. 1052. *Daley v. Mostoller (In re Daley)*, ___ F.3d ___, 2013 WL 2922651 (6th Cir. June 17, 2013).

Circuit split on inherited IRA. The Seventh Circuit has created a circuit split on the effect on exemption when the debtor inherits an IRA from someone other than a spouse. For spousal inheritances, the court acknowledged that the Internal Revenue Code continues to treat IRAs as tax exempt, with the inherited funds continuing to be treated as "retirement funds," and with the same restrictions against withdrawal before age 59 ½. But, the court identified different tax rules for an IRA inherited from someone other than a spouse, with the fund protected from taxation for a limited time and the beneficiary required to begin withdrawals within one year of the original owner's death and complete withdrawals within five years for most accounts. See 26 U.S.C. § 402(c)(11). Here, the debtor inherited a $300,000 IRA from her mother, and she claimed it as exempt. For purposes of §§ 522(b)(3)(C) or (d)(12) exemptions, the court concluded that the inheritance was no longer a "retirement fund," lacking the "economic attributes of a retirement vehicle, because the money cannot be held in the account until the current owner's retirement." The court disagreed with *In re Chilton,* 674 F.3d 486 (5th Cir. 2012), and *In re Nessa*, 426 B.R. 312 (BAP 8th Cir. 2010). *In Matter of Clark,* ___ F.3d ___, 2013 WL 1729600 (7th Cir. Apr. 23, 2013).

Exemption in homestead short-sale was denied. The Chapter 7 debtor claimed an exemption under California law in her "right" to negotiate with the lender for a short sale and carve-out the exemption from sale proceeds. The opinion notes that trustees have begun to work with underwater lenders to achieve short sales, with the trustees receiving an incentive payment from the sale proceeds. Here, the debtor was attempting to obtain the incentive payment as exempt property, but the right to control the property passed to the trustee, and the debtor cannot claim an exemption in the trustee's sale results. Only if the trustee abandons the property can the debtor negotiate with the lender. *In re Bunn-Rodemann,* 491 B.R. 132 (Bankr. E.D. Cal. 2013).

Chapter 7 Issues

Debtor's Standing

Chapter 7 debtors not "persons aggrieved" with standing. Chapter 7 trustee's order to sell the debtors' investment properties was not subject to appeal by the debtors, who lacked "persons aggrieved" standing. The debtors had sought delay of the sales, pending outcome of their appeal from a state-court judgment that gave judgment creditors a lien. The investment properties became property of the bankruptcy estate, and the debtors had not obtained stay of execution of the state court judgment. *Gentile v. DeGiacomo (In re Gentile),* ___ B.R.___, 2013 WL 2221496 (BAP 1st Cir. May 20, 2013).

Trustee's Immunity

Sixth Circuit applies quasi-judicial immunity to trustee. The Chapter 7 trustee had sued the debtor's law firm for breach of fiduciary duty and avoidance of a transfer, but that complaint was dismissed. Subsequently, the firm sued the trustee and trustee's attorneys, alleging malicious prosecution and abuse of process, and the bankruptcy court applied immunity to dismiss that complaint. The firm then sought permission to sue the same parties in state court, but that was denied. The firm didn't give up, filing a second adversary proceeding, which was dismissed, and the Sixth Circuit affirmed, holding that the trustee was not required to obtain court approval to bring the original complaint in order to receive benefit of quasi-judicial immunity, and the trustee's avoidance and breach of fiduciary duty complaint was not ultra vires. The bankruptcy court did not abuse discretion in denying permission to sue the trustee in state court. *Grant, Konvalinka & Harrison, PC v. Banks, et al. (In re McKenzie),* ___ F.3d ___, 2013 WL 2274006 (6th Cir. May 24, 2013).

Discharge Exceptions and Objections

Arbitration award was not issue preclusive. Although issue preclusion applies to § 523(a) dischargeability proceedings, under *Grogan v. Garner,* 498 U.S. 279 (1991), full faith and credit requires applying the law of the applicable state, and under California's issue preclusion law, the $900,000 arbitration award did not necessarily flow from factual issues giving rise to nondischargeabililty under §§ 523(a)(2)(A) and (a)(4). The debtor's former employer had obtained the award, after filing a state court suit for tortious interference with contract, trespass to chattels, conversion, misappropriation of trade secrets, and negligent misrepresentation. The $900,000 amount was not connected sufficiently to the nondischargeability claims, with remand required to allocate the damage award between dischargeable and nondischargeable claims. *Shahverdi v. William Hablinski Architecture (In re Shahverdi),* ___ B.R. ___, 2013 WL 2466826 (BAP 9th Cir. June 7, 2013).

Assignee could pursue § 523(a)(2) exception. Michigan law did not prevent assignee of promissory notes from pursuing exception from discharge, with the court distinguishing a "naked claim of fraud," which is not assignable, from "a right to enforce a claim which is itself assignable [but] depends upon showing fraud incidentally." The Sixth Circuit joined the Seventh and Ninth Circuits, concluding that assignees may pursue § 523(a)(2) exceptions from discharge. *Pazdzierz v. First American Title Insurance Co. (In re Pazdzierz),* ___ F.3d ___, 2013 WL 2460415 (6th Cir. June 10, 2013).

Six-days' notice of complaint bar date not enough. The debt was not scheduled until after the bar date for filing complaints, but the creditors received actual notice of

the bankruptcy six days before the bar date, and that was insufficient time to take meaningful action on a §523(a)(6) discharge complaint. The creditors could file a § 523(a)(3) complaint. *Mahorn v. Petty (In re Petty),* ___ B.R. ___, 2013 WL 1896261 (BAP 8th Cir. May 8, 2013).

Supreme Court adopts higher standard for defalcation. Noting that circuits had disagreed about the mental state required to satisfy § 523(a)(4) defalcation, the Court held that "where the conduct at issue does not involve bad faith, moral turpitude, or other immoral conduct, the term requires an intentional wrong. We include as intentional not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent. Thus, we include reckless conduct of the kind set forth in the Model Penal Code. Where actual knowledge of wrongdoing is lacking, we consider conduct as equivalent if the fiduciary 'consciously disregards' (or is willfully blind to) a 'substantial and unjustifiable risk' that his conduct will turn out to violate a fiduciary duty. . . .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.'" The Eleventh Circuit had applied an "objective reckless" standard, and remand was ordered to apply the Court's "heightened standard." *Bullock v. BankChampaign, N.A.,* 133 S.Ct. 1754 (May 13, 2013).

Good faith effort to repay student loans. Applying a clear error standard to the bankruptcy court's finding of good faith under the *Brunner* test, good faith is examined by a debtor's efforts to obtain employment, maximize income and minimize expenses. Although some expenses were not reasonably necessary to maintain a minimal standard of living, the bankruptcy court did not err in finding good faith efforts. The district court had reversed, faulting the debtor for not fully maximizing income, minimizing expenses or exploring income contingency repayment options, but the circuit court reversed, restoring the bankruptcy court's good faith finding and partial discharge. *Hedlund v. Educational Resources Institute, Inc.,* ___ F.3d ___, 2013 WL 2232325 (9th Cir. May 22, 2013). *See also Krieger v. Educational Credit Management Corp.,* 713 F.3d 882 (7th Cir. 2013) ("Destitute" debtor's discharge of student loan was restored, reversing the district court's decision that she could have "searched harder" for work and should have entered into 25-year repayment program. The circuit court held that the bankruptcy judge's finding of good faith effort was not clearly erroneous; however, the dissent would hold that the debtor's 200 applications for jobs over ten-year period were not enough and that the debtor should have enrolled in the repayment plan.). *See also Roth v. Educational Credit Management Corp.,* 490 B.R. 908 (BAP 9th Cir. 2013) (Although debtor did not make any voluntary payment on student loans and did not enter into income contingent repayment plan (ICRP), sufficient good faith effort was

found. In light of the debtor's age, poor health and limited income prospect, her refusal to enter into ICRP was justified, when no payments would be required under that plan and the tax consequences of debt forgiveness were potentially disastrous. Requiring her to enter into ICRP was "futile." A concurring judge suggested that the *Brunner* test is "too narrow, no longer reflects reality, and should be revised by the Ninth Circuit.").

Discharge Injunction

Contempt order for discharge injunction violation enforceable. The bankruptcy court had found creditors and their attorney in contempt for violating the discharge injunction when they pursued in personam damage recovery, and that court could enforce its contempt order when it found that the parties were in violation of that order. The original contempt order awarding monetary sanctions was not an ordinary money judgment, but rather a monetary sanction for contempt, and the bankruptcy court did not err when it entered a second contempt order with further monetary sanctions. The original order was clear, requiring the payment of sanctions within 60 days. *Pike v. Wallace (In re Wallace),* 490 B.R. 898 (BAP 9th Cir. 2013).

Dismissal

Prepetition bad faith is cause for dismissal. Considering the issue as a matter of first impression and noting that the circuits were divided, the Eleventh Circuit held that a Chapter 7 debtor's prepetition bad faith could be cause for dismissal under § 707(a). "The ordinary meaning of 'cause' is inadequate or sufficient reason. . . .We see no reason why prepetition bad faith should not constitute an adequate or sufficient reason for dismissal." The bankruptcy court had found bad faith in filing to evade collection of a state-court judgment, which was the largest debt in the case, and the debtor had failed to make "life-style adjustments," while having the ability to pay a portion of his debts. The debtor had transferred thousands of dollars to his wife, instead of paying creditors. The "finding of bad faith was not manifestly erroneous." *Piazza v. Nueterra Healthcare Physical Therapy, LLC (In re Piazza),* ___ F.3d ____, 2013 WL 3198005 (11th Cir. June 26, 2013).

Case dismissed under totality of circumstances abuse. Under § 707(b)(2)'s general "abuse" standard, the bankruptcy court did not abuse discretion in dismissing the case when the debtors had made no attempt to reduce upscale lifestyle, while accumulating significant consumer debt and not filing tax returns or paying taxes for several years. The panel "has no scale to measure the difference between 'substantial abuse' and 'abuse' of Chapter 7. However, BAPCPA's relaxing of that standard and elimination of the presumption in favor of relief being granted to the debtor expressed Congress's intent that bankruptcy courts be given more latitude to deny Chapter 7 relief based upon

the totality of a debtor's financial situation." *In re Weixel,* ___ B.R. ___, 2013 WL 3243563 (BAP 6th Cir. June 28, 2013).

Presumption of abuse not rebutted. Construing several portions of the means test, the Chapter 7 debtors could not deduct from their monthly payroll the voluntary contributions to retirement plan or loan repayments; they could not deduct the payments on student loan debt as a special circumstance, since those payments were not unforeseeable; they failed to demonstrate private school tuition for minor children as a special circumstance; and the case would be dismissed unless the debtors converted to Chapter 13. *In re Maura,* ___ B.R. ___, 2013 WL 1730040 (Bankr. E.D. Mich. Apr. 19, 2013).

Chapter 13 Issues

Eligibility

Debtor ineligible to file under § 109(g)(2). Reviewing the mandatory, discretionary and causal connection approaches to § 109(g)(2), the Bankruptcy Appellate Panel found it unnecessary to adopt any particular approach, since this case fell within § 109(g)(2)'s prohibition under any approach. In the first case, stay relief had been granted to allow foreclosure, after which the debtor voluntarily dismissed, with admitted purpose of filing a new case the same day to stay the foreclosure sale. This was clearly prejudicial to foreclosing creditor, and there was a causal connection between the stay relief and voluntary dismissal. The debtor argued that § 109(g)(2) didn't apply since he didn't have a pending case at the time of refilling, but that was rejected, because the statute only required that the debtor has been in a case "at any time in the preceding 180 days." *Rivera v. Matos (In re Rivera),* ___ B.R. ___, 2013 WL 3199300 (BAP 1st Cir. June 26, 2013).

Joint debtor eligibility determined by aggregate debt. Disagreeing with some courts, the statutory language of § 109(e) was construed to require that unsecured debt eligibility be determined by considering joint debtors' aggregate obligations, not by separate debts of each debtor. *In re Miller,* ___ B.R. ___, 2013 WL 2178014 (Bankr. N.D. Ill. May 21, 2013).

No time limit on dismissal motion for ineligibility. Concluding that there was no Code or Rule time limit on filing a motion for dismissal based on debt ineligibility, the trustee's motion filed six months after commencement was granted, when unsecured debt exceeded limit. The debt was liquidated, with no proof that a guaranty agreement required the creditor to liquidate its collateral. *In re Jones,* 2013 WL 2352569 (Bankr. D. S.C. May 29, 2013), slip copy.

Ineligibility triggered § 362(b)(21)(A) stay exception. Debtor was ineligible following voluntary dismissal after stay relief motion had been filed in first case, and ineligibility triggered § 362(b)(21)(A)'s stay exception. Foreclosure did not violate stay in second case. *In re Brown,* 2013 WL 2318414 (Bankr. E.D. Va. May 28, 2013).

Business Debtors

Code and Official Form 22C are inconsistent. Concluding that §§ 101(10A) and 1325(b) do not permit deduction of business expenses in the calculation of current monthly income, the Code prevails over inconsistent Form 22C. After determination of current monthly income, a business debtor may then deduct necessary business expenses, under § 1325(b)(2)(B), in the calculation of disposable income in Part IV of the form. But, to allow deduction of those expenses in arriving at current monthly income in Part I of Form 22C, a net-income approach, "would either permit a double deduction of business expenses or would render § 1325(b)(2)(B) surplusage." *In re Harkins,* ___ B.R. ___, 2013 WL 1830838 (Bankr. S.D. Ohio May 1, 2013).

Projected Disposable Income

Social Security excluded from projected disposable income, but considered for feasibility. First holding that denial of confirmation was an appealable final order, the Fourth Circuit held that Social Security income was excluded from § 1325(b)(2)'s calculation of projected disposable income, for both above and below-median income debtors. However, if the debtor proposes to use that income for plan funding, the bankruptcy court must consider it in evaluation of plan feasibility, with § 1325(a)(6) being an independent confirmation requirement from the projected disposable income inquiry. *Ranta v. Gorman,* ___ F.3d ___, 2013 WL 3286252 (4th Cir. July 1, 2013).

Economic unit approach applied. Adopting the "economic unit approach" to household size, one daughter, who was living at college and part-time employed, was not included, but another daughter, who was attending college, was not employed and spent 20 nights at debtor's home each six months, was included in the household. The difference was the degree of support provided by the debtor to each daughter and their level of dependency on that financial support. *In re Johnson,* 2013 WL 1344561 (Bankr. M.D. N.C. Apr. 2, 2013).

Confirmation

Model plan upheld. The bankruptcy court confirmed a plan, rejecting some language added by the debtor to the model plan form authorized in the Eastern District of Missouri. The Bankruptcy Appellate Panel observed that "the proposed additions as a whole made the plan ambiguous, conflicted with other preprinted provisions of the plan, and appear to be counsel's attempt to substitute his own boilerplate plan language for

the language approved in the Eastern District of Missouri." The district's model plan "does not infringe upon a debtor's substantive rights under the Bankruptcy Code and the bankruptcy court did not issue a blanket rejection of a debtor's ability to include language in paragraph 10. . . .Instead, the bankruptcy court considered the specific proposed language and rejected it as, among other things, inconsistent, confusing, and contrary to the Bankruptcy Code." *McIntosh v. LaBarge (In re McIntosh),* ___ B.R. ___, 2013 WL 2460624 (BAP 8th Cir. June 10, 2013).

Separate classification of guaranteed debt is fair discrimination. The proposed plan separately classified and paid in full an unsecured consumer debt that the debtors' mother/mother-in-law had guaranteed for debtors' benefit, while paying other unsecured creditors 4.51%, compared to 12% that would be paid if all were treated pro rata, but this classification did not offend the unfair discrimination test of § 1322(b), citing *In re Renteria,* 470 B.R. 838 (BAP 9th Cir. 2012). Good faith is the test for § 1322(b)(1) purposes. Also, § 1325(b)'s projected disposable income does not address allocation of payments among unsecured creditors. *Carrion v. Rivera (In re Rivera),* 490 B.R. 130 (BAP 1st Cir. 2013).

Section 1322(b)(10) prevents separate classification. Although a student loan would have been permitted separate classification under the facts of case, § 1322(b)(10) prevents payment of interest on an unsecured nondischargeable debt unless other unsecured creditors are being paid 100%. *In re Stull,* 489 B.R. 217 (Bankr. D. Kan. 2013).

Applicable Commitment Period

Marital adjustment applies to applicable commitment period. Citing majority view, married debtor is entitled to marital adjustment, when non-filing spouse has no current monthly income under § 101(10A)'s definition, for purposes of determining the applicable commitment period, as well as disposable income. *In re Abisso,* 490 B.R. 464 (Bankr. D. Mass. 2013).

Lien Stripping

Fourth Circuit holds that lien stripping is permitted in no-discharge case. Concluding that discharge is not a prerequisite to use of § 1322(b)(2), the Fourth Circuit held that changes to the Code made by BAPCPA did not prevent debtors ineligible for discharge stripping wholly unsecured liens. Under *Dewsnup,* § 506(d) alone can't be the basis for lien stripping, but § 506(a) in combination with § 1322(b)(2) permits it. Good faith prevents abusive stripping, and § 349(b) provides for springing back of a lien upon case dismissal. Section 1325(a)(5) does not apply to wholly unsecured liens. *Branigan v. Davis (In re Davis),* 716 F.3d 331 (4th Cir. May 10, 2013). *See also In re Wapshare,* ___ B.R. ___, 2013 WL 1982945 (Bankr. S.D. N.Y. May 15, 2013) (Debtor

ineligible for discharge can strip wholly unsecured lien, with § 1325(a)(5)(B) inapplicable.).

Bank bound by plan's mortgage strip. Under prior circuit authority, *In re Fesq,* 153 F.3d 113 (3d Cir. 1998), fraud is the only ground in § 1330 for revocation of confirmation orders, and the bank could not use Rule 60 to challenge the plan's lien strip. The bank argued that a "computer glitch" prevented the trustee from knowing about its objection to confirmation, and the bank's attorney inadvertently failed to attend the confirmation hearing. *Espinosa* did not limit the *Fesq* holding, and granting the bank Rule 60 relief would have impermissibly disturbed the confirmation order. "TD Bank could have attended the [confirmation] hearing, at which point, computer glitch or not, it could have raised its objection and provided proof that it had in fact objected previously." *In re Rodriquez,* 2013 WL 1716110 (3d Cir. Apr. 22, 2013), slip copy.

Hybrid plan not confirmable. Section 1322(b)(2) must be read in conjunction with other Code sections, and § 1325(a) "imposes requirements for treatment of secured claims as conditions for confirmation." The debtor's plan proposed to bifurcate the bank's secured claim, paying the secured portion on terms extending beyond the plan's life—a so-called "hybrid" plan. Absent the creditor's consent, the five-year limit imposed by § 1322(d)(1) applies to maintenance payments. "In effect, § 1325(a)(1) establishes that as long as a plan employs § 1322(b)(5), it can *only* be confirmed over the creditor's objection via § 1325(a)(5)(B)(i)(I)(aa). And, since that section states the debt, *as determined by nonbankruptcy law,* must be paid, a debtor may not use it *and* bifurcate the applicable claim via § 506(a). To do so would render § 1325(a)(5)(B)(i)(I) ineffective." *Bullard v. Hyde Park Savings Bank (In re Bullard),* ___ B.R. ___, 2013 WL 2302314 (BAP 1st Cir. May 24, 2013). See also *In Hurd,* ___ B.R. ___, 2013 WL 2403491 (Bankr. W.D. N.Y. May 22, 2013) (Hybrid plan proposing to surrender one parcel and pay value of remaining parcel over time could not be confirmed, absent creditor's consent.).

Although stripping available in no-discharge case, under-secured mortgage could not be stripped. Although the mortgage was on multiple-residential property, the debtor did not argue that § 1322(b)(2)'s protection was lost because of that fact; rather, the mortgage was partially secured and thus protected from modification by the holding of *Nobelman v. American Savings Bank.* The district court commented that a debtor's inability to obtain a discharge did not *per se* prevent lien stripping. *Rogers v. Eastern Savings Bank (In re Rogers),* 489 B.R. 327 (D. Conn. 2013).

Effect of Confirmation

Modification

Probate representative could not be substituted as debtor. Section 1329 only permitted the debtor, trustee or unsecured creditors to move for modification of confirmation plans, with no statutory or rule procedure for substituting the deceased debtor's probate representative as debtor for purposes of modification. Probate estate is not a § 109(a) "person." Rule 1016 only permits the deceased debtor's estate to continue administration, when "in the best interest of the parties," with no provision for substitution of the probate representative. *In re Shepherd,* 490 B.R. 338 (Bankr. N.D. Ind. 2013).

Conversion and Dismissal

Failure of payment advices, automatic dismissal. Discussing the courts' "struggle to create procedures to implement the novel concept of 'automatic' dismissal, § 521(i), as interpreted by *In re Acosta-Rivera,* 557 F.3d 8 (1st Cir. 2009), is more specific than § 1307(c)'s dismissal provisions, and the bankruptcy court did not err in dismissing the case without notice and hearing, when the debtor failed to provide the payment advices within 45 days of the petition filing. *Soto v. Doral Bank (In re Soto),* ___ B.R. ___, 2013 WL 1909037 (BAP 1st Cir. May 8, 2013).

On conversion, equity resulting from plan payments not property of estate. Applying § 348(f)(1)(A) in a case converted from Chapter 7 to Chapter 13, and then reconverted to Chapter 7, equity in real property resulting from Chapter 13 payments on secured debt was not part of the Chapter 7 estate, in part applying rationale of *In re Michael,* 699 F.3d 305 (3d Cir. 2012). *In re Hodges,* 2013 WL 1755483 (Bankr. E.D. Tenn. Apr. 24, 2013), slip copy.

On pre-confirmation conversion, undistributed funds returned to debtor before payment of administrative expense. Apply rationale of *In re Michael,* 699 F.3d 305 (3d Cir. 2012), the court addressed tension between §§ 348(f)(1) and 1326(a)(2). The phrase "if a plan is not confirmed" in § 1326(a)(2) refers to the first sentence in the subsection, which contains the phrase that the trustee will retain payments "until confirmation or denial of confirmation." Here, the court did not confirm or deny confirmation prior to conversion, making the third sentence of § 1326(a)(2) inapplicable, and § 348(f)(1) controlled, with undistributed plan payments required to be returned to the debtor. Under this interpretation, the trustee could not pay administrative expenses before returning funds to the debtor, and the debtor's attorney was not paid. *In re Clements,* ___ B.R. ___, 2013 WL 3270422 (Bankr. E.D. Pa. June 28, 2013). *See also In re Hamilton,* ___ B.R. ___, 2013 WL 2151457 (Bankr. M.D. Tenn. May 16, 2013),

holding that on dismissal after confirmation, undistributed funds must be returned to the debtor, applying § 349(b)(3).

Discharge

Credit Union did not violate discharge injunction by refusal to release title. The debtor's plan was completed but did not pay the full contractual debt of the credit union, which had a co-obligor who was co-owner of the vehicle securing the debt. Although the credit union was bound by the plan, its contractual rights as to the co-owner were not modified, and since the debt was not paid in full, the credit union could continue to hold the title, with its lien enforceable against the co-debtor's interest in the vehicle. *Faulkner v. CEFCU (In re Faulkner),* 2013 WL 2154790 (Bankr. C.D. Ill. May 17, 2013), slip copy.

Discharge injunction not violated by government's collection effort of child support. Denying debtors' motion to reopen a discharged and closed case as futile, in pre-BAPCPA case, the child support obligation was nondischargeable under § 523(a)(5), and the confirmed plan contained a provision that it did not purport to discharge the state's claim, only paying a portion of it. Reopening the closed case would serve no purpose. *In re Owsley,* ___ B.R. ___, 2013 WL 2352604 (Bankr. E.D. Tenn. May 29, 2013).

Attorney Fees

With no special circumstances, fee-only plan not appropriate, but fees approved. After remand from the First Circuit, 674 F.3d 78, the bankruptcy court found no special circumstances to justify the attorney-fee-only plan, 480 B.R. 451, but the district court, while agreeing with finding lack of special circumstances, held that the attorney should not be penalized by denial of fees. At the time of the plan proposal, some courts had confirmed fee-only plans, and the attorney should not be "viewed through the prism of hindsight nor. . .sanctioned for doing something that fell comfortably within the range of what many bankruptcy lawyers (and judges) at the time would have thought reasonable." The attorney's fees were approved, but attorneys were advised that such plans should only be filed "in the most extraordinary and compelling of cases." *Berliner v. Pappalardo (In re Puffer),* ___ F.Supp.2d ___, 2013 WL 1868085 (D. Mass. May 6, 2013).

Reopening Cases

Cause and standing for reopening case examined. Motions to reopen can be filed only by the debtor or a party in interest, under Rule 5010, and party-in-interest status is a case-by-case determination, with the appealing party failing to establish standing. The issue involved property quitclaimed to a trust, and the appealing individual did not

show a pecuniary interest that could be remedied by reopening the debtor's dismissed case. Lacking standing to reopen, the party also lacked standing to appeal. Even if standing had been established, the case could not be reopened; under Ninth Circuit authority, *In re Income Prop. Builders, Inc.,* 699 F.2d 963 (9th Cir. 1982), a dismissed case is different from an administratively closed case, and a dismissed case cannot be reopened under § 350(b), since it was not closed under § 350(a). *Goldenberg v. Deutsche Bank Nat'l Trust Co. (In re Papazov),* 2013 WL 2367802 (BAP 9th Cir. May 30, 2013).

Claims

Claim order prevents student loan collection. When an order had been entered allowing Education Credit Management's student loan claim at "0.00," following the debtor's unrebutted proof that the debt had been fully paid, ECMC was prevented from post-bankruptcy collection. ECMC had not responded to the debtor's claim objection and did not appeal the claim order. Dischargeability was not the issue; rather, the claim had been allowed at zero as a result of claim objection and a hearing, with a factual finding that the debt had been fully paid. Collection effort was an abuse of the bankruptcy process, with sanction of the debtor's costs and attorney fees affirmed. *Hann v. Educational Credit Management Corp. (In re Hann),* 711 F.3d 235 (1st Cir. 2013).

Debtor's untimely tax claim filed on behalf of municipality was disallowed. The trustee objected to the untimely property tax claim filed on behalf of a municipality by the debtor, when the claim was filed more than 30 days after the governmental claim's bar date. The municipality filed a Rule 60(b) motion for reconsideration 10 months after the court had sustained the trustee's objection. Although excusable neglect applies to a Rule 3004 proof of claim, the government did not meet that standard as to the debtor's failure to file a timely Rule 3004 claim, nor did the government explain its 10-month delay. *The Municipality of Carolina v. Gonzalez (In re Gonzalez),* 490 B.R. 642 (BAP 1st Cir. 2013).

Bankruptcy court did not err in vacating disallowance order. Noting that a secured creditor is not required to file a proof of claim, unless it wants to receive a distribution in Chapter 13, and that its lien passes through bankruptcy in the absence of a proof of claim, the Bankruptcy Appellate Panel affirmed that Duetsche Bank had standing to file its proof of claim, based on proof that the bank held the original note endorsed in blank. The debtor had objected to the claim for lack of documentation, and the court sustained the objection, but the bank then amended its claim, with documentation, and the court vacated the disallowance order. Subsequently, the bank obtained stay relief and foreclosed, resulting in no deficiency claim under California law; therefore, the panel affirmed the allowance of the bank's claim, without prejudice to the debtor moving for §

502(j) reconsideration, in light of the foreclosure's extinguishment of the bank's claim. *Simpson v. Deutsche Bank Nat'l Trust Co. (In re Simpson),* 2013 WL 2350967 (BAP 9th Cir. May 29, 2013), slip copy.

Effect of IRS form on cancellation of mortgage deficiency. Acknowledging a split of judicial authority, mortgage lender's mere issuance of IRS Form 1099-C did not, as matter of law, extinguish indebtedness, but issuance "*reflects* that a financial institution has . . . discharged an indebtedness, which must then be reported by the debtor as taxable income. The statute requires the filing of a return by an entity 'which discharges (in whole or in part) the indebtedness of any person during any calendar year[.]' 26 U.S.C. § 6050P(a)." Debtors were no longer obligated and proof of claim would be disallowed, except for interest, lender's collection costs or attorney fees, which were not required by IRS Code to be reported on 1099-C. *In re Reed,* ___ B.R. ___, 2013 WL 2015984 (Bankr. E.D. Tenn. May 14, 2013).

No extension for debtors to file claim under Rule 3004. Finding no cause or excusable neglect under Rule 9006(b)(1), when the only excuse offered was failure to calendar the claims' deadline, the debtors were denied additional time to file claims under Rule 3004. *In re Petuck,* 2013 WL 2154385 (Bankr. D. N.H. May 17, 2013).

Secured creditors filing claims are required to file timely. Reviewing differing approaches to whether secured creditors were required to file timely proofs of claim, the court concluded that Rule 3002(c) applied to secured creditors in Chapter 13, with § 502(b)(9) imposing time requirements on every claim, whether secured or unsecured, and § 101(5) defined "claim" as either secured or unsecured. "A reading of Bankruptcy Rule 3002(a) and (c) that would result in no bar date for secured creditors would impermissibly circumvent the broad application of section 50[2](b)(9). . . . The omission of secured creditor from Bankruptcy Rule 3002(a) should not be imputed to Bankruptcy Rule 3002(c)[,. . . .which] contains five enumerated exceptions, none of which relate to secured claims. . . .Without a claims bar date, secured creditors could file a proof of claim at any time, which would disrupt distribution and lead to uncertainty of administration. The Court sees no practical reason why the bar date for secured creditors should be any different from the bar date imposed in Bankruptcy Rule 3002(c)." *In re Dumain,* ___ B.R. ____, 2013 WL 1890256 (Bankr. S.D. N.Y. May 8, 2013).

Clerk's error justified allowing late claim. Although the creditor had notice of the claims' bar date in the Chapter 13 phase and did not file a timely claim, the clerk sent two notices of new bar dates when the case converted to Chapter 7 and reconverted to Chapter 13, and the court had authority under § 105(a) to allow the late claim because of the clerk's error, when the creditor relied on erroneous new bar date. *In re Noll,* ___ B.R. ___, 2013 WL 1979390 (Bankr. E.D. Wis. May 15, 2013).

Tax sale purchaser held tax claim, entitled to interest under nonbankruptcy law. Applying § 511, the purchaser who paid delinquent taxes, including interest and sale costs, held a tax claim for the full redemption price, and the purchaser's claim was entitled to interest under applicable nonbankruptcy law. A premium paid by the purchaser was not an obligation of the debtor. *In re Curry,* ___ B.R. ___, 2013 WL 2190087 (Bankr. D. N.J. May 21, 2013).

Truth in Lending Actions

Federal Law preempted Massachusetts statutes. Under federal preemption doctrine, the mortgage loan disclosure requirements in the Truth in Lending Act and Home Owner's Loan Act preempted the state's disclosure laws. *Frykberg v. JP Morgan Chase Bank (In re Frykberg),* 490 B.R. 652 (BAP 1st Cir. 2013).

Debtor's Litigation Standing

Debtor had standing to bring ADA action. Acknowledging that the Code is silent as to the Chapter 13 debtor's capacity to bring nonbankruptcy causes of action, the Fourth Circuit agreed with the Third, Fifth, Seventh, Tenth and Eleventh Circuits that "Chapter 13 debtors have standing to bring causes of action in the own name on behalf of the estate." Under the Code's provision for the debtor to remain in possession and use property of the estate, it is implicit that the debtor, "unlike the Chapter 7 debtor," has the power to sue in his own name "pursuant to Rule 17(a) of the Federal Rule of Civil Procedure." Here, the debtor had standing to bring suit for violation of the Americans with Disabilities Act; however, on the merits the debtor lost, with summary judgment for the defendants affirmed. *Wilson v. Dollar General Corp.,* ___ F.3d ___, 2013 WL 2130939 (4th Cir. May 17, 2013).

CONSUMER LAW UPDATE

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

Prepared for Federal Judicial Center

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Automatic Stay

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

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

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

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

Avoidance Actions

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

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

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

Property of Estate

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

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

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

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

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

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

Exemptions

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

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

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

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

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

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

Debt Relief Agencies

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

Chapter 7 Issues

Discharge Issues

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

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

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

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

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

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

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

Revocation of Discharge.

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

Lien Stripping

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

Case Closing/Reopening

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

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

Dismissal and Conversion

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

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

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

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

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

Chapter 13 Issues

Eligibility

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

Disposable Income

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

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

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

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

Social Security income of non-filing spouse not included in projected disposable income. Applying rationale of *Mort Ranta v. Gorman,* 721 F.3d 2013 (4th Cir. 2013), which excluded the debtor's Social Security income from the projected disposable income calculation, the non-filing spouse's Social Security income was also excluded.

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

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

Applicable Commitment Period

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

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

Best Interests Test

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

Lien Stripping and Modification

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

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

Effect of Confirmation

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

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

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

Conversion and Dismissal

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

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

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

Discharge

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

Attorney Issues

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

Claims

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

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

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

CONSUMER LAW UPDATE

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

Prepared for Federal Judicial Center

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Jurisdiction and Authority of Bankruptcy Court

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

Automatic Stay

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

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

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

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

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

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

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

Avoidance Actions

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

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

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

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

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

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

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

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

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

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

Property of Estate and Exemptions

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

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

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

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

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

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

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

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

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

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

Chapter 7 Issues

Abuse Dismissal

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

Discharge

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chapter 13 Issues

Trustee

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

Disposable Income

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

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

Classification

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

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

Lien Stripping

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

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

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

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

Effect of Confirmation

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

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

Postconfirmation Modification

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

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

Discharge

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

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

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

Dismissal and Conversion

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

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

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

Reopening Cases

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

Claims

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

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

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

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

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

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

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

Attorney Fees and Issues

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

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

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

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

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

Fair Debt Collection Practices Act

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

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

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Tampa Marriott Waterside Hotel & Marina
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RECENT DEVELOPMENTS IN DISCHARGE AND DISCHARGEABILITY LITIGATION

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RECENT DEVELOPMENTS IN DISCHARGE AND DISCHARGEABILITY LITIGATION

I. COMMENCEMENT, TIMING AND PROCEDURE

A. Commencement

1. Adversary proceeding governed by Part VIII of the Bankruptcy Rules. Bankr. R. 7001
2. Commenced by filing a complaint. Bankr. R. 7003

B. Timing and extensions of time

1. Section 523(a)(2), (4) or (6) complaint must be filed no later than 60 days after the first date set for the meeting of creditors. 11 U.S.C. § 523(c); FED. R. BANKR. P. 4007(c)

Anwar v. Johnson, 720 F.3d 1183 (9th Cir. 2013) (Complaint filed 26 minutes after midnight because of computer problems in counsel's office is untimely; bankruptcy court has no discretion to grant retroactive extension of deadline in Bankruptcy Rule 4007(c) and no "external force" is asserted that might implicate equitable relief. "Under the federal bankruptcy rules, the deadline for all electronic filings is midnight local time on the day set by the relevant order . . . . [T]he sixty-day time limit . . . under 11 U.S.C. § 523(c) is 'strict' and without qualification, 'cannot be extended unless a motion is made before the 60-day limit expires.' . . . [T]he Anwar missed the filing deadline by less than an hour is immaterial. . . . Nor is the lack of prejudice to the debtors significant. . . . That Anwar seeks to file a fraud claim is . . . irrelevant . . . . [T]hat Anwar's untimely filing stemmed from difficulty with an electronic filing system is immaterial. . . . [A]bsent unique and exceptional circumstances . . . [court will] not inquire into the reason a party failed to file on time in assessing whether she is entitled to an equitable exception from FRBP 4007(c)'s filing deadline; under the plain language of the rules and our controlling precedent, there is no such exception." In a footnote, "We acknowledge that the U.S. Supreme Court has not expressly addressed whether FRBP 4007(c)'s filing deadline admits of any equitable exceptions and that lower courts are divided on the issue. . . . We need not . . . reach the question of whether external forces that prevented any filings—such as emergency situations, the loss of the court's own electronic filing capacity, or the court's affirmative misleading of a party—would warrant such an exception.").

Shain v. Johnson (In re Johnson), 504 F. App'x 378 (6th Cir. 2012) (per curiam) (Equitable tolling not available to save untimely dischargeability complaint filed by incarcerated creditor. Inmate had actual knowledge of deadline and cited no impediment to compliance. Allowing untimely complaint would "obviously" be prejudicial to debtors.).

Davin v. Johnson (In re Calderon), BAP No. EC-13-1010-JuKiPa, 2013 WL 5797616 (B.A.P. 9th Cir. Oct. 28, 2013) (unpublished) ("[A]ctual timely notice to the creditor's attorney of the pendency of the bankruptcy meets the due process requirement. . . . [A] creditor who learns of a bankruptcy filing has a duty to inquire into the relevant deadlines. . . . [I]n cases of actual notice, it is up to the creditor to see that the complaint for § 523 nondischargeability is timely filed." Attorney's actual notice of case is imputed to creditor for due process purposes.).

2. No specific limitation on other dischargeability complaints. Case can be reopened without payment of additional filing fee. Bankr. R. 4007(b)
3. Complaint objecting to discharge in a Chapter 7 case must be filed no later than 60 days after the first date set for the meeting of creditors. Bankr. R. 4004(a)

Sullivan v. Costa (In re Costa), No. MB 12-032, 2013 WL 63916 (B.A.P. 1st Cir. Jan. 3, 2013) (Untimely filed § 523 complaint cannot be amended to add § 727 claims. "'Rules 4004(a) and 4007(c) contain identical time limits and conditions on the bankruptcy court's ability to grant extensions of those time limits.' . . . '[G]iven the similar language of Rules 4004(a) and 4007(c), construction of one is informative of the proper construction of the other.' . . . [T]he deadlines established in Rule 4004(a) are equally firm. . . . Rule 4004(a) is to be strictly construed. . . . § 105 does not permit an extension of time after the expiration of the applicable limitations period, 'as determined in accordance with the Bankruptcy Code and Bankruptcy Rules.' . . . [I]n the context of Rules 4004(a) and 4007(c), there is no allowance for excusable neglect if a motion to extend time is filed late, or not at all. . . . Rule 4004 and Rule 4007 do not allow equitable exceptions, notwithstanding their nonjurisdictional nature, when a party files an untimely extension request. . . . 'While principles of equitable tolling may, as a general proposition, apply to non-jurisdictional deadlines, the general rule cannot overcome express limitations.'").

In re Petrone, 498 B.R. 1 (B.A.P. 1st Cir. 2013) (Bankruptcy court appropriately denied debtor's 28th motion to delay entry of discharge in four-year old case. "Notwithstanding Bankruptcy Rule 4004(c)(1), a bankruptcy court may defer the entry of debtor's discharge for up to 30 days, and, if the debtor files another motion within that 30–day period, the bankruptcy court may exercise its discretion to further defer the entry of discharge to a 'date certain.' . . . 'The threshold prerequisite to an exercise of discretion to defer discharge under Rule 4004(c)(2) is that the debtors must be acting in good faith.' Although multiple extensions may be warranted under certain circumstances, Bankruptcy Rule 4004(c)(2) cannot be used to delay the entry of discharge indefinitely.").

4. Complaint objecting to discharge in a Chapter 11 case must be filed no later than the first date set for the hearing on confirmation. Bankr. R. 4004(a)
5. Sixty days from meeting of creditors at which debtor was present, 60 days from date first set, or 60 days from date of continued meeting?
6. Cause for extension of time
7. Party in interest must seek extension of time before original deadline expires

Willms v. Sanderson, 723 F.3d 1094 (9th Cir. 2013) (Bankruptcy court cannot extend § 523(c) deadline sua sponte when motion to extend only addressed objecting to discharge. "'Ninth Circuit law . . . strictly construes Rule 4007(c)' and courts 'cannot extend [its] time limit implicitly' where no such motion is made. . . . Strict construction of Rule 4007(c) is necessary due to 'the need for certainty in determining which claims are and are not discharged.' . . . [A] complaint to determine dischargeability [is] untimely . . . [when] 'there was no clear indication in the record at the expiration of Rule 4007(c)'s 60–day period for filing complaints . . . that th[e] debt [at issue] was not to be discharged along with all others.' . . . Discharge and dischargeability 'refer to distinct concepts and

cannot be used interchangeably' because they 'are based on separate policies and are governed by distinct procedural rules.' . . . [Creditors'] motion failed to reference § 523 or otherwise put [debtor] on notice that they sought to have a specific debt declared nondischargeable for being fraudulently obtained. Nor did the [creditors] clarify the nature of their request before the hearing, which came after the 60–day deadline. . . . It was the bankruptcy judge who first suggested a § 523 complaint after denying the motion that the [creditors] actually filed. . . . [W]e have suggested that ''unique' or 'extraordinary' circumstances' might allow an untimely § 523(a)(2) complaint to stand. . . . But 'the validity of the doctrine remains doubtful' and 'would appear to be limited to situations where a court explicitly misleads a party.'").

Burgraf v. Munion (In re Munion), 487 B.R. 599 (B.A.P. 6th Cir. 2013) (table decision) (Timely request for extension of time to object to discharge goes not rescue untimely § 523(a)(3) compliant when creditor had actual notice of bankruptcy at least 25 days before § 523(c) bar date and motion to extend discharge complaint deadline was never acted on by bankruptcy court.).

8. Deadline affected by notice or actual knowledge?

Perle v. Fiero (In re Perle), 725 F.3d 1023 (9th Cir. 2013) (Knowledge that attorney gained while representing different client not imputed to client no longer represented with respect to nondischargeable 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) (Six days actual notice to attorney was not enough to bar § 523(a)(3) compliant.).

Burgraf v. Munion (In re Munion), 487 B.R. 599 (B.A.P. 6th Cir. 2013) (table decision) (Twenty-five days notice before bar date was sufficient time to object to dischargeability for purposes of § 523(a)(3).).

9. Deadline affected by debtor's misconduct
10. Effects of clerk's office notice and administrative mistakes
11. Conversion from Chapter 11 to Chapter 7 commences new period
12. Can timeliness of complaint be waived?
13. Effect of conversion to Chapter 13

C. Statutes of limitations
D. Service of process
    1. Delayed service of summons
    2. Error in service of process
    3. Debtor *and* debtor's attorney must be served

E. Amending complaint after filing deadline
   1. Allowing amendment
   2. Not allowing amendment

Diamond v. Vickery (In re Vickery), 488 B.R. 680 (B.A.P. 10th Cir. 2013) (Complaint that referenced only fraud or defalcation in a fiduciary capacity was not expressly or impliedly amended to include embezzlement prong of § 523(a)(4); allusion to embezzlement in summary judgment motion did not give debtor fair notice to defend embezzlement claim at trial. "A complaint is impliedly amended under [Federal Rule of Civil Procedure] 15(b) 'if an issue has been tried with the express or implied consent of the parties and not over objection.' Implied consent is found when a party either introduces evidence on the new issue or fails to object when the opposing party introduces such evidence.").

F. Intervention; substitution
G. Counterclaims
H. Jury trial in discharge and dischargeability proceedings
I. Estoppel and *res judicata*
   1. *Res judicata* or "claim preclusion" generally not available in discharge and dischargeability proceedings
   2. Collateral estoppel or "issue preclusion" may be available in discharge and dischargeability proceeding

First Weber Group, Inc. v. Horsfall, 738 F.3d 767 (7th Cir. Dec. 20, 2013) (Wisconsin judgment for tortious interference and conversion based on receipt of commission in violation of real estate listing agreement precluded relitigation of all elements of § 523(a)(6) complaint except "willfulness"; "intent to act" was a necessary element of the state law intentional torts but "intent to injure" was not. "In Wisconsin . . . , the question whether issue preclusion applies depends on two criteria. The first (the 'actually litigated step') requires that 'the question of fact or law that is sought to be precluded actually must have been litigated in a previous action and [have been] necessary to the judgment.' . . . The second (the 'fundamental fairness step') requires the court to 'determine whether it is fundamentally fair to employ issue preclusion given the circumstances of the particular case at hand.' . . . The fundamental fairness step eschews formalistic requirements in favor of 'a looser, equities-based interpretation of the doctrine.' . . . In order to find liability on the tortious interference claim, the state court had to find: (1) [plaintiff] had a contract with a third party; (2) [debtor] interfered with that contract; (3) [debtor's] interference was intentional; (4) the interference caused [plaintiff] damages; and (5) [debtor] was not justified or privileged to interfere. . . . For the conversion claim, the court had to find: (1) intentional control or taking of property belonging to [plaintiff]; (2) without [plaintiff's] consent; which (3) resulted in serious interference with [plaintiff's] right to possess the property. . . . In order to compare the essential state-court findings with the requirements for willful and malicious injury, we need a better understanding of the latter term. Unfortunately, the case law is 'all over the lot' when it comes to defining it. . . . Bankruptcy courts in this circuit have focused on three points: (1) an injury caused by the debtor (2) willfully and (3) maliciously. . . . The term 'injury,' while not defined in the Code, is understood to mean a

'violation of another's legal right, for which the law provides a remedy.' . . . The injury need not have been suffered directly by the creditor asserting the claim. . . . The creditor's claim must, however, derive from the other's injury. Willfulness requires 'a deliberate or intentional *injury*, not merely a deliberate or intentional act that leads to injury.' . . . 'Willfulness' can be found either if the 'debtor's motive was to inflict the injury, or the debtor's act was substantially certain to result in injury.' . . . Lastly there is maliciousness, which requires that the debtor acted 'in conscious disregard of [his] duties or without just cause or excuse; it does not require ill-will or specific intent to do harm.' . . . Understanding that the definition of willfulness must incorporate *Geiger*'s admonition that the requisite intent for purposes of § 523(a)(6) is the intent to injure rather than the intent to act, we reaffirm today . . . our definition of maliciousness . . . . [I]ssue preclusion [applies] to the first and third elements of the § 523(a)(6) inquiry (injury and maliciousness). The state court necessarily and actually found injury on each intentional tort claim. The tortious interference claim rested on the finding that [debtor's] interference caused [creditor] damages. . . . Similarly, the conversion claim required the finding that [debtor's] taking of property resulted in serious interference with [creditor's] rights. . . . Because injury was a required element of the claims, the state court's injury findings were actually litigated and necessary to the judgment. . . . We also find nothing fundamentally unfair in holding [debtor] to the state court's decision on injury. The state court judgment also precluded relitigation of the issue of maliciousness. For purposes of section 523(a)(6), maliciousness exists when one acts in 'conscious disregard of one's duties or without just cause or excuse.' . . . [Creditor's] state-law tortious interference claim required a finding that [debtor] was 'not justified or privileged to interfere' with its contractual rights. . . . The state court thus determined that [debtor's] interference was intentional and that he was neither justified nor privileged to interfere with [creditor's] rights. In order to reach this conclusion, the state court had to find that [debtor's] actions were not reasonable or taken in good faith. This inquiry substantially mirrored the federal test for maliciousness. As before, there is nothing fundamentally unfair about holding [debtor] to this finding. Only one element of the § 523(a)(6) inquiry remains between [creditor] and the result it wants: willfulness, meaning either a motive to inflict injury or an act substantially certain to result in injury. The first element of conversion requires 'intentional control or taking of property belonging to another;' the third element of tortious interference requires that the interference was intentional. Both of these necessarily require only intent to act, not intent to injure. . . . Neither of the state-law claims requires showing intent to injure, and thus that finding was not necessary to the state court's judgment. . . . [T]he state court's decision did not preclude [creditor] from litigating the issue of willfulness in the bankruptcy case.").

Martin v. Hauck (In re Hauck), No. 13-1180, 2013 WL 6069271 (10th Cir. Nov. 19, 2013) (unpublished) (Stipulated judgment manifested intent to be bound by admission of culpability for fraud and civil theft; all elements of § 523(a)(2)(A) and (a)(4) were satisfied.).

Hogan v. George (In re George), 485 B.R. 478 (B.A.P. 6th Cir. 2013) (table decision) (Bankruptcy court correctly limited nondischargeable amount to $171,000 actually awarded for fraud by state court, rather than $513,000 total judgment that included breach of contract and negligence claims. "When determining the collateral estoppel effect of a state court judgment in dischargeability proceedings, the bankruptcy court must consider the entire state court record, not just the

judgment. . . . The language of the Special Verdict form, the Jury Inquiry form, and the Colorado Judgment establish that the jury awarded the Appellants damages against both Debtors, in the amount of $171,000 for fraud, $171,000 for breach of contract, and $171,000 for negligent misrepresentation, for a total of $513,000 in damages. Specifically, the Special Verdict form states that the damages on the fraud claim are '$171,000.00.' The Jury Inquiry form also affirms that separate damages awarded were awarded by the jury on each of the Appellants' causes of action. The Jury Inquiry form reads: '[your] actual awards were $171,000 on the breach of contract claim, $171,000 on the negligent misrepresentation or concealment claim, and *$171,000 on the deceit based on fraud claim.*'").

Phillips v. Phillips (In re Phillips), 500 B.R. 570 (B.A.P. 8th Cir. 2013) (Postpetition state court finding that debtor "removed and disposed of the converted property without claim of right and knowing that he had no claim of right" collaterally estopped debtor to re-litigate liability in § 523(a)(6) action notwithstanding absence of judgment against debtor. "[T]echnically, [debtor] was a 'party' to the state court case—the action was simply stayed against him and proceeded to trial only against the other defendants due to [debtor's] bankruptcy filing. [Debtor] identifies himself as 'simply a witness' in the state court case at the time it was tried. The reality, however, is that [debtor] was much more than simply a witness. As a party to the state court proceeding which commenced three months prior to the bankruptcy filing, [debtor] was well aware that the issues involved ownership and conversion of assets. He chose to file bankruptcy to avoid having a personal judgment entered. It is undisputed that [debtor] testified extensively at the state court trial and was found to be in control of the entities and made the decisions on behalf of the entities, including the decisions to take the property and dispose of it. '[T]he persons for whose benefit and at whose direction a cause of action is litigated cannot be said to be 'strangers to the cause. . . .'' . . . [Debtor] was an active participant in the state court trial and had the opportunity to claim ownership of any of the assets. [Debtor's] arguments that he was not a party and did not have an opportunity to litigate ownership of the assets are without merit. . . . [T]he bankruptcy court correctly gave preclusive effect to the state court's determination as to ownership of the assets because a contrary decision by the bankruptcy court would 'wholly undermine' the state court's ruling.").

Child v. Foxboro Ranch Estates, LLC (In re Child), 486 B.R. 168 (B.A.P. 9th Cir. 2013) (Arizona law requires actual participation by debtor in prior litigation before collateral estoppel effect is available in subsequent dischargeability litigation; appearance at four case management conferences and one six-page letter to judge are not sufficient participation to support issue preclusion. Under Arizona law, issue preclusion is applicable when: "'(1) the issue or fact to be litigated ***was actually litigated*** in a previous suit, (2) a final judgment was entered, and (3) the party against whom the doctrine is to be invoked had a full opportunity to litigate the matter, (4) ***and actually did litigate it***, [and] (5) such issue or fact was essential to the prior judgment.' . . . Cases evaluating whether a party actively participated in litigation (element (4)), for purposes of issue preclusion, consider the nature and extent of participation in the litigation by the party against whom issue preclusion is to be invoked. . . . This includes looking to various factors such as whether a party (i) answers the complaint, (ii) files pleadings such as motions or oppositions, (iii) appears and participates at hearings, conferences and trials, (iv) engages in discovery, and (v) is represented by

counsel. . . . Although there does not appear to be reported (or published) case law setting forth a minimum level of participation needed to satisfy element (4) under Arizona law, the facts of this case fall below the level of participation that has been found in other cases to satisfy element (4). Debtor's only 'filing' was a rambling letter to the court disputing the claims against him but including the assertion he would file bankruptcy. Also, the record shows that [debtor] did not file an answer, conduct discovery, or even file an opposition to the summary judgment motion. . . . [Debtor's] attendance at four case management conferences was not participation in any meaningful sense, primarily given his repeated assertions of intent to file bankruptcy and his limited comments at the conferences.").

Kaplan v. Wasko (In re Wasko), No CC-12-1118-PaMkBe, 2013 WL 842505 (B.A.P. 9th Cir. Mar. 6, 2013) (Attorney fees awarded for debtor's failure to comply with discovery rules are not necessarily nondischargeable under *Cohen v. de la Cruz,* 523 U.S. 213, 118 S. Ct. 1212, 140 L. Ed. 2d 341 (1998), notwithstanding nondischargeability of underlying debt. Bankruptcy court must conduct independent analysis of issue preclusion as it applies to attorney fee award. "[V]iolation of a statute that provides for an award of attorney's fees for conduct which the Bankruptcy Code considers grounds for exception to discharge may result in denial of discharge for those attorney's fees. In this appeal, the statute on which the . . . Sanctions Order was based, . . . , sanctions the failure to respond to requests for admission of facts that then requires a party to prove them. . . . [U]nder the statute, an award of attorney's fees may be made for conduct that a bankruptcy court may find does not support an exception to discharge. On remand to the bankruptcy court, [plaintiff] is free to argue that, like the state court apparently found, Debtors' failure to respond . . . was part of Debtors' scheme to defraud him. . . . [Plaintiff] may contend that there is an identity of issues between the . . . Sanctions Order and the bankruptcy court's determination that the Judgment debt is excepted from discharge under § 523(a)(2), (a)(4) or (a)(6). However, in light of the strong policy considerations in bankruptcy law that exceptions to discharge are narrowly construed, and the issue preclusion case law discussed above, attorney's fees awarded under a statute will be excepted from discharge only if that statute proscribes conduct that violates one of the provisions of § 523(a). Because an award of attorney's fees . . . does not necessarily result from conduct proscribed in the Bankruptcy Code, an award of attorneys fees under that statute is not automatically excepted from discharge.").

Black v. Bonnie Springs Family Ltd. (In re Black), 487 B.R. 202 (B.A.P. 9th Cir. 2013) (Nevada judgment for abuse of process and nuisance collaterally estopped relitigation of willfulness under § 523(a)(6). "'[W]illful injury is a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury.' . . . '[C]ourts within the Ninth Circuit use a subjective approach in determining willfulness, i.e., they look to whether the debtor acted with the desire to injure or a belief that injury was substantially certain to occur.' . . . In Nevada, the elements of an abuse of process claim are '(1) an ulterior purpose by the defendants other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding.' 'An ulterior purpose is any improper motive underlying the issuance of legal process.' . . . [I]t is 'the action[ ] which the [filer takes] (or fail[s] to take) after the filing of the complaint' that constitutes abuse of process. . . . [D]ebtors clearly misused the county commissioner complaint for an end other

than to investigate and inspect environmental issues and health code violations; they used it in an attempt to strong-arm [defendant] into renegotiating the purchase price for the property. . . . The bankruptcy court determined that the state court's finding of oppression further supported a finding of willfulness under § 523(a)(6). It focused on the 'cruel and unjust hardship' portion of oppression, reasoning that, in subjecting the appellees to 'cruel and unjust hardship,' the debtors necessarily intended to inflict injury . . . . A finding of oppression requires that a person act with conscious disregard of another person's rights or safety and with awareness of the probable dangerous consequences of his conduct. . . . '[S]ubjecting a person to cruel and unjust hardship in conscious disregard of that person's rights' supports a determination of subjective intent to injure in the context of an abuse of process claim. . . . In Nevada, '[a]n actionable nuisance is an intentional interference with the use and enjoyment of land that is both substantial and unreasonable.' . . . A nuisance is 'such unreasonable, unwarrantable or unlawful use by a person of his own property, or his improper, indecent or unlawful conduct which operates as an obstruction or injury to the right of another or to the public and produces such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage.' . . . Coupled with the overlay of the oppression finding, adding an element of subjective cruelty to the jury's necessary nuisance finding that [debtor] directed his interference specifically at the appellees' use and enjoyment of their property".).

3. Judicial estoppel
4. Equitable estoppel
5. "Quasi-estoppel" and "Judicial admissions"

J. Exceptions to dischargeability apply to individual debtors only
K. Individual debtor's fifth amendment privilege
L. Exceptions to discharge and community property

Kinkade v. Kinkade (In re Kinkade), 707 F.3d 546 (5th Cir. 2013) (Money loaned before and during marriage in a community property state becomes nondischargeable under § 523(a)(15) when divorce decree assigned debt to debtor. "'[I]n determining whether a debt is non-dischargeable under . . . § 523(a)(15), it does not matter whether the debt was a community debt or a separate debt.' The statutory language requires only that the debt be 'incurred by the debtor in the course of a divorce or separation.'").

M. Exceptions to discharge and dischargeability are narrowly construed
N. Jurisdiction, concurrent jurisdiction and abstention

Carpenters Pension Trust Fund for N. Cal. v. Moxley, 734 F.3d 864 (9th Cir. 2013) (Notwithstanding *Stern v. Marshall,* __ U.S. __, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011), bankruptcy court has jurisdiction over dischargeability litigation. "The dischargeability determination is necessarily resolved during the process of allowing or disallowing claims against the estate, and therefore constitutes a public rights dispute that the bankruptcy court may decide.").

O. Eleventh amendment immunity and sovereign immunity
P. Standing

Pazdzierz v. First Am. Title Ins. Co. (In re Pazdzierz), 718 F.3d 582 (6th Cir. 2013) (Michigan law that precludes assignment of fraud claims did not prevent title insurer as assignee of promissory note from pursuing nondischargeability under §523(a)(2)(B). "Under Michigan law, a promissory note is a negotiable instrument that may be transferred between persons. . . . The transfer of a promissory note 'vests in the transferee any right of the transferor to enforce the instrument.' . . . [Plaintiff's] notes are tangible property interests, . . . [plaintiff's] claim is based on the notes, not a naked claim of fraud. . . . Michigan law does not bar [plaintiff's] claim.").

Diamond v. Vickery (In re Vickery), 488 B.R. 680 (B.A.P. 10th Cir. 2013) (Trustee for Chapter 7 corporation lacked standing to bring action under § 523(a)(2)(A) for misrepresentations by debtor to third party investors.).

Q. Settlement of discharge and dischargeability litigation
R. Effect of prebankruptcy settlement or novation
S. Enhanced damages and costs
   1. Punitive damages are dischargeable
   2. Punitive damages are nondischargeable
   3. Treble damages
   4. Attorney fees, interest, other damages and costs

In re Sears, 533 F. App'x 941 (11th Cir. 2013) (per curiam) (In addition to cost of repairs by subsequent contractor, commission government paid debtor as surety on defaulted bond was nondischargeable under § 523(a)(2)(A). Under *Cohen v. de la Cruz*, 523 U.S. 213, 222, 118 S. Ct. 1212, 1218, 140 L. Ed. 2d 341 (1998), "§ 523(a)(2)(A) 'bars the discharge of all liability arising from fraud,' including 'the value of any money, property, etc., fraudulently obtained by the debtor.' . . . [C]ommission [debtor] received constitutes 'money . . . fraudulently obtained by the debtor,' as the government would not have accepted [debtor] as a surety and paid him a commission but for his false statements about the collateral supporting his bonds.").

Kaplan v. Wasko (In re Wasko), No CC-12-1118-PaMkBe, 2013 WL 842505 (B.A.P. 9th Cir. Mar. 6, 2013) (Attorney fees awarded under state statute for debtor's failure to comply with discovery rules is not automatically nondischargeable when underlying debt is declared nondischargeable. "[V]iolation of a statute that provides for an award of attorney's fees for conduct which the Bankruptcy Code considers grounds for exception to discharge may result in denial of discharge for those attorney's fees. In this appeal, the statute on which the . . . Sanctions Order was based, . . . , sanctions the failure to respond to requests for admission of facts that then requires a party to prove them. . . . [U]nder the statute, an award of attorney's fees may be made for conduct that a bankruptcy court may find does not support an exception to discharge. On remand to the bankruptcy court, [plaintiff] is free to argue that . . . Debtors' failure to respond . . . was part of Debtors' scheme to defraud him. . . . [Plaintiff] may contend that there is an identity of issues

between the . . . Sanctions Order and the bankruptcy court's determination that the Judgment debt is excepted from discharge under § 523(a)(2), (a)(4) or (a)(6). However, in light of the strong policy considerations in bankruptcy law that exceptions to discharge are narrowly construed, . . . , attorney's fees awarded under a statute will be excepted from discharge only if that statute proscribes conduct that violates one of the provisions of § 523(a). Because an award of attorney's fees under the California statute does not necessarily result from conduct proscribed in the Bankruptcy Code, an award of attorneys fees under that statute is not automatically excepted from discharge.").

Lowry v. Nicodemus (In re Nicodemus), 497 B.R. 852 (B.A.P. 6th Cir. 2013) (Applying *Cohen v. de la Cruz*, 523 U.S. 213, 118 S. Ct. 1212, 140 L. Ed. 2d 341 (1998), $22,800 sanction award for willful contempt of court order to turn over model train collection was nondischargeable under § 523(a)(2)(A) as a continuation of debtor's fraudulent conduct. Section "523(a)(2)(A) prevents discharge of 'any debt' as long as the debt sought to be discharged is assessed 'on account of the fraud.' . . . The Supreme Court in *Cohen* explains that the phrase 'to the extent obtained by' in § 523(a)(2)(A) 'does not impose any limitation on the extent to which 'any debt' arising from fraud is excepted from discharge. . . . This means that as long as the debt in question arises out of the debtor's fraud, false pretenses, or false representation, the debt should be held nondischargeable under § 523(a)(2)(A). . . . [R]ecovery under this section of the Code is not limited to the value of any 'money, property, services, or . . . credit' fraudulently obtained by a debtor, but includes even compensatory, punitive or statutory liability. . . . *Cohen* . . . makes clear that to the extent that debts in the nature of a sanction arose from an underlying nondischargeable debt, such sanctions are also nondischargeable under § 523(a)(2)(A).").

T. Motion for new trial
U. Motions to alter or amend and motions for relief from judgment
V. New Issues or evidence on appeal
W. Default judgments
X. Entry of final judgment

Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751 (7th Cir. 2013) (Bankruptcy court had authority to enter final judgment on objections to discharge but lacked authority to enter final judgment on alter ego claim. Constitutional objection based on *Stern v. Marshall*, ___ U.S. ___, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011), is not waivable—agreeing with *Waldman v. Stone*, 698 F.3d 910 (6th Cir. 2012), *cert. granted,* 133 S. Ct. 1604, 185 L. Ed. 2d 581 (2013), and disagreeing with *Executive Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.)*, 722 F.3d 553 (9th Cir. 2012), *cert. granted,* 133 S. Ct. 2880, 186 L. Ed. 2d 908 (2013). "[I]t simply cannot be said that by resolving [creditor's] objections to discharge the bankruptcy court necessarily . . . needed to resolve the alter-ego claim. To be sure, there is some factual overlap, . . . [b]ut in passing on the merits of the alter-ego claim, the Bankruptcy court would have had to determine, first, whether [state] law recognizes an alter-ego theory . . . and, second, whether the evidence satisfied the applicable standard. . . . [W]e cannot say that in resolving [creditor's] claims under 11 U.S.C. § 727 the bankruptcy court necessarily would have resolved the alter-ego claim had it reached the merits (as opposed to entering default judgment). . . . Assuming that the alter-ego claim is in fact a core matter,

it is difficult to find a statutory basis on which the district court could rely to treat the bankruptcy court's order as proposed findings and conclusions. To be sure, the bankruptcy court never reached the merits of the claim because it entered default judgment as a discovery sanction. But there is no statutory provision authorizing a bankruptcy court to preside over discovery, apart from its authority over core and noncore matters. . . . It appears, therefore, that if the alter-ego claim is in fact a core proceeding, the only statutorily authorized remedy would be for the district court to withdraw the reference, . . . , and then set a new discovery schedule. Of course, this would present a windfall to [debtor], but it is difficult to see any other solution under the peculiar circumstances of this case. Accordingly, on remand the district court shall first determine whether the alter-ego claim is a core or a noncore proceeding. If it concludes that it is a noncore proceeding, then the court may treat the bankruptcy court's order purporting to enter final judgment on the alter-ego claim as proposed findings of fact and conclusions of law to be reviewed de novo. . . . If, on the other hand, the court determines the alter-ego claim to be a core proceeding, then it shall order that the reference of the alter-ego claim to the bankruptcy court be withdrawn and conduct fresh discovery proceedings in the district court, though the district judge will have discretion in setting a more abbreviated schedule given that prior discovery has been had.").

II. LITIGATION OF DISCHARGEABILITY COMPLAINTS: 11 U.S.C. § 523

A. Standard of proof

B. 11 U.S.C. § 523(a)(1)

1. Counting and tolling of time periods

2. Dummy, substitute and unsigned returns

3. Trust fund, excise or gross receipts tax

4. Fraudulent return or willful attempt to evade

5. Dischargeability of interest and penalties

6. "Responsible person" liability

7. Subrogation

8. Miscellaneous § 523(a)(1) cases

C. 11 U.S.C. § 523(a)(2)

1. Standard of proof

Aquino v. Ponce (In re Ponce), BAP Nos. CC-13-1124-TaDKi & CC-13-1125-TaDKi, 2013 WL 6671490 (B.A.P. 9th Cir. Dec. 18, 2013) (unpublished) (In a fractious, intra-familial dispute in which "none of the parties were particularly credible," debtor won when plaintiff did not satisfy 51%/49% evidentiary metric. "[T]he preponderance of the evidence standard [is used] when determining whether a debt is nondischargeable under § 523(a). . . . This standard requires the finder of fact to conclude that 'the proposition [is] more likely true than not . . .' in order to find in favor of the creditor. . . . The creditor . . . has the burden of proof. . . . The analysis is strictly construed against the creditor and in favor of the debtor.").

2. Elements of proof under § 523(a)(2)(A)

In re Sears, 533 F. App'x 941 (11th Cir. 2013) (per curiam) (Failure to attached required documentation did not negate justifiable reliance by government on affidavit in support of contract surety bonds. "'Justifiable reliance is gauged by an *individual standard* of the plaintiff's own capacity and the knowledge which he has, or which may fairly be charged against him from the facts within his observation in the light of his individual case.' . . . Although [debtor] failed to supply documents to support his sworn statements, it was not apparent from a 'cursory glance' at his affidavits that they were fraudulent. . . . Moreover, [debtor's] own failure to provide documentation to support his fraudulent statements should not allow him to avoid his obligation to the party he lied to.").

Old Republic Nat'l Title Ins. Co. v. Levasseur (In re Levasseur), 737 F.3d 814 (1st Cir. 2013) (Writing checks totaling $124,200 on line of credit that should have been closed two years earlier when property was sold but remained open because of bank error was nondischargeable. "A false pretense or misrepresentation can be created 'when the circumstances imply a particular set of facts, and one party knows the facts to be otherwise,' and where the silent party 'may have a duty to correct what would otherwise be a false impression.' . . . [S]cienter is established where an individual 'knows or believes that the matter is not as [s]he represents it to be.'").

SG Homes Assocs., LP v. Marinucci, 718 F.3d 327 (4th Cir. 2013) (Plaintiff justifiably relied on certificates signed by debtor that misrepresented that company was paying subcontractors and suppliers with draws from plaintiff. "To satisfy the justifiable reliance element in proof of fraud, a plaintiff must show that it actually relied on the debtor's misrepresentations, and was justified in doing so because of 'the circumstances of the particular case.' . . . A plaintiff 'is justified in relying on a representation . . . although he might have ascertained the falsity of the representation had he made an investigation.' . . . [T]he parties' intent and the plain language of the Contract, which must be read in conjunction with the certifications, required [debtor's company] to use the money from [plaintiff] to pay only the subcontractors and suppliers working on the [plaintiff's] project.").

deBenedictis v. Brady-Zell (In re Brady-Zell), 500 B.R. 295 (B.A.P. 1st Cir. 2013) (Notwithstanding debtor's complete lack of credibility, prepetition divorce counsel failed to establish debtor had no intention of paying legal fees at time of retention or that debtor misrepresented intent to eventually pay legal fees to induce counsel to continue representation for purposes of § 523(a)(2)(A). "'[I]f a debtor enters into a contract with the intent not to pay, the contract may provide a basis for an exception to discharge on the grounds of fraud if the other remaining elements are established.' . . . [A] debtor's ''mere failure to perform is not sufficient evidence of scienter nor is subsequent conduct contrary to the original representation necessarily indicative of fraudulent intent.''").

Lowry v. Nicodemus (In re Nicodemus), 497 B.R. 852 (B.A.P. 6th Cir. 2013) (Applying *Cohen v. de la Cruz*, 523 U.S. 213, 118 S. Ct. 1212, 140 L. Ed. 2d 341 (1998), sanction award for willful contempt of court order was nondischargeable under § 523(a)(2)(A). "The Sixth Circuit has not

directly addressed whether a contempt judgment is nondischargeable under § 523(a)(2)(A). Most cases dealing specifically with the dischargeability of contempt judgments have been decided instead under § 523(a)(6), and have uniformly held that such judgments may constitute a nondischargeable debt. . . . [C]ases decided after [*Cohen v. de la Cruz,* 523 U.S. 213, 118 S. Ct. 1212, 140 L. Ed. 2d 341 (1998),] adhere to the Supreme Court's interpretation of the scope of § 523(a)(2)(A), holding that punitive damages are nondischargeable under § 523(a)(2)(A). . . . [L]ike contempt sanctions, punitive damages are awarded not to compensate the prevailing party, but rather are intended to punish and deter its repetition. . . . [T]he contempt sanction was issued and its purpose was to force Debtor to comply and punish Debtor if she continued to ignore the court's orders. . . . Applying the policy and principles set forth in *Cohen* to the facts of this case, the Panel concludes that the entire debt stems from Debtor's fraudulent conduct and misrepresentations, and therefore is not dischargeable.").

Diamond v. Vickery (In re Vickery), 488 B.R. 680 (B.A.P. 10th Cir. 2013) ("Actual fraud" is an independent basis for nondischargeability under § 523(a)(2)(A). Embracing *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000), and *Mellon Bank, N.A. v. Vitanovich (In re Vitanovich)*, 259 B.R. 873 (B.A.P. 6th Cir. 2001), "'actual fraud' under § 523(a)(2)(A) is not limited to misrepresentations or misleading omissions. As in *McClellan*, we are careful to clarify that only 'actual fraud' is covered by § 523(a)(2)(A), not constructive, or implied fraud. '[T]he term 'fraud' as used in § 523(a)(2)(A) means actual or positive fraud rather than fraud implied by law.'").

Bank of Cordell v. Sturgeon (In re Sturgeon), 496 B.R. 215 (B.A.P. 10th Cir. 2013) (Debtor, father, brother and various entities schemed to defraud cattle lender by hiding proceeds of cattle sales, diverting advances to cover commodity trading losses and lying about the number of cattle available; debt was nondischargeable under § 523(a)(2)(A). "False representations and implied misrepresentations that are intended to create and foster a false impression by co-conspirators in furtherance of a fraudulent scheme may be attributed to a debtor who is an active, willing and knowing participant in the fraudulent scheme for purposes of Section 523(a)(2)(A). . . . Fraudulent intent for purposes of Section 523(a)(2)(A) can be shown by establishing that the debtor was a willing participant in a fraudulent scheme and thereby intended to deceive a creditor. . . . Debtor was an active, knowing participant in a fraudulent scheme to deceive the Bank through a series of false representations and false pretenses that created a contrived and misleading understanding by the Bank, and that the Debtor thereby intended to deceive the Bank. The false representations and false pretenses wrongfully induced the Bank to grant loans . . . , approve loan advances, and permit use of . . . sale proceeds[.]").

3. Elements of proof under § 523(a)(2)(B)

Toye v. O'Donnell (In re O'Donnell), 728 F.3d 41 (1st Cir. 2013) (Instructing agent to prepare personal financial statements and then turning a blind eye to what they contained did not negate that debtor caused statements to be made with intent to deceive for purposes of § 523(a)(2)(B). Joining six other circuits, "'[i]ntent to deceive under section 523(a)(2)(B) may be demonstrated by the

debtor's knowledge of, reckless indifference to, or reckless disregard for the written statement's falsity.").

Pazdzierz v. First Am. Title Ins. Co. (In re Pazdzierz), 718 F.3d 582 (6th Cir. 2013) (Joining the Seventh and Ninth Circuits, assignee stands in shoes of assignor and can pursue § 523(a)(2)(B) exception based on assignor's reliance on materially false financial statements.).

4. 11 U.S.C. § 523(a)(2)(C): Luxury goods and cash advances
5. 11 U.S.C. § 523(d): Fees and costs

D. 11 U.S.C. § 523(a)(3)

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).).

E. 11 U.S.C. § 523(a)(4)

1. Fraud or defalcation

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.' . . .").

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.").

Pemstein v. Pemstein (In re Pemstein), 492 B.R. 274 (B.A.P. 9th Cir. 2013) (table decision) (Failure to account for rents from partnership property will support finding of defalcation for § 523(a)(4) purposes without regard to whether debtor actually received the missing rents. "[F]ocus [on actual receipt of funds] negates any difference between defalcation and embezzlement under § 523(a)(4). Embezzlement, however, is nondischargeable under § 523(a)(4) whether or not committed by someone acting in a fiduciary capacity. To equate defalcation with embezzlement, thus, would improperly render part of § 523(a)(4) mere surplusage. . . . [D]efalcation does not require conversion, whereas embezzlement does. . . . Defalcation, therefore, is broader than the misappropriation of funds or mere bookkeeping malfeasance. Defalcation includes the failure by a fiduciary to account for money or property that has been entrusted to him.").

2. Fiduciary capacity

Carpenters Pension Trust Fund for N. Cal. v. Moxley, 734 F.3d 864 (9th Cir. 2013) (Contractor is not a fiduciary for purposes of § 523(a)(4) with respect to pension plan withdrawal liability because unpaid statutory withdrawal liability is neither an asset of pension fund nor an unpaid contractual contribution. "[T]he [collective bargaining] Agreement defin[ed] the plan assets to include 'all contributions required . . . to be made' to the Fund. . . . [W]e do not have to decide the question of whether unpaid contributions are plan assets. This is because we do not deal with unpaid contributions arising from contractual obligations. This case involves withdrawal liability under ERISA that is imposed because the employer no longer has a contractual obligation to contribute. This obligation is statutory. ERISA recognizes that contributions, on the other hand, are contractual obligations that ERISA enforces . . . . For an employer, like [debtor], . . . withdrawal liability does not arise until the 'employer ceases to have an obligation to contribute under the plan,' and the employer 'continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required.' . . . Because withdrawal liability does not arise until the employer ceases to have an obligation to contribute to the plan, it cannot be considered an unpaid contribution under the collective bargaining agreement. . . . [W]ithdrawal liability is imposed by ERISA to account for the pension fund's needs going forward, and therefore is distinct from the contributions required to be made by the plan agreements. . . . One obligation is created by statute, the other by contract. . . . [E]ven if we assume that unpaid contributions can be considered assets of the Fund under the particular provisions of this agreement, and non-dischargeable, the withdrawal liability is not an unpaid contribution. . . . [T]his withdrawal liability is dischargeable.").

Mele v. Mele (In re Mele), 501 B.R. 357 (B.A.P. 9th Cir. 2013) (Under Washington state law, marriage is not an "express" or "technical" trust relationship for § 523(a)(4) purposes; inappropriate withdrawals of 401(k) funds from marital community are not defalcations in a fiduciary capacity. "Under Washington law, the requirements for creating a trust are established by statute. . . . 'A trust may be created by: (1) Transfer of property to another person as trustee during the trustor's lifetime or by will or other disposition taking effect upon the trustor's death; (2) Declaration by the owner of property that the owner holds identifiable property as trustee; or (3) Exercise of a power of appointment in favor of a trustee. . . . 'Trust creation—Requirements,' states among other provisions that, 'A trust is created only if: . . . (b) the trustor indicates an intention to create the trust.' . . . 'Trust creation—Oral trusts,' provides that, 'Except as required by a statute other than this title, a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear, cogent, and convincing evidence.' Existence of a marital relationship in Washington simply does not, of itself, satisfy any of the highlighted statutory requirements for the establishment of an express trust under Washington law. . . . [W]e conclude as a matter of law that the marital community of the parties, when they were married spouses, did not constitute an express trust relationship for purposes of § 523(a)(4). The issue then becomes whether the relationship between married spouses is appropriately characterized as a 'technical' trust relationship. As opposed to an 'express' trust, created by the covenants of the parties, a 'technical' trust is a trust imposed by law. . . . There are no comparable provisions under Washington statutes to establish the marital

relationship as an express trust or fiduciary relationship. . . . We recognize the intuitive appeal of the bankruptcy court's conclusion that marriage establishes a trust relationship between spouses that entails the imposition of fiduciary duties. However, in the absence of a Washington statute that characterizes marriage as a trust relationship or that describes the obligations of spouses in managing and disposing of community property as fiduciary in nature, we do not see how the incidental characterizations of the marital relationship and its obligations in Washington common law decisions, upon which the bankruptcy court relied for its conclusion, constitute more than generalized descriptions of fiduciary duty that do not meet the 'express' or 'technical' trust standard required as an element of a § 523(a)(4) claim.").

Pemstein v. Pemstein (In re Pemstein), 492 B.R. 274 (B.A.P. 9th Cir. 2013) (table decision) (Under California law, partners are fiduciaries within the meaning of § 523(a)(4).).

Utnehmer v. Crull (In re Utnehmer), 499 B.R. 705 (B.A.P. 9th Cir. 2013) (Applying *Bullock v. BankChampaign, N.A.*, __ U.S. __, 133 S. Ct. 1754, 185 L. Ed. 2d 922 (2013), "the bankruptcy court erred when it concluded that [the debtor] committed a defalcation 'notwithstanding [his] lack of demonstrated intent to harm or cheat his partners.'" Applying California law, provision in loan agreement to share profits in the future did not create a partnership but instead indicated an intent to form a partnership at some time in the future—insufficient to support nondischargeability under § 523(a)(4). While California law renders "all partners trustees over the assets of the partnership" and fiduciaries within the meaning of § 523(a)(4), even "'where the parties purport to establish a partnership to engage in business at a future time or upon the happening of a contingency, the partnership does not come into being until the time specified or until the contingency is removed.' . . . There is nothing in the Loan Agreement to indicate any intent to form a partnership or LLC at the time of signing the Loan Agreement, nor at any point before the execution of the operating agreement or LLC formation. . . . If there was no partnership, no trust relationship existed between the parties, and no fiduciary duty was imposed upon [debtor] at the time of execution of the Loan Agreement. . . . [A]ny subsequent behavior, whether or not accompanied by bad intent, would not be a fiduciary breach triggering exception to discharge under § 523(a)(4).").

3. Embezzlement or larceny

Bank of Am., N.A. v. Armstrong (In re Armstrong), 498 B.R. 229 (B.A.P. 8th Cir. 2013) ("[T]he only difference between a nondischargeable debt for embezzlement and a nondischargeable debt for larceny under § 523(a)(4) is whether the initial possession of the property was lawful." Debtor/sole member of LLC came into possession of insurance checks lawfully, however his personal use of the proceeds constituted embezzlement. "'Embezzlement, for purposes of section 523(a)(4), is the fraudulent appropriation of property of another by a person to whom such property has been entrusted or into whose hands it has lawfully come.' . . . 'A plaintiff must establish that the debtor was not lawfully entitled to use the funds for the purposes for which they were in fact used.'. . . 'To show embezzlement, the creditor has to prove that it entrusted its property to the debtor, the debtor appropriated the property for a use other than that for which it was entrusted, and the circumstances

indicate fraud.' . . . 'Obligations sufficient to support a claim of embezzlement are ones which make the debtor's discretionary use of the payment, prior to complying with the obligations, improper.'").

F. 11 U.S.C. § 523(a)(5)
  1. Procedure and jurisdiction
  2. To spouse, former spouse or child
  3. Separation agreement, divorce decree, order of a court of record, determination by government unit, property settlement
  4. Alimony, maintenance or support

Taylor v. Taylor (In re Taylor), 737 F.3d 670 (10th Cir. 2013) (Judgment for overpayment of spousal support was not a domestic support obligation because it was not in the nature of support. "Section 101(14A)(A) defines a debt as a 'domestic support obligation' when four requirements are satisfied. First, the debt must be owed to either 'a spouse, former spouse, or child of the debtor,' . . . or 'a governmental unit,' . . . . Second, § 101(14A)(B) next requires that the 'nature' of the debt be 'alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor . . . without regard to whether such debt is expressly so designated.' . . . Third, the debt must arise from a separation agreement, divorce decree, or property settlement agreement. . . . Finally, the debt must not have been assigned to a nongovernmental entity, unless for collection purposes. . . . The only requirement at issue in this appeal is whether the debt meets the second requirement that it be in the nature of support. Under the plain language of the statute, the debt must be 'in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse.' . . . When read in context, 'such spouse' in § 101(14A)(B) refers to 'a spouse' in § 101(14A)(A)(i). . . . [T]he modifier 'such' limits the determination of the nature of the debt with respect to the creditor-spouse referenced in § 101(14A)(A)(I). . . . [P]ursuant to the plain language defining 'domestic support obligation,' the debt must be in the nature of support to the creditor-spouse . . . .").

  5. Changed circumstances
  6. Assignment of support rights
  7. Postpetition and postdischarge alimony or support modification

G. 11 U.S.C. § 523(a)(6)
  1. In general
  2. Libel and slander
  3. Drunk driving
  4. Conversion

First Weber Group, Inc. v. Horsfall, 738 F.3d 767 (7th Cir. 2013) (Judgment for tortious interference and conversion against debtor/realtor for receiving commission in violation of legal and ethical obligations under Wisconsin law precluded relitigation of all elements of § 523(a)(6) complaint except willfulness; "intent to act" was a necessary element of the state law causes of action but "intent to injure" was not. "Willfulness requires 'a deliberate or intentional *injury*, not merely a deliberate or intentional act that leads to injury.' . . . 'Willfulness' can be found either if the

'debtor's motive was to inflict the injury, or the debtor's act was substantially certain to result in injury." . . . [T]he definition of willfulness must incorporate *Geiger*'s admonition that the requisite intent for purposes of § 523(a)(6) is the intent to injure rather than the intent to act . . . . Only one element of the § 523(a)(6) inquiry remains between [creditor] and the result it wants: willfulness, meaning either a motive to inflict injury or an act substantially certain to result in injury. The first element of conversion requires 'intentional control or taking of property belonging to another;' the third element of tortious interference requires that the interference was intentional. Both of these necessarily require only intent to act, not intent to injure. . . . Neither of the state-law claims require[d] showing intent to injure, and thus that finding was not necessary to the state court's judgment. . . . [Debtor] did not intend to injure [creditor] and . . . injury to [creditor] was not substantially certain to occur. [Debtor] could not have intended to injure [creditor] if [debtor] did not even realize that the prior agreements remained in force. . . . [E]ven if he had known the agreements remained in force, [debtor's] collection of a commission . . . did nothing formally to change [seller's] liability to [creditor]. . . . Because [debtor's] actions did not have the effect of extinguishing [seller's] debt to [creditor], injury flowing from those actions was not substantially certain to occur. [Debtor's] unethical collection of an additional commission, while not to be commended, did not affect [creditor's] legal rights against [purchaser]. If [creditor] had collected from [seller], then perhaps [purchaser] would have had a claim for willful and malicious injury against [debtor]. . . . Although [creditor] was entitled to schedule its contractual claims against [debtor] in the bankruptcy court, it failed to show that those claims should be excepted from the normal power of the court to discharge debts.").

5. Assault or battery
6. Professional "negligence"
7. Breach of contract
8. Other wrongful acts

Black v. Bonnie Springs Family Ltd. Partnership (In re Black), 487 B.R. 202 (B.A.P. 9th Cir. 2013) (Nevada judgment for abuse of process and nuisance collaterally estopped relitigation of willfulness issue under § 523(a)(6).).

Old Republic Nat'l Title Ins. Co. v. Levasseur (In re Levasseur), 737 F.3d 814 (1st Cir. 2013) (Nondischargeable debt for willful and malicious injury resulted when debtor drew against line of credit secured by property that had been sold. Line of credit remained open only because of bank error. Debtor's "'objectively wrongful' actions, 'committed in conscious disregard of her duty not to deceive,' . . . were malicious. . . . [Debtor's] deliberate use of false pretense—the Home equity Line was and should still have been available . . . following . . . sale [were willful].").

9. Agency, master-servant and imputed liability

H. 11 U.S.C. § 523(a)(7)

Disciplinary Bd. of the Supreme Court of Pa. v. Feingold (In re Feingold), 730 F.3d 1268 (11th Cir. 2013) (per curiam) (Costs and expenses of attorney disciplinary proceeding were

nondischargeable penalties for purposes of § 523(a)(7). *Kelly v. Robinson*, 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216 (1986), "extends to cost assessments arising out of attorney disciplinary proceedings. First, although attorney disciplinary proceedings are not criminal in nature, the two types of proceedings share some common goals: '[t]he ultimate goal of both criminal and attorney disciplinary proceedings is to protect the public. The imposition of sanctions and costs protects the public by restricting a lawyer's right to practice law when warranted. Monetary penalties imposed against the offender, whether part of an attorney disciplinary proceeding or a criminal proceeding, promote the state's penal and rehabilitative interests.' Second, the cost assessment provision . . . is discretionary, rather than mandatory, which further suggests that such assessments should be viewed as penalties. The Pennsylvania court, in its discretion and in consideration of the circumstances of the particular case before it, may find that the goals furthered by the disciplinary proceedings either do or do not call for the payment of costs by a disciplined attorney. In this way, the imposition of costs is rolled into the overall sanction imposed against an attorney who engages in misconduct. By making the imposition of costs discretionary, the Disciplinary Board has permitted them to be used more like a sanction than like the civil litigation analogue of awarding costs to prevailing parties as a matter of course. . . . In light of the purposes of Pennsylvania's attorney disciplinary system—deterrence and protection of the public—and the discretionary nature of cost assessments . . . , we conclude that the Disciplinary Board's judgment against [debtor] is effectively a 'fine, penalty, or forfeiture' within the meaning of § 523(a)(7). . . . [W]e 'look to the context in which the penalty [was] imposed to determine whether its purpose is truly compensatory.' . . . '[E]ven where a debt is intended to help defray the expense of government, it may not be dischargeable if its primary purpose is penal.' . . . That the cost assessment is determined based on the actual costs incurred by the Disciplinary Board in disciplining [debtor] does not automatically transform the judgment into 'compensation for actual pecuniary loss.' In *Kelly*, the nondischargeable restitution order was calculated by reference to the victim's actual loss, but this fact was not outcome-determinative. Rather, what matters is the Disciplinary Board's purpose, which as we explained above, is penal in nature. In addition, it would torture the statutory language and framework to hold that the Disciplinary Board's legal expenditures in furtherance of 'its governmental function to pursue disciplinary or remedial actions against attorneys' amounted to an 'actual pecuniary loss.' . . . 'The cost of performing such a governmental function is not an actual pecuniary loss to the State' insofar as the Disciplinary Board would perform its public function whether it could recoup the costs associated with it or not.").

I. 11 U.S.C. § 523(a)(8)
   1. Cosigners, guarantors and non-students
   2. Government made, government guaranteed or funded by non-profit institution
   3. Scholarship v. loan or educational benefit
   4. Measurement of seven-year period
   5. Undue hardship

Matthews v. Educational Credit Mgmt. Corp. (In re Matthews), 516 F. App'x 556 (6th Cir. 2013) (unpublished) (Default judgment against lender, Sallie Mae, did not extinguish obligation to guarantor, ECMC. "It is well-settled that a guarantor or surety for the debtor . . . will be a creditor

under the Code because the guarantor holds a contingent claim against the debtor that becomes fixed when the guarantor pays the creditor whose claim was guaranteed or insured.' . . . A debtor's obligations to the lender and to the guarantor are two distinct obligations. . . . [Debtor's] obligation to pay her student loans is not fully discharged without a judgment against guarantor . . . , as well as against lender Sallie Mae." Sallie Mae's failure to comply with applicable regulations respecting timing of demand upon guarantor after notice of dischargeability proceeding did not cause loan guarantee to lapse.).

Krieger v. Educational Credit Mgmt. Corp., 713 F.3d 882 (7th Cir. 2013) (District court improperly tied good faith to acceptance of 25-year payment plan. "[W]e must remember that the statutory inquiry is 'undue hardship,' a case-specific, fact-dominated standard, which implies deferential appellate review. . . . To the extent that the district judge thought that debtors always must agree to a payment plan and forgo a discharge, that is a proposition of law—an incorrect proposition . . . . What remains is a predominantly factual understanding, on which the bankruptcy judge's findings must prevail. . . . The bankruptcy judge found that [debtor's] straitened circumstances are likely to persist indefinitely. This is a factual finding and not clearly erroneous. [Debtor] lives in a rural area with few jobs. She lacks the resources to travel in search of employment elsewhere. Educational Credit contends that she could and should accept jobs that pay less than a paralegal position, but the bankruptcy judge found that she had applied without success and that '[n]ever has the Court seen such utter futility be the result of a debtor's job search efforts.' . . . She is 53 years old and has not held a job since 1986, when she left the work force to raise a family. She did not earn more than $12,000 a year in her working career (between 1978 and 1986). That's not the sort of background employers are looking for. There is no reason to think that a brighter future is in store; indeed, both the district judge and Educational Credit concede that the result of a 25–year payment plan probably would be no payments, with interest accumulating, followed by forgiveness when [debtor] reaches age 78 (forgiveness of the unpaid balance is one inducement to accept a deferred-payment plan). . . . [We have] boiled the three criteria down to 'certainty of hopelessness'. . . . That sounds more restrictive than the statutory 'undue hardship,' but at all events the bankruptcy judge found that [debtor's] situation is hopeless. That may be unduly pessimistic, but a judge asked to apply a multi-factor standard interpreting an open-ended statute necessarily has latitude; the more vague the standard, the harder it is to find error in its application. The ultimate finding of 'undue hardship' [was] neither clearly erroneous nor an abuse of discretion.").

Hedlund v. Educational Res. Inst. Inc., 718 F.3d 848 (9th Cir. 2013) (Good faith prong of *Brunner* reviewed for clear error; district court improperly applied de novo review. Bankruptcy court's good faith finding was not clearly erroneous. Thirty-three year old law school graduate unable to pass bar exam sought to discharge $85,000 in student loan debt. Bankruptcy court granted partial discharge, leaving debtor responsible for $32,080. "There was considerable evidence showing that [debtor] had maximized his income, and the court properly declined to attribute [debtor's spouse's] underemployment to [debtor's] bad faith. Although [debtor] had not fully minimized his expenses, the court permissibly interpreted the excess expenses as marginal. And although we might have viewed certain expenses more skeptically . . . the court's view of the expenses was not clearly erroneous. . . . The record regarding efforts to negotiate and to make voluntary payments is less

favorable to [debtor]. Although he did submit a consolidation application, his efforts thereafter were minimal. His offer to pay $5,000 in exchange for a more lenient plan was at best unrealistic, and his research into ICRP eligibility could have been more searching. [Debtor] . . . also declined to pursue the three revised repayment plans . . . offered just before trial. Finally, in the four years prior to bankruptcy, [debtor] made only a single voluntary payment of approximately $950. Although this evidence could be interpreted to support a finding of lack of good faith, it was not so strong as to demand such a finding. . . . [E]ven though some might disagree with the bankruptcy court's good faith finding, it was not clearly erroneous. The court relied on substantial evidence in the record, and its factual inferences were permissible.").

Conway v. National Collegiate Trust (In re Conway), 495 B.R. 416 (B.A.P. 8th Cir. 2013) (Partial discharge of student loans is not available in Eighth Circuit but each of 15 loans had to be considered individually under totality of circumstances standard. "The court does not have the authority to modify the payment terms of a student loan or to discharge a partial amount of principal or accrued interest. . . . Although partial discharge of a single loan is unavailable, [creditor] actually holds 15 separate loans. . . . [T]he monthly installment obligations on those 15 loans range from $39.63 to $98.58 per month. . . . [A] bankruptcy court can find that some loans are discharged while repayment of one or more others does not constitute an undue hardship. A separate loan-by-loan analysis was not conducted by the bankruptcy court in this case because the court made a fact finding that [debtor] had reasonably reliable future financial resources to pay the entire debt. In light of our determination that [debtor] has established by a preponderance of the evidence that she does not have reasonably reliable future financial resources to pay the entire debt, a loan-by-loan undue hardship analysis is 'required.' . . . [Creditor's] . . . 'partial repayment' argument is essentially an argument that the court should not allow discharge of the individual loans that [debtor] is able to pay without undue hardship. The record reveals that [debtor's] income fluctuates . . . The record on appeal does not reveal . . . the amount of her present disposable income, if any, available to service a loan or loans . . . over the course of an entire year. . . . [On remand] the bankruptcy court [must] determine whether [debtor's] present disposable income, if any, over the course of an entire year is sufficient to service any of the individual loan payments[.]").

J. 11 U.S.C. § 523(a)(9)
K. 11 U.S.C. § 523(a)(10)
L. 11 U.S.C. § 523(a)(11)
M. 11 U.S.C. § 523(a)(12)
N. 11 U.S.C. § 523(a)(13)
O. 11 U.S.C. § 523(a)(14)
P. 11 U.S.C. § 523(a)(15)
    1. Standing
    2. Burden of proof
    3. Timing of decision
    4. "Hold harmless" or similar language

5. Tests and standards

Kinkade v. Kinkade (In re Kinkade), 707 F.3d 546 (5th Cir. 2013) ("'[I]n determining whether a debt is non-dischargeable under . . . § 523(a)(15), it does not matter whether the debt was a community debt or a separate debt.' The statutory language requires only that the debt be 'incurred by the debtor in the course of a divorce or separation.'").

6. Income or property of debtor
7. Partial discharge?
8. In general

Kinkade v. Kinkade (In re Kinkade), 707 F.3d 546 (5th Cir. 2013) (Funds loaned by former spouse prior to marriage and during marriage are nondischargeable under § 523(a)(15) in a community property state when ordered to be repayed in divorce decree. "Holding the debt nondischargeable pursuant to Section 523(a)(15) does not equate with 'recognizing' common-law marriage in Louisiana. Section 523(a)(15) leaves it to the state court to decide whether a property right is properly addressed in divorce proceedings, or as a separate contractual claim. Only after the state court has made that determination can Section 523(a)(15) have any effect. . . . [T]he Louisiana court determined that the Debt [from the loan prior to the marriage], . . . was more than a mere contractual obligation unrelated to the marriage. Applying Section 523(a)(15) in this case merely recognizes the state court's application of its own law; it does not, as [debtor] suggests, 'rewrite the community property laws' of Louisiana.").

Taylor v. Taylor (In re Taylor), 737 F.3d 670 (10th Cir. 2013) (Judgment for overpayment of spousal support was not in the nature of support for purposes of § 523(a)(5) but was incurred in connection with a divorce decree for purposes of nondischargeability under § 523(a)(15). "Pursuant to § 523(a)(15)'s plain and unambiguous language, the overpayment debt qualifies as a nondischargeable debt: the debt arose as a result of a judgment against a spouse, [debtor], in favor of her former spouse, . . . , by the Virginia circuit court 'in connection with a separation agreement [or] divorce decree.' . . . The state court entered the overpayment judgment after retaining jurisdiction to modify the amount of . . . spousal support obligation to [debtor]. [U]nder the plain language of the statute, the overpayment judgment is a nondischargeable debt. . . . [A]pplication of § 523(a)(15)'s exception to the overpayment debt here does not produce a result at odds with the intentions of its drafters. . . . [T]here is no indication that congressional concern extended to the protection of a debtor-dependent spouse who may be responsible for repayment of wrongfully paid spousal support. . . . Even if Congress only intended to protect marital debts owed to a dependent spouse, 'the reality [is] that the reach of a statute often exceeds the precise evil to be eliminated.'").

Q. 11 U.S.C. § 523(a)(16)
R. 11 U.S.C. § 523(a)(17)
S. 11 U.S.C. § 523(a)(18)
T. 18 U.S.C. § 3613(e) and (f)
U. 37 U.S.C. § 302g(3)

V. 11 U.S.C. § 523(b)
W. 11 U.S.C. § 523(c)(1) and (2)
X. 11 U.S.C. § 523(e)

III. LITIGATION OF COMPLAINTS TO BAR DISCHARGE: 11 U.S.C. § 727

A. In general
B. 11 U.S.C. § 727(a)(1)
C. 11 U.S.C. § 727(a)(2)

In re von Kiel, No. 13-1925, 2013 WL 6768147 (3d Cir. Dec. 24, 2013) (unpublished) (Vow of poverty did not preclude finding that elaborate channeling of income through wholly-owned ministry amounted to fraudulent concealment of assets. "Concealment is defined as acting 'to secrete or hide away' or ''to prevent the discovery of or to withhold knowledge of.'' . . . [Debtor] did conceal his compensation . . . by transferring it to [the ministry] each pay period. He concealed both his compensation and the transfers themselves by using a social security number that did not belong to him. His pay was then returned to him through transfers from [the ministry] to his [personal ministry] accounts. These accounts were established using a tax identification number that did not belong to [debtor], and [debtor] retained exclusive control over these accounts, as he was the only individual with signatory authority and who had custody of the debit cards to access these accounts. Furthermore, he regularly used the funds in [his personal ministry] accounts for the benefit of his family and himself. . . . [Debtor] maintained a property interest in [his personal ministry] accounts and the funds located therein, and he disclosed neither the existence of these accounts, nor the monies on deposit as of the date of his bankruptcy petition, nor the transfers of funds into and out of these accounts. . . . [Debtor] concealed property belonging to him [for purposes of denial of discharge under § 727(a)(2)].").

D. 11 U.S.C. § 727(a)(3)
E. 11 U.S.C. § 727(a)(4)

Robin Singh Educ. Servs., Inc. v. McCarthy (In re McCarthy), 488 B.R. 814 (B.A.P. 1st Cir. 2013) (Debtor's ADHD did not excuse omission from schedules of bank accounts and retirement accounts. "Under § 727(a)(4), '[t]he existence of false or inaccurate statements is not, in and of itself, sufficient cause to deny a debtor's discharge unless it is shown that these were knowingly and fraudulently made.' . . . The intent required by § 727(a)(4)(A) is satisfied by a showing of reckless disregard for the truth. . . . Even though courts will not construe an ignorant or inadvertent omission as evidence of fraudulent intent, reckless disregard may nonetheless be found based on the 'cumulative effect of a series of innocent mistakes.' . . . Debtor failed to disclose the existence of three bank accounts, . . . all of which he actively used in the days before and after his bankruptcy filing. . . . Debtor understated the balance of [another] . . . account, and then, after the bankruptcy filing, he took funds from that account and deposited them into the undisclosed . . . account . . . that he used for his own benefit. . . . Debtor failed to disclose three retirement accounts with a combined value of more than $50,000.00. . . . Debtor gave untruthful responses to direct inquiries by the trustee . . . at § 341 meetings, his Rule 2004 examination, and his deposition . . . Debtor made

untimely and incomplete disclosures in his multiple amendments to his schedules . . . . From the foregoing pattern of misstatements and omissions, the bankruptcy court inferred that the Debtor acted with either fraudulent intent or reckless disregard for the truth. Such a finding is supported by the record and, therefore, is not clearly erroneous. . . . Debtor's explanation for his repeated false oaths was not credible. . . . [N]one of the Debtor's supposed lapses of memory or judgment operated against his selfish interests—despite his ADHD, the Debtor was able to establish and execute a system enabling him to deposit income in undisclosed accounts and shield pre-petition income from the potential reach of creditors. . . . Debtors have an absolute duty to report all assets 'even if they believe their assets are worthless or are unavailable to the bankruptcy estate.' [A] debtor cannot escape the consequences of § 727(a)(4)(A) by asserting that a bank account contains little or no money. . . . 'valuation is not really the point.' . . . 'Matters are material if pertinent to the discovery of assets . . . . Debtor's omissions in this case were material even if the assets he failed to disclose had little or no value.").

Kluge v. RHI/10223 Sepulveda, LLC (In re Kluge), No. CC-12-1344-TaPaKi, 2013 WL 1459274 (B.A.P. 9th Cir. Apr. 10, 2013) (unpublished) (Failure to disclose monthly distributions to nonfiling spouse from controlled corporation coupled with conflicting explanations of logic behind omission—sometimes repayment of a loan; sometimes return of capital investment—upset defense of reliance on counsel.).

F. 11 U.S.C. § 727(a)(5)
G. 11 U.S.C. § 727(a)(6)
H. 11 U.S.C. § 727(a)(7)
I. 11 U.S.C. § 727(a)(8)
J. 11 U.S.C. § 727(a)(9)
K. 11 U.S.C. § 727(a)(10)
L. 11 U.S.C. § 727(a)(11)

IV. REVOCATION OF DISCHARGE: 11 U.S.C. § 727(c), (d) AND (e)

In re Herman, 737 F.3d 449 (7th Cir. 2013) (Scheduling creditor with attorney's address instead of creditor's home address would not support revocation of discharge under § 727(d) when only fraud alleged related to faulty home construction years before bankruptcy.).

Jones v. United States Trustee, 736 F.3d 897 (9th Cir. 2013) (False oaths—misrepresenting existence or value of assets—that would have resulted in denial of discharge under § 727(a)(4)(A) had they been known prior to discharge support revocation of discharge under § 727(d).).

In re Seymour, Nos. WW-12-1429-TaPaJu, 12-14039-TWD, 2013 WL 3963695 (B.A.P. 9th Cir. Aug. 1, 2013) (unpublished) (Debtor did not have standing under § 727(d) to seek revocation of her own discharge. Pro se debtor moved to vacate Chapter 7 discharge because of unscheduled assets and causes of action.).

Rajala v. Taylor (In re Taylor), 495 B.R. 28 (B.A.P. 10th Cir. 2013) (Bankruptcy court appropriately granted default judgment that revoked discharge for debtor's failure to turnover copies of tax returns and to pay costs imposed by prior bankruptcy court order.).

V. DISCHARGE INJUNCTION

Chionis v. Starkus (In re Chionis), BAP No. CC-12-1501-KuBaPa, 2013 WL 6840485 (B.A.P. 9th Cir. Dec. 27, 2013) (unpublished) (Citing *Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186, 1190–91 (9th Cir. 2011), "civil contempt sanctions for the violation of the discharge injunction must be sought by contested matter rather than an adversary proceeding." Defendant's self-serving statement that he believed "no discharge" provision of loan agreement trumped discharge order was overcome by evidence of warnings from attorneys and court that discharge applied to all debt. "[T]he party seeking to demonstrate contempt in the discharge injunction context must prove by clear and convincing evidence that the alleged contemnor: '(1) [actually] knew the discharge injunction was applicable and (2) intended the actions which violated the injunction.' . . . 'To be held in contempt, the [alleged contemnors] must not only have been aware of the discharge injunction, but must also have been aware that the injunction applied to their claims. To the extent that the deficient notices led the [alleged contemnors] to believe, even unreasonably, that the discharge injunction did not apply to their claims because they were not affected by the bankruptcy, this would preclude a finding of willfulness.' . . . [Creditor] knew and understood the legal effect of the order he is charged with violating. But instead of complying with the discharge order, he opted to rely upon the untested contractual no discharge language he had implemented in an attempt to work around the unequivocal legal impact of the discharge. . . . 'It does not lie in [the contemnors'] mouths to say that they have an immunity from civil contempt because the plan or scheme which they adopted was not specifically enjoined. Such a rule would give tremendous impetus to the program of experimentation with disobedience of the law[.]'").

Canning v. Beneficial Maine, Inc. (In re Canning), 706 F.3d 64 (1st Cir. 2013) (Distinguishing *Pratt v. General Motors Acceptance Corp. (In re Pratt)*, 462 F.3d 14 (1st Cir. 2006), lender's refusal to foreclose or take possession of surrendered property and advice to debtors that they remained responsible for incidents of ownership such as property taxes, insurance and maintenance did not violate discharge injunction. "[T]he discharge injunction does not enjoin a secured creditor from recovering on valid prepetition liens, which, unless modified or avoided, ride through bankruptcy unaffected and are enforceable in accordance with state law. . . . 'Surrendering' . . . means 'that the debtor agree[s] to make the collateral available to the secured creditor-viz., to cede his possessory rights in the collateral[.]' . . . The secured creditor, however, has the prerogative to decide whether to accept or reject the surrendered collateral, since 'nothing in subsection 521(a)(2) remotely suggests that the secured creditor is required to accept possession of the [collateral].' . . . But the creditor's decision in this respect must not constitute a subterfuge intended to coerce payment of a discharged debt[,] . . . where they were required to either yield to the secured creditor's 'pay in full' demand or indefinitely remain in possession of inoperable, worthless and burdensome collateral. . . . '[T]here [was] nothing in the record . . . to evidence any expenses related to [the debtors' continued] equitable ownership other than the . . . reference in their brief to being exposed

to liability.' . . . [T]he record here does not paint a picture in which a secured creditor cornered the debtors between a rock and hard place. . . . [Debtors] never explained to the court exactly why a short sale or a settlement was out of the question for them. The record is also devoid of any other indicia of coercion, such as . . . refusal to negotiate with the [debtors] a compromise different to the one originally proposed. In fact, . . . it seems that [debtors] employed a 'take it or leave it' approach in negotiating with their mortgage lender, who, given its state-law rights over the collateral, did not have to accept the two choices presented. Bankruptcy law . . . cannot alter a secured creditor's state-law rights, unless it is shown that those rights are relied upon to coerce payment of a discharged debt. . . . [Debtors] invoke the 'fresh start' to indirectly validate the decision to abandon their residence. They do so without providing any evidence showing that the residence posed an undue burden upon them after their bankruptcy discharge. . . . [Debtors] fail[ed] to advance any legal authority . . . to support the proposition that a homeowner may walk away, with no strings attached, from their legally owned residence. But even worse, . . . [debtors] placed many of the burdens of dealing with an abandoned property on their neighbors, their town, and their city—in other words, on everyone but them. The 'fresh start' does not countenance that result. . . . Nor does it generally 'discharge the ongoing burdens of owning property,' as the bankruptcy court aptly noted.").

United States v. Monahan (In re Monahan), 497 B.R. 642 (B.A.P. 1st Cir. 2013) (Payment in full without interest of priority trust fund taxes under §§ 507(a)(8) and 1322(a)(1) did not discharge postpetition interest; IRS did not violate discharge injunction or transgress *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010), by seeking to collect postpetition interest after discharge when plan did not pay or discharge postpetition interest.).

Smith v. Missouri (In re Smith), 488 B.R. 101 (B.A.P. 8th Cir. 2013) (Post discharge deduction from debtor's inmate account pursuant to prepetition judgment under Missouri Incarceration Reimbursement Act was not violation of discharge injunction. Discharge voided judgment only to extent of dischargeable debt—costs accrued as of petition date. Judgment remained valid with respect to postpetition and future reimbursement costs.).

Pennington-Thurman v. Bank of Am. N.A. (In re Pennington-Thurman), 499 B.R. 329 (B.A.P. 8th Cir. 2013) (Multiple post-discharge letters and notices were not attempts to collect from debtor personally, but were for information purposes—to give notice of status of foreclosure and, as required by state law, of debtor's right to cure default. Lender's actions were consistent with § 524(j)(3) that excepts from discharge injunction actions limited "to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien." Notices were branded "for information purposes only." Letters acknowledged bankruptcy and stated that notice was not an attempt to collect from debtor personally. Missouri law required foreclosing creditor to inform borrower of right to cure.).

Pierce v. Carson (In re Rader), 488 B.R. 406 (B.A.P. 9th Cir. 2013) (Arizona law that required lender to commence deficiency action within 90 days after foreclosure or forfeit deficiency claim is pre-empted by Bankruptcy Code; amount and allowance of deficiency claim would be determined in bankruptcy court. "[C]ompliance with the Bankruptcy Code and A.R.S. § 33–814 was impossible

because the latter required the Carsons to file an action within ninety days of the foreclosure sale, but the automatic stay and the discharge injunction prevented them from doing so. . . . [T]he Bankruptcy Code and A.R.S. § 33–814 are in conflict and the state law must yield. . . . Requiring the Carsons to file a deficiency action pursuant to A.R.S. § 33–814 would also be contrary to the Bankruptcy Code's framework for determining the secured and unsecured status of claims.").