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Consumer Case Law Update: Important Recent Cases Affecting Your Practice

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Kinney v. HSBC Bank USA, N.A. (In re Kinney), 5 F.4th 1136, 1145 (10th Cir. 2021)

Overview: Margaret Kinney filed a voluntary Chapter 13 petition. As an above-median-income debtor, Kinney proposed a five-year plan, which was confirmed by the Bankruptcy Court. Her plan required her to make monthly mortgage payments directly to HSBC Bank (HSBC). Subsequently, because of expenses related to a post-petition car accident, she missed mortgage payments in the final months of her plan. Following the expiration of the plan term, HSBC filed a motion to dismiss under § 1307(c)(6). Kinney objected; she cured the post-petition arrears in short course. The Bankruptcy Court ruled it did not have discretion to allow Kinney to extend payments under the plan beyond the five-year period, citing its decision in *In re Humes*, 579 B.R. 557 (Bankr. D. Colo. 2018). The Bankruptcy Court rejected Kinney's argument the default was not material because the amount and number of payments were nominal. The Bankruptcy Court noted, although it had been the long-standing practice of Chapter 13 trustees to allows debtors to cure small arrearages, this practice was not sanctioned by the court or the Code. The Bankruptcy Court characterized the debtor's actions as a "material default" under her Chapter 13 plan and dismissed the bankruptcy case without entry of a discharge. Kinney appealed directly to the Tenth Circuit.

Issue: Whether the Bankruptcy Court had discretion to allow the debtor additional time after the expiration of the Chapter 13 plan term to cure missed plan payments and still obtain a discharge.

Analysis: The Tenth Circuit held the Bankruptcy Court did not have discretion to allow a debtor to cure her missed payments after their Chapter 13 plan has ended and obtain a discharge. The Tenth Circuit began by interpreting the statutory phrase "all payments under the plan" found in § 1328. The Tenth Circuit concluded this phrase was ambiguous but reasoned a review of the Code suggests a "discharge is unavailable when the plan ends with an ongoing material default." Next, the Tenth Circuit focused on the meaning of the word "under" and specifically the U.S. Supreme Court's interpretation of § 1146(c)'s "under a plan confirmed" language in *Piccadilly Cafeterias, Inc.*, 554 U.S. 33 (2008). In *Piccadilly*, the U.S. Supreme Court interpreted the phrase to mean "'subject to . . . or under the authority of' the plan" and ruled payments could not be made "under a plan" until the plan was confirmed. Applying this same reasoning, the Tenth Circuit determined payments cannot be made "under a plan" **when a plan has expired**. Payments made after a plan has ended are not "subject to" or "authorized by" the plan and therefore not "under a plan." Thus, the Tenth Circuit concluded payments "under a plan" meant payments made during the existence of the plan. Finally, the Tenth Circuit rejected Kinney's that argument § 1307(c)'s permissive language (the court "may dismiss a case") created discretion to allow the Bankruptcy Court to forgo dismissing her case, and instead treat her late payments as an informal cure and grant a discharge. The Tenth Circuit further explained the Code permits plan modifications; however, a plan cannot be modified to provide for payments outside of the five-year period. Thus, the Tenth Circuit determined a Bankruptcy Court does not have the discretion to allow a debtor who has cured an arrearage outside of the five-year plan period to obtain a discharge.

Kinney filed a writ of certiorari to the U.S, Supreme Court. The petition is pending.

In re Michael Bryan Albert, No. 16-15128, 2021 WL 4994413 (Bankr. D. Colo., Oct. 27, 2021)

Overview: The Debtor committed, in his confirmed Chapter 13 plan, to make regular monthly payments to the Chapter 13 Trustee for five years. He made all such payments for four years and eleven months, despite experiencing some financial hardships. But then, he made the final payment to the Chapter 13 Trustee 23 days after expiration of the plan term (if the beginning date of the plan is calculated according to the most common way to make such calculation). Thereafter, the Debtor requested a discharge pursuant to § 1328(a). No one objected. However, because the Debtor's discharge raised complex legal issues concerning the five-year Chapter 13 plan limit, including the issue of when the five-year plan period started, and the issue of whether the Bankruptcy Court could grant the discharge to the Debtor if he had made the payment outside of the term of the plan, the Bankruptcy Court ordered briefing on the issues. The Chapter 13 Trustee and the Debtor submitted briefs, and a group of Chapter 13 practitioners also submitted an *amicus* brief. In the meantime, the Debtor filed a motion asking the court to approve a modification of his Chapter 13 plan to extend the term from 60 months to 62 months, relying on 11 U.S.C. § 1329(d), a new amendment to the Code designed to protect debtors who had "experienced a material financial hardship due, directly, or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic." The Bankruptcy Court then determined, based on the circumstances set forth in the Debtor's motion to modify, the Debtor had satisfied the requirements of § 1329(d) such that the Bankruptcy Court could approve his modified plan extending the term for payment to the Chapter 13 Trustee from 60 to 62 months. Further, upon determining that the Debtor had made "all payments under the plan," as modified, the Bankruptcy Court granted the Debtor a discharge pursuant to § 1328(a).

Issue: Whether the Bankruptcy Court had discretion to allow the debtor additional time after the expiration of a Chapter 13 plan term to cure missed plan payments and still obtain a discharge.

Analysis: The Bankruptcy Court noted that, while debtors must generally complete plan payments within 5 years, citing *Kinney v. HSBC Bank USA, N.A. (In re Kinney)*, 5 F.4th 1136 (10th Cir. 2021), § 1329(d) allowed debtors who had suffered a material hardship due, directly or indirectly, to the COVID-19 or the Coronavirus pandemic, to modify their Chapter 13 plans. Given the foregoing resolution and application of § 1329(d), the Bankruptcy Court noted it did need not enter a ruling on the start date controversy and the application of *Kinney*. Nonetheless, in dicta, the Bankruptcy Court provided a concise summary of these issues:

Start Date Debate

The Bankruptcy Court noted there is some debate concerning when the five-year period actually begins. A few courts have determined that the five-year period starts when a Chapter 13 plan is confirmed. On the other hand, "[a] strong majority of courts and bankruptcy treatises hold that the 60 month period runs from the date the first payment is due." There is no binding appellate precedent in the Tenth Circuit on such topic. *Kinney* did not address this issue. However, the Bankruptcy Court highlighted "solid" Colorado precedent right on point: *In re Humes*, 579 B.R. 557, 567 (Bank. D. Colo. 2018) (deciding the five-year period runs from the date specified in the Chapter 13 plan for the

first plan payment — not the confirmation date which typically occurs much later.)

Bankruptcy Court's Discretion to Allow Payments After Plan Expiration

Following *Kinney*, this issue is the subject of a Circuit split between the Tenth and the Third Circuit. The Third Circuit permits a "grace period" for Chapter 13 debtors to catch up and complete all plan payments after the expiration of the five-year limit, and still obtain a discharge. The Bankruptcy Court noted that, behind the scenes, that appears to have been the practice in Colorado for years, provided that no party objected and the "cure payment" was received by the Chapter 13 Trustee within some "reasonable" amount of time after the expiration of the five-year term. The Bankruptcy Court highlighted that frequently the court was not even advised that payments had been made after the expiration of the five-year period. In 2018, however, Judge Brown criticized that practice and determined the Bankruptcy Court "does not have the discretion to allow a debtor to make plan payments beyond five years" and denied the entry of discharge for a debtor who tried to complete Chapter 13 plan payments about seven months after the end of the five-year limit in *Humes.* The *Humes* approach was effectively validated (albeit not by name) in *Kinney*. The message of *Kinney* is unequivocal: Chapter 13 debtors must complete all payments under their Chapter 13 plans within the five-year limit. The Bankruptcy Court emphasized this point: practitioners and Chapter 13 debtors now are on notice that Chapter 13 debtors must complete all payments under their Chapter 13 plans *within the five-year limit* in order to secure a discharge. That said, the Bankruptcy Court highlighted that, in *Kinney*, the default was material, and the Tenth Circuit framed the question before it as whether the Bankruptcy Court could grant a discharge under such circumstances. The Tenth Circuit ruled the Bankruptcy Court did not have the discretion to allow Ms. Kinney "to cure her default once the plan's five-year period ended." The Bankruptcy Court notes that other passages in *Kinney* are similar but reference a material default.

For example, the *Kinney* the Tenth Circuit held:

- "Though the bankruptcy code is ambiguous, its language suggests that discharge is allowable only if the debtor had no ongoing **material** default when the plan ended."
- "Section 1307(c) and 1328(a) don't definitively resolve the extent of discretion over dismissal and discharge but suggest that discharge is unavailable when the plan ends with an ongoing **material** default."
- "The bankruptcy code suggests that **material** defaults cannot be cured after the plan has ended."
- "Given Ms. Kinney's **material** default, the plan's expiration *left the Bankruptcy Court without authority to grant a discharge.* We thus affirm dismissal of the Chapter 13 bankruptcy case."
- Is the *Kinney* holding limited to material defaults? Is a single payment 23 days late where creditors were not affected a material default? The Bankruptcy Court noted "the deep mystery why the Tenth Circuit repeatedly referred to the term "material default" throughout the *Kinney* decision (especially since materiality does not feature in the text of § 1328(a)," and left answers to these questions for another day.

In re Roper, 621 B.R. 899 (Bankr. D. Colo. 2020).

Bottom line: Fees claimed due and owing post-petition, if not paid by the final plan payment, do not prevent an order of discharge.

Noting that a debtor must make all plan payments, including mortgage payments outside of the plan, Debtor had not paid $1370 in "fees" owed to the mortgage lender, incurred post-petition. Looking at Rule 3002.1 and §§ 1322(b)(5) and 1328, the court held that the post-petition fees do not have a deadline in which to pay, and that making all payments "under the plan" do not include post-petition mortgage fees, as they are not part of the confirmed plan. The court noted that Rule 3002.1(c) contains no deadline by which a debtor must pay the additional interest and charges. Nor does the rule contain consequences for nonpayment. To obtain an order of discharge, the court held the only relevant issue is whether the debtor fulfilled the obligations *under the plan.* That is limited to plan, and payments within and outside of the plan. The court notes that a discharge within chapter 13 does not apply to long-term debts, such as a home mortgage. Section 1328(c)(1).

Silvernagel v. US Bank National Association, 20CA1035, 2021 COA 128 (Colo. App. October 21, 2021).

Bottom line: The filing of a bankruptcy triggers the default provision of a note, as if "accelerated." Big implications for the expiration of a ("zombie") consensual lien.

In 2004, Sivernagel and Wu bought a home in Highlands Ranch. Two years later, the couple took out a $62,400 second mortgage with New Century Mortgage Corporation. The loan matured 2036. In 2012, a bankruptcy court discharged Silvernagel's personal liability on the note. He stopped making note payments.

In June 2019, the couple filed for declaratory relief against US Bank claiming that the bank began demanding payment on the underlying discharged debt and threatening to foreclose on Silvernagel even though it could not prove it was the owner of the deed of trust and could not start foreclosure because of statutes of limitations and the doctrine of laches. Silvernagel also requested a declaratory judgment that he and Wu owned the property in fee simple unencumbered by the deed of trust and US Bank had "no further rights" to it.

The district court dismissed the complaint after US Bank provided a copy of the MERS report showing it was the current trustee. It also accepted the bank's arguments that because the deed of trust extended to 2036, a final limitations period had not yet commenced and Wu could have the deed of trust enforced against him since he signed to grant "an enforceable interest in the Property to the Trustee [US Bank] under the terms of the Deed of Trust."
Silvernagle appealed the dismissal. Appellant argued that US Bank didn't have standing to enforce the deed and that the lower court erred in dismissing the claim based on US Bank's claim that a new

cause of action opened every month Silvernagle didn't make payment and that the statute of limitations extended to at least 2036.

The court dismissed the first appeal claim but agreed with the second one regarding the statute of limitations. It held that Silvernagle's 2012 discharge in bankruptcy meant that he didn't have personal liability for the monthly non-payments afterward. The court applied reasoning used in a similar case from Washington's Court of Appeals to find that the **correct statute of limitations was six years from the bankruptcy discharge in 2012.** US Bank filed a notice of appeal.

Nitka v. Dept. of Educ. (In re Nitka), 857 Fed. Appx. 965 (10th Cir. 2021)

Overview: Debtor filed Chapter 7 seeking a hardship discharge of student loans in excess of $200,000. Debtor had a history of not paying his student loans, even when he had income from employment. The Department of Education moved for summary judgment, which the Bankruptcy Court granted.

Issue: Did Debtor meet the criteria to be eligible for to a student loan hardship discharge under section 523(a)(8)?

Analysis: To establish undue hardship for discharging student loans under § 523(a)(8), a debtor must satisfy three factors: (1) that the debtor cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans. *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1307, 1309 (10th Cir. 2004) (internal quotation marks omitted). The test must be applied to allow discharge for "debtors who truly cannot afford to repay their loans." Because the Bankruptcy Court ruled in favor of Debtor on the first and third factor, the only issue was the existence of "additional circumstances" under the second *Polleys* factor. When considering this factor, a court must take "a realistic look . . . into [the] debtor's circumstances and . . . ability to provide for adequate shelter, nutrition, health care, and the like." A "court[] should base [its] estimation of a debtor's prospects on specific articulable facts, not unfounded optimism, and the inquiry into future circumstances should be limited to the foreseeable future, at most over the term of the loan." A debtor need not show "a certainty of hopelessness," but the second factor "recognizes that a student loan is viewed as a mortgage on the debtor's future." Here, the Bankruptcy Court found the Debtor was young, had no dependents, and had a law degree. Moreover, the Debtor's job seeking history showed he spent much more time developing new business instead of search for jobs. Debtor had waived any argument for hardship discharge based on a medical condition. Ultimately, the Court affirmed the Bankruptcy Court's conclusions that while Debtor's current financial situation was bad, the state of affairs was not likely to persist.

McDaniel v. Navient Sols. Inc. (In re McDaniel), 2020 WL 5104560 (10th Cir. Aug. 31, 2020).

Overview: The Debtors filed a Chapter 13 bankruptcy case in 2009. The filing included eleven student loan accounts with Sallie Mae, with an approximate balance of $200,000. The Sallie Mae accounts covered six private student loans that Ms. McDaniel used to pay college expenses. The debtors' confirmed Chapter 13 plan provided that "[s]tudent loans are to be treated as an unsecured Class Four claim or as follows: deferred until end of plan." A standard discharge order was issued, and the case was closed. After the discharge, the McDaniels made $37,460 in payments on the loans. The debtors subsequently reopened the bankruptcy case and filed a complaint against Navient seeking (i) a declaratory judgment that their student loans were discharged in bankruptcy and (ii) damages arising from discharge violations. Navient moved the bankruptcy court to dismiss the McDaniels' complaint under Rule 12(b)(6), arguing res judicata due to plan statement that the loans were non-dischargeable, and that the loans were non-dischargeable under 11 U.S.C. §523(a)(8)(A)(ii) because the constituted "an obligation to repay funds received as an educational benefit". The bankruptcy court denied the motion, rejecting the res judicata argument and the statutory argument finding that "the plain language" of §523(a)(8)(A)(ii) established that educational loans are not obligations to repay funds received as an educational benefit. Navient filed an interlocutory appeal directly to the Tenth Circuit.

Issue: Whether it was res judicata that the student loans were excepted from the discharge based on the confirmed Chapter 13 plan and whether the student loans are non-dischargeable under § 523(a)(8)(A)(ii) as an "educational benefit".

Analysis: First addressing the res judicata argument, the Court affirms the bankruptcy holding that the short provision in the Debtors' Chapter 13 plan contained no explicit statement or determination as to the dischargeability of the student loans. Next, the Court turns to the merits of Navient's claim that 11 U.S.C. §523(a)(8)(A)(ii) excepts the student loans from discharge. The Court notes that there are three types of debt excepted from discharge in §523(a)(8): 1) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit; 2) any other educational loan that is a qualified educational loan; and at issue here 3) an obligation to repay funds received as an educational benefit, scholarship, or stipend. The Court again agreed with the bankruptcy court's finding that subsection (A)(ii) does not apply to loans based on the court's analysis of both the language and construction of the provision. The Court continues by conducting its own analysis of the history, plain language and meaning of the statute, concluding with a rejection of all of Navient's arguments as "meritless" and conclude it failed to shoulder its burden. Navient's appeal is denied and the case remanded for further proceedings in the bankruptcy court.

Sweet v. Cardona, No. 19-CV-3674 (formerly *Sweet v. DeVos)* (N.D. Cal.) pending.

Overview: The Department of Education offers several non-bankruptcy federal student loan discharge remedies for borrowers who are unable to repay their loans. One such remedy is the borrower defense loan discharge program. If a school misled borrowers or engaged in other

misconduct in violation of certain state laws this discharge may be available for some or all a borrower's federal student loan debt. During Betsy DeVos' tenure as the Secretary of Education, the Department refused to enter decisions on any applications.
Seven borrower defense applicants ("plaintiffs") sued the U.S. Department of Education because it did not issue a final decision on any borrower defense application from June 2018 until December 2019. The plaintiffs later added a claim to their complaint that the Department's form notices denying borrower defense applications, issued between December 2019 and October 2020, were unlawful. The lawsuit challenges the Department's refusal to make final decisions on borrower defense applications and its issuance of unlawful form denial notices. In October 2019, the Court certified the class of over 200,000 borrowers with pending applications.

In Spring 2020, the parties filed a proposed settlement agreement that promised to provide all settlement class members a decision on the merits of their borrower defense claims within 18 months and relief (either partial or complete loan discharge) within 20 months of the effective date of the agreement. The agreement also included provisions for reporting the statistics on how many decisions were made, how many class members received relief, the names of the schools that eligibility findings were made for, and the status of decisions for school that had more than 100 borrower defense applications. Shortly after the filing of the agreement, Department of Education sent out tens of thousands of blanket denials. Most of the letters denied relief due to "lack of evidence" despite extensive evidence being submitted with the applications.

In Fall 2020, the Court held a hearing via Zoom, attended by over 500 student borrowers, and the judge found that Department of Education had not acted in good faith in sending the blanket denials, and rejected the proposed settlement. The judge ordered discovery, including turnover of documents and deposition of officials at Department of Education, which revealed evidence that the agency had created a sham process to deny borrowers relief regardless of evidence. In March 2021, a supplemental complaint was filed with the Court incorporating new allegations against the department.

Since early 2021, the Department of Education has been rolling out borrower defense relief for some borrowers. This began with a recission of the formula for calculating partial loan relief. It also includes the approval of more than 1,800 claims for individuals who attended Court Reporting Institute, Westwood College and Marinello School of Beauty for total relief of $55.6 million and another $500 million for 18,000 borrowers who attended ITT Technical Institute. While the Biden administration has undertaken efforts to reverse the policies of the previous administration, they have also tried to shield Secretary DeVos from having to be deposed for the *Sweet* case.

California Coast University v. Aleckna, Case No.: 3:16-cv-00158 (M.D. Pa. August 28, 2019).

<u>Bottom line</u>: Holding a transcript ransom until the student loans are paid is not a good idea. And arguing the law is "unsettled" does not go far.

Debtor was a student at the college. She completed her coursework but failed to make all tuition payments. College put a "hold" on her transcripts. Debtor filed bankruptcy, listed college as creditor. Post-petition, Debtor asked college for her transcripts. College declined, noting she owed money. Debtor filed adversary action. College counterclaimed. Bankruptcy court held willful violation of stay against college. Court ordered that transcript to be provided to debtor. College appealed. Appellant court held: to establish a lack of willfulness, the law must be unsettled, and the creditor must take an action in reliance on some persuasive authority. In this case, college failed to point to any persuasive authority to suggest that the law may be unsettled and fails to show that it relied on any authority when it withheld the transcript.

Walters v. Stevens Littman Biddison Tharp & Weinberg LLC (In re Wagenknecht), 971 F.3d 1209 (10th Cir. 2020).

Overview: Wagenknecht and his wife filed for relief under chapter 13 of the Bankruptcy Code on January 19, 2016. The case was converted to chapter 7 and Jared Walters was appointed as the trustee for the estate (the "Trustee"). Prior to the Petition Date, Stevens, Littman, Biddison, Tharp & Weinberg, LLC (the "Law Firm") provided legal services to Wagenknecht and by the end of 2015, he owed the Law Firm over $20,000. Wagenknecht asked his mother to borrow $21,672.65 to pay the Law Firm in January 2016. On January 11, 2016, he executed a promissory note to repay her (the "Note"). Although the Note does not place any conditions on the loan, Wagenknecht's mother stated that she would not have made the loan unless the funds were used to pay the Law Firm. She wrote a check on January 14, 2016, in an amount of $21,672.65 and she delivered the check directly to the Law Firm, who cashed the check on January 15, 2016. The Trustee initiated an adversary proceeding against the Law Firm alleging that the payment was a preferential transfer that could be avoided and the payment recovered under 11 U.S.C. §§ 547 and 550. The parties cross-moved for summary judgment, and the Bankruptcy Court entered an order denying the Law Firm's motion for summary judgment and granting the Trustee's cross-motion for summary judgment. The Law Firm appealed. The United States Bankruptcy Appellate Panel for the Tenth Circuit affirmed the Bankruptcy Court's decision. The Law Firm appealed to the United States Court of Appeals for the Tenth Circuit.

Issue: Whether the payment to the Law Firm constituted a "transfer of an interest of the debtor in property" as a matter of law under 11 U.S.C. § 547(b). More generally, the Court of Appeals analyzed whether a debtor has an interest in loan proceeds used to directly pay a pre-existing creditor where the creditor exercised exclusive control over the disbursement of the loan proceeds and those proceeds never came under the control or authority or in the possession of the debtor.

Analysis: Although the Bankruptcy Code does not define "an interest of the debtor in property," the United States Supreme Court has held that phrase is "coextensive with property of the estate as defined in 11 U.S.C. § 541(a)(1)." *Begier v. IRS*, 496 U.S. 53, 58–59 (1990). The Court of Appeals applied both the dominion/control and diminution of the estate tests identified in *Parks v. FIA Card Services, N.A. (In re Marshall)*, 550 F.3d 1251 (10th Cir. 2008), to determine whether Wagenknecht

had a legal or equitable interest in the payment to the Law Firm. The Court of Appeals determined that neither the dominion/control nor diminution of the estate test was satisfied in this case. First, Wagenknecht did not, and could not, exercise dominion or control over the funds used to pay the Law Firm because he did not have "an ability to direct their distribution." Second, the payment to the Law Firm did not diminish Wagenknecht's bankruptcy estate because the monies never became part of the estate. The Court of Appeals reversed the order and judgment of the Bankruptcy Court and remanded for further proceedings.

Dissent: Judge Briscoe dissented because in her view, the Bankruptcy Court was correct in treating the payment by Wagenknecht's mother on behalf of her son to the Law Firm as a preferential transfer under 11 U.S.C. § 547. His mother's funds paid directly to the Law Firm became an asset of the bankruptcy estate because Wagenknecht executed a Note in favor of his mother. Additionally, the dissenting opinion objects to the earmarking doctrine, and particularly to its extension to a situation beyond when an earmarked payment was made by a guarantor or surety of a debt of the estate.

Doll v. Goodman (In re Doll), 2021 WL 5768991 (D. Colo. 2021), No. 21-cv-00731-RBJ, (D.Colo. December 6, 2021).

Bottom line: The chapter 13 trustee may not retain his "percentage fee" in a chapter 13 case that is dismissed, prior to confirmation.

Siding with the majority, Judge Jackson reversed the bankruptcy court and held that a chapter 13 Trustee is not entitled to be paid if the case is dismissed before confirmation of a plan. The District Court reviewed the Tenth Circuit opinion of *In re BDT Farms, Inc.,* 21 F.3d 1019 (10th Cir. 1994), relied upon by the bankruptcy court. *BDT* concerned the calculation of the standing trustee's fee under 28 U.S.C. § 586(e) in a Chapter 12 bankruptcy. The question was whether the standing trustee's fee should be calculated on the total amount collected by the trustee or on the amount to be paid to creditors (after deduction of the trustee's fee). The Handbook's policy was that the trustee's fee was a percentage of all monies received from the debtor, including the trustee's fee itself. In *BDT*, the court held that § 586 was ambiguous. As such, it deferred a reasonable interpretation of the statute by the agency, i.e., so-called *Chevron* deference. *Id.* at 1023.

In *Doll*, the appellate court distinguished *BDT*, noting the court did not consider the issue presented in Doll, that is, where the plan is not confirmed. And *BDT* did not construe or consider § 1326. The appellate court noted that Chapter 12 has a mechanism to pay a trustee when a case is dismissed prior to confirmation. Chapter 13 has no equivalent provision.

The trustee has appealed to the 10th Circuit.

In re McCune, 20-12326-j7 (Bankr. D. N.M. Nov. 12, 2021)

Overview: Debtors filed a pro-se Chapter 13 bankruptcy case in 2020, and subsequently retained counsel to assist them. Counsel filed an interim Fee Application in July 2021. The case went through several hearings, motions, and opinions on a variety of unrelated issues. Counsel moved to withdraw in October 2021, shortly before the Court entered a Memorandum Opinion and Order denying the debtors' Motion to Convert the case to Chapter 11, denying a creditor's motion to convert to Chapter 7 and granting the debtors the opportunity to voluntarily dismiss their case, or convert to Chapter 7.

Issue: Whether funds the debtors had paid to the Chapter 13 Trustee should be paid to the debtors' attorney who have an allowed administrative claim for fees, pursuant to §1326(a)(2), and whether a debtors' assignment of the funds held by the Trustee to their counsel provide an independent basis for payment of the funds to debtors' counsel.

Analysis: The Court, citing *Harris v. Viegelahn*, 575 U.S. 510 (2015), held that the funds on hand could not be distributed to attorneys under §1326(a). In that case, the Supreme Court held that "a debtor who converts to Chapter 7 is entitled to return of any post-petition wages not yet distributed by the Chapter 13 trustee" under the terms of a confirmed plan. The Bankruptcy Court had previously held that funds held by the Chapter 13 trustee upon conversion could not be used to pay an administrative claim but must be returned to the debtor. This follows the reasoning of most courts in the 10th Circuit.

The next question before the Court was whether a debtors' assignment of the funds held by the Trustee to their counsel, either pre-petition via the engagement agreement, or post-conversion via a certified voluntary assignment. The Court points out that a prior New Mexico case addressing *Viegelahn*, suggested, in dicta, that debtors' counsel could include an assignment of the funds as part of an engagement agreement. The Court holds that such an assignment is permissible. Pointing out that this does not require the Court to give effect to any Chapter 13 provision, as prohibited by *Viegelahn*, instead it is simply honoring the private agreement of the parties. Finally, the Court expands this proposition by holding that an assignment by the debtors to have the Chapter 13 Trustee pay the funds to their attorney post-conversion was also allowed, if there was a certification from the debtor that the assignment was voluntary. The Court even provides suggested language for the certification.

In re Taylor, 631 B.R. 346 (Bankr. D. Kan. 2021).

Overview: Debtor filed for Chapter 13 in 2016 and confirmed a Chapter 13 plan providing for monthly payments of $175 per month. The plan provided for filing fees, attorney fees, secured debts including a car and a mattress and the trustee fees. There was no provision for unsecured creditors. In 2019, the debtor suffered personal injuries and in 2021 filed a Motion to Appoint for an attorney to recover on a claim arising from the injuries. Two days after the motion was filed, the Trustee filed a Motion to Modify the Chapter13 Plan to provide for payment on unsecured creditors in full. The

Debtor objected. Subsequently, the Debtor filed a Motion to Approve the settlement of the personal injury case in the amount of $295,000 gross, with $141,357.90 net proceeds payable to the debtor. The confirmed plan provided that "property of the estate included all property acquired after the filng of the bankruptcy petition including earnings."

Issue Presented: Whether property acquired by the Debtor because of a post-petition injury is included in the application of the best interest of creditors test when a modified plan is proposed.

Analysis: The Chapter 13 Trustee argued that the Motion to Modify should be granted because the settlement proceeds were property of the estate under §1306(a) and §541 and because 1329(a) incorporates §1325(a)(4), the best interest of creditors test. Under that test, the plan must provide payment to unsecured creditors in an amount not less than they would receive in a Chapter 7 liquidation. The Trustee argues that the settlement proceeds must be included in the hypothetical liquidation. While the Debtor does not contest that the proceeds are property of the estate, she did object to the inclusion of the proceeds in the best interest of creditors test.
The Bankruptcy Court reviews cases on both sides, noting that the application of the best interest of creditors test requires comparison of two calculations.

The first is the value of the property to be distributed to unsecured creditors as of the "effective date of the plan." The Court addresses the determination of the effective date of the plan, and notes that the Code does not provide for "confirmation of a modified plan, rather a plan as modified becomes the plan if not disapproved. Relying on a 1st Circuit decision, *In re Barbosa*, 235 F.3d 31 (1st Cir. 2000), the Court agreed with the Trustee that the effective date is the effective date of the modified plan. This interpretation better provided for the interaction between §1329(b) and §1325(a)(4). Specifically, it was the best interpretation when the property of the estate does not vest in the debtor until discharge.

The second calculation is the amount that would be paid on each allowed unsecured claim if the debtor's estate were liquidated on the effective date in a hypothetical Chapter 7 case. The Court rejects the Trustee's position that §1306 requires that property acquired post-petition should be included in the best interests of creditors analysis. Instead, the Court looks to §348(f) which provides that property of a Chapter 7 estate resulting from a good faith conversion consists of property of the estate as of the date of filing the petition that remains in the debtor's possession or control at the time of conversion. Since the converted estate excludes 1306 property, unsecured creditors would not benefit from the settlement of Debtor's post-petition personal injury claim if the case were converted to a Chapter 7.

Finally, the Court notes that while the majority position appears to favor inclusion of the post-petition windfall property in the best interest calculation, several prominent commentators including The *Lundin on Chapter 13* treatise and the *Chapter 13 Practice & Procedure* §11.9 co-authored by Colorado Chapter 13 Trustee, Adam Goodman, reject the result.

In re Gosch, 627 B.R. 669 (Bankr. D. Colo. 2021).

Overview: Debtor-wife received $46,500 as a result of a personal injury settlement. Debtor-wife, along with her husband, filed a chapter 13 case four days after receiving the personal injury settlement proceeds (the "PI Proceeds"). The Debtors calculated their disposable income to be $582 per month and proposed a 60-month plan totaling $93,734 in plan payments, including approximately $35,000 for unsecured creditors.

Debtors claimed the PI Proceeds were 100% exempt under Colorado Law, C.R.S. §13-54- 102(1)(n). The chapter 13 trustee objected to Debtors' claim of exemption and objected to confirmation unless the PI Proceeds were contributed to the plan for distribution to allowed unsecured claims pursuant to 11 U.S.C. §§1325(a)(3), (4), and (b). The trustee also argued that the plan was filed in bad faith. Debtors filed two amended plans; neither proposed contributing the PI Proceeds to unsecured claims. The Trustee filed the same objections to confirmation. In the interim, the Court entered a ruling on the objection to the exempt status of the PI Proceeds, holding the PI Proceeds were exempt as to the Debtors.

Issue: Are personal injury proceeds received less than a month prior to a chapter 13 filing date subject to projected disposable income calculations?

Analysis: The Court highlighted the somewhat misleading nature of the "Current Monthly Income" standard as defined in the Code, which differs from "Combined Monthly Income" which is used for purposes of determine monthly net income indicated on Schedule I. The standard for determining Current Monthly Income ("CMI") is set forth in section 101(10A) as "the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on—(i) the last day of the calendar month immediately preceding the date of the commencement of the case." Section 1325(b)(2) defines disposable income as the CMI received by the Debtor less reasonable amounts to be expended. CMI is, in fact, not current at all— it is determined by averaging a debtor's income from the six months preceding the bankruptcy petition date, not including the month in which the case is filed. Further, A debtor must propose and obtain Court approval of a "plan under which [the debtor] pay[s] creditors out of . . . *future income*."

In the instant case, Debtor-wife received the PI Proceeds in the month in which her bankruptcy case was filed, and therefore, the PI Proceeds were received outside the CMI timeframe set forth in sections 1325(b)(2) and 101(10A). Further, under section 1322(a)(1), a plan must "provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan." The Court noted Congress' use of the word "future" twice. The Court ultimately found that Debtor-Wife received the PI Proceeds prior to the petition date during a "gap period," and therefore, Debtors are not required to contribute the PI Proceeds as "projected disposable income." The Debtors were allowed to retain

the PI Proceeds as their exempt asset.

In re Barragan-Flores, 984 F.3d 471 (5th Cir. 2021).

Bottom line: Debtor cannot bifurcate (and cram down) collateral when secured by one loan.

Debtor financed two vehicles under two separate loans. Loans were "cross-collateralized." Debtor's plan elected to surrender one vehicle, cram down the other. Fifth Circuit said no-can-do. "Debtors must select the same § 1325(a)(5) option for all of the collateral securing a single claim." Citing *Associates Commercial Corporation v. Rash* "(1) "[a] plan's proposed treatment of secured claims can be confirmed if *one of three* conditions is satisfied" and (2) "[i]f a secured creditor does not accept a debtor's Chapter 13 plan, the debtor has *two options* for handling allowed secured claims: surrender the collateral to the creditor ... *or,* under the cram down option, keep the collateral over the creditor's objection." The 5th Circuit held that a debtor must select the same § 1325(a)(5) option **for all the collateral securing a single claim**.

Penfound v. Ruskin (In re Penfound), 7 F.4th 527 (6th Cir. 2021)

Bottom line: If you want to deduct retirement contributions, best to have a 6-month pre-petition history.

Penfound worked for a company that provided employees a 401(k) plan. In 2017, Penfound went with a new company, which did not offer a 401(k) plan. Thus, Penfound could no longer make contributions to a 401(k) plan. He left that company and began work at another company. That company did offer a 401(k) program. He eventually began making contributions. In 2018, he filed chapter 13. In his budget, he sought to deduct $1375.01 per month from his disability income as a voluntary contribution to the 401(k) plan. Trustee objected.

Bankruptcy court held deductions could not be taken off the couple's disable income. District court affirmed. Sixth Circuit held that § 541(b)(7) is "best read to exclude from disposable income a debtor's post-petition monthly 401(k) contributions so long as those contributions were regularly withheld prior to filing. Court rejected "good faith" argument, and noted debtor made contributions within 6 months of filing.

*Stevens v. Whitmore***,** 617 B.R. 328 (9th Cir. 2021).

Bottom line: A debtor can never "over-disclose" on the schedules.

While the state suit was pending, debtors filed for bankruptcy. On a schedule that asked about claims against third parties, they stated they had none. They listed the mortgage servicing company as a non-

priority creditor, and they disclosed the state lawsuit in their Statement of Financial Affairs. They also discussed the state lawsuit with the bankruptcy trustee. The trustee determined there were no scheduled assets that would benefit the estate, and the bankruptcy court discharged the trustee and closed the case. Later, the mortgage servicing company contacted the bankruptcy trustee and offered to settle debtors' claims in the state lawsuit. The trustee was reappointed by the bankruptcy court, took over the state lawsuit, settled it, and got the settlement approved by both the state court and the bankruptcy court. The settlement proceeds went to the bankruptcy estate, not the debtors.

“We conclude that property listed only on the SOFA, § 521(a)(1)(B)(iii), is not "scheduled," and thus without Trustee or court action, cannot be abandoned under § 554(c). We acknowledge that the Debtors' failure to list the state lawsuit on a schedule may have been an inadvertent oversight, but given the statute's plain text, we cannot consider equitable arguments. The Debtors could have amended their schedules "as a matter of course at any time before the case . . . closed." Fed. R. Bankr. P. 1009(a). But they didn't.”

In re Guillen, 972 F.3d 1221 (11th Cir. 2020).

Bottom line: ‘Changed circumstances” not needed to modify a chapter 13 plan, post-confirmation.

The Eleventh Circuit addressed whether a party is required to demonstrate that they experienced some change in circumstances to modify a confirmed Chapter 13 bankruptcy plan under 11 U.S.C. § 1329. The ruling answered a question of first impression for the Eleventh Circuit that has divided some of its sister circuits. The First, Fifth, and Seventh Circuit Courts of Appeals do not require a threshold showing of any change in circumstances to modify a confirmed bankruptcy plan. The Fourth Circuit does require such a showing. The Eleventh Circuit ultimately determined that a change in circumstances is not required to modify a plan, and thereby concurred with the First, Fifth, and Seventh Circuits.

In re Mattorano, No. 20-11814-JGR, 2021 WL 4558291 (Bankr. D. Colo. Oct. 5, 2021).

Overview: Individual Debtors owned and operated a company known as Innovative Baths and Remodeling. Innovative entered a contract to build an addition to a customer’s home and took a $60,000 deposit. A dispute arose as to the quality of the work, and the customer/creditor sued in Adams County District Court. The state court issued a 33-page opinion and entered judgment in favor of Creditors and against Debtors in the total amount of $102,645 on the claims for breach of contract, breach of warranty, negligence, and fraud. The state court denied Creditors’ civil theft claim. The Colorado Court of Appeals affirmed the judgment. Over the course of the bankruptcy case, the Creditors aggressively sought examinations, stay relief, and filed a nondischargeability action. Debtors conceded the debt is nondischargeable and proposed a plan which would make payments for 60 months, then satisfy the balance of the nondisachargeable portion of the Creditors’ debt from the

equity in the Debtors' home. Creditors objected based on Debtors' alleged lack of good faith premised on the state court judgment and findings of fraud; miscalculation of Debtors' expenses; and because dismissal in favor of state court collection was more fair treatment of the nondischargeable claim.

Issue: Whether the Debtors' plan was proposed in good faith, met the feasibility requirement, and was otherwise confirmable.

Analysis: Under *Flygare v. Boulden (In re Flygare)*, 709 F.2d 1344 (10th Cir. 1983), there are eleven factors for the Court to consider in evaluating the totality of the circumstances in a good faith analysis. In the case of *In re Cranmer*, 697 F.3d 1314 (10th Cir. 2012), the Tenth Circuit affirmed the continued validity of the Flygare test in analyzing good faith and instructed the Bankruptcy Court to also consider: (i) whether the debtor has stated debts and expenses accurately, (ii) whether the debtor has made any fraudulent misrepresentation to mislead the Bankruptcy Court, and (iii) whether the debtor has unfairly manipulated the Bankruptcy Code. In finding the *Flygare* factors supportive of finding good faith under the evidence in the case, the Court rejected the Creditors' reliance on *In re Gier*, 986 F.2d 1326 (10th Cir. 1993) and *In re Melendez*, 597 B.R. 647 (Bankr. D. Colo. 2019). In *Gier*, the court found the debtor was not acting in good faith because the timing of his bankruptcy filing, together with his proposal to discharge otherwise non- dischargeable debt, indicated he was not motivated by a desire to pay creditors. In *Melendez*, the debtor's plan proposed to pay $59,700 into his own retirement account while paying only $8,521.80 into the plan, none of which would go to unsecured creditors. In contrast, the Debtors in *Mattorano* were not discharging the fraud judgment, the payments were significant, the Debtors were paying all their disposable income over the maximum 5-year plan term, and the Debtors retained no surplus. The court dealt with the feasibility issue summarily, holding that "Debtors have had relatively stable income from the remodeling business, are sincerely motivated to comply with the terms of the Plan, and have the budgeting skills to complete the Plan. They should be afforded the opportunity to fund the Plan and pay their creditors."

Faculty

Stephen E. Berken is a partner with Berken Cloyes, PC in Denver, where he focuses his practice on consumer bankruptcy law, and he is the Colorado state chair for the National Association of Consumer Bankruptcy Attorneys. He handles cases involving chapter 7 and 13, and the defense and prosecution of bankruptcy adversary matters. Mr. Berken is the founding member of the Colorado Consumer Bankruptcy Association and the creator of the Colorado Debtors' Counsel Listserv, an online source of information for debtors' counsel in the state of Colorado provided as a free service to counsel of the debtors' bar. He serves on the advisory board for ABI's Rocky Mountain Bankruptcy Conference and is Board Certified in Consumer Bankruptcy Law by the American Board of Certification. He also is the former state chair for CARE (Credit Abuse Resistance Education). Mr. Berken was named Bankruptcy Attorney of the Year by *5280 Magazine* for 2014, 2015, 2016, 2017 and 2018, and was named in *Super Lawyers* from 2020-21. He received his B.A. *cum laude* in political science from the University of California in 1981 and his J.D. from the University of California-Hastings College of Law in 1984.

Tara G. Salinas is the founder and managing attorney of Salinas Law Group LLC in Denver, and her practice focuses on consumer chapter 7 and 13 bankruptcy and litigation, as well as student loan law. She founded her law firm in 2003 and has handled hundreds of personal and business bankruptcy cases since then. In 2018, Ms. Salinas expanded the practice to include litigation and settlement of private student loans, as well as providing assistance to distressed federal student loan borrowers. She is a frequent speaker at local, regional, national and international bankruptcy programs, including being a speaker at the ABI's Rocky Mountain Conference in 2022, 2020, 2015, 2014, 2012 and 2009 and a contributor to the Central and Eastern European Law Institute's program on International Models of Insolvency in 2020, 2018 and 2017. Active in her local bankruptcy bar, Ms. Salinas has been a member of two judicial selection committees recommending bankruptcy judicial candidates to the district court. She also has served on the Colorado Bankruptcy Local Rules Standing Committee since 2010 and sponsors and manages the Debtors' Counsel Listserv for Colorado consumer debtor lawyers. Ms. Salinas received her B.A. in history from Colorado State University and her J.D. from the University of Colorado School of Law.

Hon. Kimberley H. Tyson is Chief U.S. Bankruptcy Judge for the District of Colorado in Denver, initially appointed to the bench in May 2017. Previously she was a director of Ireland Stapleton Pryor & Pascoe, PC, where her practice focused on bankruptcy and related litigation. She represented secured and unsecured creditors, creditors' committees, trustees and purchasers in bankruptcies, as well as clients in contested foreclosure proceedings and lender-liability cases. She also pursued hidden or improperly transferred assets. In March 2011, she was appointed to the panel of chapter 7 trustees by the U.S. Trustee. Ms. Tyson is a former chair of the Colorado Bar Association's Bankruptcy subcommittee and is a frequent lecturer on bankruptcy issues, co-authors the bankruptcy chapter of the *Annual Survey of Colorado Law*, and has been named in *Colorado Super Lawyers*. She is an active member of ABI, having served on its Rocky Mountain Bankruptcy Conference advisory board since 2003. Ms. Tyson clerked for Hon. John K. Pearson of the U.S. Bankruptcy Court for the District of Kansas and Hon. Jerry G. Elliot of the Kansas Court of Appeals. She earned her B.A. at Smith College and her J.D. at the University of Kansas School of Law.