



AMERICAN
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2018 Northeast Bankruptcy Conference and Consumer Forum

Get a Big Retainer! Preparing Complex Consumer Cases

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ABI Northeast Conference 2018

NE Bankruptcy Consumer Forum

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“Spotting Criminal Issues in a Complex Case”

-Daniel M. Rabinovitz, Esq.

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Spotting Criminal Issues in a Complex Case

The purpose of this presentation is to highlight the need for Debtor's counsel to identify potential criminal liability issues in the early stages of their representation. When that occurs, it is imperative for Debtor's counsel to consult with experienced criminal defense counsel. Whenever possible, this should occur before certain seemingly harmless steps are taken that, unbeknownst to many Debtor's counsel, may undermine a Debtor's ability to defend themselves against potential criminal liability.

In a variety of cases, it is immediately apparent from the beginning of your representation of a Debtor that potential criminal issues exist. For example, if your Debtor client is President of a company whose business appears to have been a Ponzi scheme, or if the Debtor was an officer of a company that sold contaminated consumable product causing consumers to become sick and/or die. In these types of cases, the potential for criminal liability is readily apparent and Debtor's counsel will consult with, and often hire, criminal defense counsel. But in many other cases, potential criminal culpability may not be so obvious. In those cases, Debtor's counsel must be prepared to spot potential criminal issues, so that routine bankruptcy practices do not hamstring a Debtor's ability to defend against criminal allegations.

The need to identify potential criminal liability issues early in your representation is important for several reasons. First, 18 U.S.C. § 3057 obligates a Trustee who has "reasonable grounds" for believing that the laws of the United States have been violated to report that to the appropriate United States Attorney. (This is not optional, the statute says "shall" report). Therefore, in cases where a Debtor has the option of *not* filing, the possibility of a Trustee referring a case to the U.S Attorney's Office may ultimately cause you to advise the client not to file.

Second, it is important to identify potential criminal liability issues early in your representation so that the Debtor can consult, and perhaps retain, a lawyer who practices criminal law. The importance of considering this step as early as possible cannot be understated. The law relating to waiver of an individual's 5th Amendment right to remain silent, is complex. When the potential for criminal liability exists, many events that ordinarily are completely benign must be viewed in a different light. For example:

- Under certain circumstances the act of producing documents can be deemed as testimonial in nature and thus act as a waiver of an individual's 5th Amendment privilege against self-incrimination;
- Written testimony (i.e. just signing the bankruptcy petition and related schedules) can act as a waiver of the Debtor's 5th Amendment privilege;

- Oral testimony by the Debtor at the 341 meeting and/or 2004 examinations can constitute a waiver of an individual's 5th Amendment Privilege.
- In cases where criminal liability issues are present, fee applications should be written in a way to not to run the risk that a Debtor's 5th Amendment privilege is compromised.

Thus, any time potential criminal liability issues have been identified, whenever possible, Debtor's counsel should consult criminal defense counsel before documents are produced, the bankruptcy petition and schedules are filed, or oral testimony occurs.

Timing of Retaining Criminal Defense Counsel

While Debtor's counsel should consult with criminal counsel as soon as the potential for criminal liability is discovered, if it is determined that criminal counsel should be retained, when and how counsel is hired must also be considered. If the Debtor pays a criminal defense attorney before filing that must be reported on the Statement of Financial Affairs ("SOFA) and a 2016(b) statement. When this occurs, the world may learn about the possibility of criminal liability.

However, many times the potential criminal liability is not a secret. Very rarely will you as Debtor's counsel be the first person to discover the potential for criminal liability. Thus, if the proverbial cat is out of the bag, publicly available filings should not be a major issue. In those instances where you do have concerns that the SOFA or 2016(b) statement could cause unwanted attention to be drawn to potential criminal issues, one approach is for Debtor's counsel to make sure that only a general description is used when describing the need for that counsel. While the Debtor must report funds used for counsel, usually there is no requirement to detail the nature of the legal representation. In instances where one can hire criminal defense counsel who works for a law firm that also offers insolvency services, just naming the firm as counsel, along with a generic description of legal services may prevent unwanted attention in this area. However, if Debtor's counsel is faced with the choice of recommending the Debtor retain criminal defense and risking "outing" the issue, versus the Debtor not retaining criminal defense counsel, so that the potential liability is not exposed, this is not a difficult choice. In most cases, it is far better to have someone well versed in criminal law advising the Debtor, than not.

How to Spot Potential Criminal Issues

One of the most natural ways for Debtors' counsel to spot potential criminal issues is by being cognizant of the fact that often times non-dischargeable debt may trigger potential criminal liability.

Types of Non-dischargeable Debt That May Include Criminal Liability:

- Debt “for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by— false pretenses, a false representation, or actual fraud;”
- Or obtained through the “use of a statement in writing—that is materially false;”
- Debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;
- Debt based on a “willful and malicious injury by the debtor to another;”
- Debt based in “death or personal injury caused by the debtor’s operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;”

In addition, Debtors' counsel should be aware of two commonly used criminal statutes favored by prosecutors.

MAIL AND WIRE FRAUD

Perhaps the most commonly used Federal laws used by Prosecutors are the Mail or Wire Fraud statutes. In order for the government to prevail on a charge of Mail Fraud (18 U.S.C. 1341), it must prove merely that the defendant:

- (1) Having devised or intending to devise a scheme to defraud (or to perform specified fraudulent acts), and
- (2) Used the mail for the purpose of executing, or attempting to execute, the scheme (or specified fraudulent acts).

[U.S. Attorneys » Resources » U.S. Attorneys' Manual » Criminal Resource Manual » CRM 500-999 » Criminal Resource Manual 901-999 citing *Schmuck v. United States*, 489 U.S. 705, 721 n. 10 (1989) where Defendant purchased used cars, rolled back their odometers, and sold them to retail dealers at prices artificially inflated by the low-mileage

readings, and that the unwitting dealers, relying on the altered readings, resold the cars to customers at inflated prices, consummating the transactions by mailing title-application forms to the State on behalf of the buyers.

Wire Fraud (941 18 U.S.C. 1341) directly parallels the mail fraud statute, but instead of the use of the mail, it requires the use of an interstate telephone call, or electronic communication (such as e-mail) made in furtherance of the scheme.

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Interrelated Businesses in a Consumer Context

I. Initial intake considerations

- A. What type of Business?
1. Are the owner and principal both filing or only one? Principal can file without forcing the business to close. Finances are closely tied together. May help the business for the principal to file.
 2. Is the potential debtor the sole owner of the business? Former business partners can be as problematic as former spouses.
 3. Is it a complicated business? Multiple employees?
- B. What Chapter?
1. Practical Considerations
 - a. The more complex the business, the harder it is to shoehorn into Chapter 13.
 - b. The Expense of Chapter 11 may render administrative insolvency – US Trustee fees are based upon total disbursements. With a d/b/a this could include groceries and basic living expenses in addition to business operational expenditures.
 - c. Secured claims may be treated differently in Chapter 13 and Chapter 11. Consider long term debt (Compare §1322 (b)(5) and 1329(c) and §1141(d)) and treatment of secured debt (Compare §1325(a)(5) with §1129(B)(2)(A)).
 2. Debt Limits: Who can be a debtor? §109
 - a. Is not jurisdictional. Does not trigger an automatic dismissal. *See, e.g., In re Zarnel*, 619 F.3d 156, 169 (2d Cir. 2010) (finding that § 109(h) is not jurisdictional, and that such a finding is consistent with other courts' conclusions that various subsections of § 109 are not jurisdictional). Instead, it is something that "must be established to sustain a voluntary bankruptcy proceeding." *Zarnel*, 619 F.3d at 169.
 - b. Amounts may include personal guaranties of business related debt.
 - c. May include so-called "trust" taxes.

- d. Courts not limited to looking at schedules. *See, e.g., In Re Shukla*, 550 B.R. 204, 211 (Bankr. E.D. N.Y. 2016) (“Though a [s]ection 109(e) analysis generally begins with a review of the debtor’s schedules, a court may also consider materials outside of the debtor’s schedules.” The schedules, while important, are not binding, and must be considered along with “all readily available evidence, including claims filed, any liens that are obviously avoidable, and the like.” *In re Garcia*, 520 B.R. 848, 853 (Bankr. D. N.M. 2014).
 - e. The debt limits are subject to adjustment every three years after April 1, 1998. See 11 U.S.C. § 104(a) (“On April 1, 1998, and at each 3-year interval ending on April 1 thereafter, each dollar amount in effect under sections 101(3), 101(18), 101(19A), 101(51D), 109(e), 303(b), 507(a), 522(d), 522(f)(3) and 522(f)(4), 522(n), 522(p), 522(q), 523(a)(2)(C), 541(b), 547(c)(9), 707(b), 1322(d), 1325(b), and 1326(b)(3) of this title and section 1409(b) of title 28 immediately before [*8] such April 1 shall be adjusted . . .”). The most recent adjustment, went into effect on April 1, 2016. See Revision of Certain Dollar Amounts in the Bankruptcy Code, 81 Fed. Reg. 8748 (Feb. 22, 2016).
3. Income
- a. Does the Means Test Apply? Primarily Business or Consumer Debts? §707 Focus on purpose for debt
 - (1) §101 (8) defined “consumer debt” as debt incurred by an individual primarily for a personal, family or household purpose.
 - (2) Code does not define business but courts have classified based upon whether it was incurred with an eye toward a profit.
 - (3) Primarily = more than half the total dollar amount.
 - (4) Determination could speak to dismissal or possible conversion and often involves litigation
 - (5) In Chapter 13 – consider whether ordinary and necessary business expenses should be deducted when computing the applicable commitment period. In Maine, the trustee has taken the position that “no” they should not, *see In re Wiegand*, 386 B.R. 238 (9th Cir. BAP 2008).
 - b. Is Income regular?
 - (1) Must be “regular” under §109(e) for Chapter 13

- (2) Must be “regular annual” under §109(f) for Chapter 12 (Must also meet definition of Family farmer or family fisherman under §101(18)-(21). Agritourism may be an issue).
 - (3) Does business owner draw a regular salary or draw? Should they?
 - C. Income and Expenses: What is Available for Creditors? What is Disposable Income? What income/expenses belong to whom?
 1. Danger of False Oaths or perception of False Oaths. *Fido’s Fences, Inc. v. Bordonaro (In re Bordonaro)*, 543 B.R. 692, 701-702 (Bankr. E.D. NY 2016)
 2. Schedule I considerations: Attach schedule with monthly net income from operations. May need to average over a period of time. May be used in a §707 inquiry as to whether the Debtor can repay a portion of his or her debts.
 3. Schedule J considerations: Ensure not double dipping or accounting for expenses in two places – such as vehicles or other personal assets that could also be used as business expense.
 4. Means Test considerations
 5. Chapter 13 defines “disposable income” as income less reasonable necessary expenses to live and continue to operate a business. §1325(b)(2). Must be debtors engaged in business as defined in §1304(a). Is conjunctive and both prongs must be met in order to deduct business expenses from disposable income. *In re Whitcomb*, 310 B.R. 428, 432 (Bankr. W.D. Ar 2004).
 6. Preparing a Budget: Can the business and debtor be extracted?

II. Operational Considerations

- A. Operating Reports
 1. Extracting, where to place what
 2. May necessitate additional bank accounts and a new way of accounting for the debtor.
- B. Income and Expenses: What belongs to whom? Duties of a Trustee. Nothing outside the ordinary course.
- C. Incurring additional debt.

III. Potential Litigation

- A. Preferences
 - 1. Insider = broad and includes associated entities and businesses; § 101 (31)
 - 2. Expands preference timeline to one year under § 547. Look at inter-company and company-debtor transfers within the year prior to filing. Keep alert for any aggressive pay back of investment capital.
- B. Piercing: What is yours is mine.
- C. Business Divorces – litigation with former business partners
- D. Vendors
- E. Asset Title Disputes
- F. Foreclosures

1. Focus

- a. In a complex case, there is a premium on focus. Too much can distract the factfinder.
- b. Stipulate to undisputed facts.
- c. Use summaries (Fed. R. Evid. 1006).
- d. Don't introduce 52 exhibits and then mention only 3 of them.
- e. Don't make your 9 best arguments. You don't have 9 best arguments. Identify the strongest arguments, focus on them, and jettison the others.
- f. Tether your arguments to the statute and controlling caselaw. If you cannot tether the argument, don't make it.
- g. A long string cite of persuasive authorities, without explanation, doesn't advance the ball much. Explain why those authorities should supply the rule of decision in your case.

2. Valuation

- a. What is the relevant measurement date?
 - i. Make sure that your valuation evidence matches (as close as possible) to the relevant measurement date.
 - ii. If the contest is one relating to the best interests of creditors under 11 U.S.C. § 1325(a)(4), the statute focuses the inquiry on the effective date of the plan. If the confirmation hearing is taking place several months or years after the petition date, then valuation evidence from years before the petition may not be your best bet.
 - iii. If the only available valuation evidence does not match the statutory inquiry, you should have some credible explanation as to why the "older" valuation is still reliable.
- b. What is the proper method for valuing the asset or business?
 - i. Look to 11 U.S.C. § 506(a)(1). The statute commands that value must "be determined in light of the purpose of the valuation and of the proposed disposition or use of [the] property. . . ."
 - ii. There is a special rule for valuing personal property in a chapter 7 or chapter 13 case involving an individual. See 11 U.S.C. § 506(a)(2). In a "small business" chapter 13 case, the application of this rule can have significant consequences for the amount of the secured claim.
- c. Burden of proof
 - i. Do not commence any sort of hearing or trial involving valuation without understanding who has the burden of proof.
 - ii. If you have the burden of proof, how will you meet it? Do you need expert testimony under Rule 702 to establish the value of an asset or a business? Maybe. Lay and expert testimony is governed, in part, by Rules 701 and 702 of the Federal Rules of Evidence. In 2000, Rule 701 was amended. A lay witness cannot testify regarding an opinion "based on scientific, technical or specialized knowledge within the scope of Rule

702.” Some courts have held that this amendment prohibits a property owner from providing opinion testimony about the value of the property under Rule 701. *See, e.g., James River v. Rapid Funding, LLC*, 658 F.3d 1207, 1215 (10th Cir. 2011) (“[T]he Federal Rules of Evidence generally consider landowner testimony about land value to be expert opinion[,]” because such opinions require specialized knowledge).

3. Cross Examination
 - a. Use sparingly. Nothing in the rules requires you to cross-examine witnesses called by the opposing party.
 - b. Your goal is to establish facts and to persuade the Court regarding the law. Making an opponent look bad doesn’t necessarily advance the ball. There are times when it helps. But, an effective cross examination should be carefully constructed to undercut a key element of the opposing party’s claim or defense.

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AUTHORITY OF CHAPTER 13 DEBTORS AND TRUSTEES

Avoidance Power:

Kalesnik v. HSBC 571 B.R. 491 (Bankr. D. Mass. 2017). Chapter 13 debtors do not have a trustee's power to avoid mortgages under Section 544.

“There is a split in the case law as to whether a Chapter 13 debtor may exercise avoidance powers outside the § 522(h) context, but, ” [a]s numerous courts have noted, 'there is a significant and growing number of courts that have held, except to enhance the debtor's exemptions under section 522, the chapter 5 avoiding powers of a trustee are not available to a chapter 13 debtor.'" *Kirschke v. Butler Bank* (In re *Kirschke*), 2009 WL 4344434, *4 (Bankr. D. Mass. Nov. 24, 2009), aff'd 2010 WL 2510087 (D. Mass. June 16, 2010) (quoting *Cardillo v. Andover Bank* (In re *Cardillo*), 169 B.R. 8, 11 (Bankr. D.N.H. 1994)).[4] Relying on this explicit, but limited, grant of trustee powers to a Chapter 13 debtor, a majority of courts, including all the courts to address the issue in this district, have held that Chapter 13 debtors have no standing to exercise a trustee's avoidance powers under Chapter 5 of the Bankruptcy Code. See, e.g., *Stangel v. United States* (In re *Stangel*), 219 F.3d 498 (5th Cir. 2000); *In re Hansen*, 332 B.R. 8; *In re Merrifield*, 214 B.R. 362; *Currie v. Wells Fargo Bank, N.A.* (In re *Currie*), 2013 WL 1305805 (Bankr. D. Mass. March 28, 2013); *In re Kirschke*, 2009 WL 4344434; *In re Miller*, 251 B.R. 770.[5]”

Sale Power:

11 U.S.C. Section 1303: Subject to any limitations on a trustee under this chapter, the debtor shall have, exclusive of the trustee, the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f) and 363(l), of this title.

Andrade v. Essinfeld 570 B.R. 121 (Bankr. D. Mass. 2017). Chapter 13 debtors do not have a trustee's power to sell co-owned property under Section 363(h).

“[Section 363\(h\) of the Bankruptcy Code](#) provides that a “trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property” under certain limited circumstances. [11 U.S.C. § 363\(h\)](#) (emphasis supplied). Pursuant to § 1303, *122 Chapter 13 debtors are authorized to exercise a limited set of powers otherwise granted to a trustee. Specifically, the Chapter 13 debtor has, “exclusive of the trustee, the rights and powers of a trustee under [sections 363\(b\)](#), [363\(d\)](#), [363\(e\)](#), [363\(f\)](#), and [363\(l\)](#).” [11 U.S.C. § 1303](#). Notably absent from this list is [§ 363\(h\)](#).

The Court has identified five published cases allowing a Chapter 13 debtor to proceed under [§ 363\(h\)](#). The court in one case simply assumed, with no discussion, that the Chapter 13 debtor had authority to proceed with a [§ 363\(h\)](#) action.² In a separate case, the court relied on the 1978

Senate Report which would have given Chapter 13 debtors the right to proceed under [§ 363\(h\)](#).³ But, as noted in [Wrublik v. Wrublik \(In re Wrublik\)](#), 312 B.R. 284, 286–87 (Bankr. D. Md. 2004), the competing House version omitted [§ 363\(h\)](#), and the enacted version of the Code omitted that section as well.

The most substantive reason for allowing a Chapter 13 debtor to utilize [§ 363\(h\)](#) of the Code is found in the three cases where each court concluded that “[b]ecause [§ 363\(h\)](#) specifically incorporates subsection (b) by reference ... the debtor can proceed under [§ 363\(h\)](#).” [Wright v. Wright \(In re Wright\)](#), 2009 WL 2384189, *2 fn. 1 (Bankr. W.D. Ark. July 31, 2009).⁴ The Court finds this reasoning unpersuasive. [Section 363\(h\)](#) addresses sales of a particular type of property—i.e., property co-owned with a nondebtor—noting that the sale of the estate property can either be outside the ordinary course of business ([§ 363\(b\)](#)) or within the ordinary course ([§ 363\(c\)](#)). The Court does not read this reference in [§ 363\(h\)](#) as “incorporating” [§ 363\(b\)](#), which is among the trustee powers granted to Chapter 13 debtors. While a [§ 363\(h\)](#) sale must also be pursuant to [§ 363\(b\)](#) or [\(c\)](#), the power to sell under [§ 363\(b\)](#) exists separately from [§ 363\(h\)](#). [Section 363\(b\)](#) sales can, and frequently do, occur where there is no co-owner. And that is the limited authority granted to a Debtor under [§ 1303](#)—the power to sell estate property under [§ 363\(b\)](#), but not the authority to attempt a [§ 363\(b\)](#) sale if the property is co-owned.

¹The majority of recent cases have also rejected this “incorporation” theory, holding that the plain language of the statute, especially in light of the Supreme Court’s ruling in [Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.](#), 530 U.S. 1, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000), leads to the obvious conclusion that Chapter 13 debtors cannot bring [§ 363\(h\)](#) actions.⁵ The Court agrees with the plain language analysis and holds that a Chapter 13 debtor may not force the sale of property co-owned with a nondebtor as a tenant in common, joint tenant, or tenant by the entirety under [§ 363\(h\)](#). This conclusion is consistent not only with a recent majority of courts to address the issue, but is also consistent with the vast majority of case law regarding limitations on a Chapter 13 debtor’s right to exercise trustee powers under the Bankruptcy Code. See *123 [Kalesnik v. HSBC Bank Nat’l Assn. \(In re Kalesnik\)](#), Ch. 13 Case No. 15–30597, Adv. No. 16–3027, Memorandum of Decision, ECF No. 36, 571 B.R. 491, 2017 WL 2964799 (Bankr. D. Mass. July 11, 2017).”

Extension of Time:

11 U.S.C. Section 108

(a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of—

(1)

the end of such period, [including](#) any suspension of such period occurring on or after the commencement of the case; or

(2)

two years after the [order for relief](#).

Hatton v. TD Bank 2018 WL 770363 (Bankr. D.N.H. 2018). Chapter 13 debtors cannot utilize Section 108(a) to extend time periods to sue; only trustees can use that Code section to extend limitations of actions.

“Courts are split as to whether [§ 108\(a\)](#) applies to chapter 13 debtors. Compare [Estate of Carr v. United States](#), 482 F.Supp.2d 842, 850 (Bankr. W.D. Tex. 2007) (“[I]n the context of bankruptcies filed under Chapter 13, the extension offered by [section 108\(a\)](#) is available to Trustees only, and not to Chapter 13 debtors.”), and [Ranasinghe v. Compton \(In re Ranasinghe\)](#), 314 B.R. 556, 567 (Bankr. E.D. Va 2006) (“[S]ince [§ 108\(a\)](#) is not a specific trustee power of a trustee given to a chapter 13 debtor, and absent a provision allowing a chapter 13 debtor to generally exercise the rights and powers of a trustee (as exists in chapter 11 when a trustee has not been appointed), a chapter 13 debtor does not receive the benefit of the [§ 108\(a\)](#) extension. This analysis, moreover, comports with the stated policy behind § 108—allowing the trustee additional time to discover and evaluate potential causes of action after stepping into the shoes of the debtor) (internal quotations and citations omitted), and [Straub v. Richardson](#), 92 So.3d 548, 552 (La. Ct. App. 2012) (“[W]e conclude that applying the plain language of [11 U.S.C.A. § 108](#) of the Bankruptcy Code, a Chapter 13 debtor is not entitled to the benefit of the [§ 108](#) two-year extension as is a bankruptcy trustee.”), with [Stephenson v. Chase Home Fin. LLC](#), Civil No.10cv2639–L(WMc), 2011 WL 2006117, at *5 (S.D. Cal. May 23, 2011) (“Although the statute speaks in terms of giving the trustee the extension of time, it may have equal force and effect when utilized by the debtor Specifically, [11 U.S.C. Section 103](#) makes [section 108](#) applicable to Chapter 13 bankruptcies. A Chapter 13 Debtor has the trustee's capacity to sue on behalf of the estate. Accordingly, the tolling statute applied to extend the ... statute of limitations for ‘two years after the order for relief.’ ”) (citations omitted), and [In re Dawson](#), 441 B.R. 1, 29 (Bankr. D.D.C. 2008) (“[M]y interpretation of the statute is not a case of enlarging [§ 108\(a\)](#) to add the missing words ‘chapter 13 debtor’ to [§ 108\(a\)](#) ... Instead, my interpretation reads [§ 108\(a\)](#) as modifying the limitations on a trustee's powers under § 363, and thus modifying the limitations applicable to the power of a chapter 13 debtor (who by reason of § 1303 is subject to the same limitations) when suing pursuant to the power of a trustee under § 363.”), and [McConnell v. K–2 Mortg. \(In re McConnell\)](#), 390 B.R. 170, 181 (Bankr. W.D. Pa. 2008) (“It is the opinion of this Court that holding [11 U.S.C. § 108\(a\)](#) applicable to Chapter 13 debtors suing on behalf of the estate is not only consistent with the legislative purpose of the Code, but also the statutory text of the Code.”).

In the Court's view, the better reasoned decisions are those that hold that [§ 108\(a\)](#) cannot be used by chapter 13 debtors to toll the time period for commencing an action. By its very terms, [§ 108\(a\)](#) applies to actions that may be commenced by a “trustee,” not to actions commenced by a “debtor.” The Court need not engage in a convoluted statutory interpretation to reach a conclusion that would conflict with the plain language of the Bankruptcy Code: “trustee” means “trustee.” For that reason, the Court holds that chapter 13 debtors are not entitled to the protections of [§ 108\(a\)](#). Therefore, the statutes of limitations applicable in this case have not been tolled by the Debtor's bankruptcy filing.”

Executory Contracts:

In re Hyeegu Cho, 2016 WL 2340677 (Bankr. D. Me. 2016). The assumption and rejection provisions of Section 365(d)(4)(A) apply in Chapter 13 cases.

11 U.S.C. 365(d)(4)

(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of—

(i)

the date that is 120 days after the date of the [order for relief](#); or

(ii)

the date of the entry of an order confirming a plan.

(B)

(i)

The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

(ii)

If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

11 U.S.C. 1322(b)

Subject to subsections (a) and (c) of this section, the plan may -

(7) subject to [section 365 of this title](#), provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

Consumer Post-Petition Borrowing:

In re Fields 551B.R. 424 (Bankr. D. Minn 2016). Consumer Chapter 13 debtors do not need court permission to incur post-petition borrowing.

11 U.S.C. 1305

Filing and allowance of postpetition claims

(a) A proof of [claim](#) may be filed by any [entity](#) that holds a [claim against the debtor](#)—

(2)

that is a [consumer debt](#), that arises after the date of the [order for relief](#) under this chapter, and that is for property or services necessary for the debtor's performance under the plan.

(c)

A [claim](#) filed under subsection (a)(2) of this section shall be disallowed if the holder of such [claim](#) knew or should have known that prior approval by the trustee of the debtor's incurring the obligation was practicable and was not obtained.

Operation of Business:

11 U.S.C. Section 1304

(a) A debtor that is self-employed and incurs trade credit in the production of income from such employment is engaged in business.

(b) Unless the court orders otherwise, a debtor engaged in business may operate the business of the debtor and, subject to any limitations on a trustee under [sections 363\(c\)](#) and [364](#) of this title and to such limitations or conditions as the court prescribes, shall have, exclusive of the trustee, the rights and powers of the trustee under such sections.

(c) A debtor engaged in business shall perform the duties of the trustee specified in [section 704\(a\)\(8\)](#) of this title.

11 U.S.C. Section 704(a)(8)

if the business of the debtor is authorized to be operated, file with the court, with the [United States trustee](#), and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the

operation of such business, including a statement of receipts and disbursements, and such other information as the [United States trustee](#) or the court requires;

11 U.S.C. Section 364

(a)

If the trustee is authorized to operate the business of the debtor under section [721](#), [1108](#), [1203](#), [1204](#), or [1304](#) of this title, unless the court orders otherwise, the trustee may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under [section 503\(b\)\(1\) of this title](#) as an administrative expense.

(b)

The court, [after notice and a hearing](#), may authorize the trustee to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under [section 503\(b\)\(1\) of this title](#) as an administrative expense.

11 U.S.C. 363(c)

(1)

If the business of the debtor is authorized to be operated under section [721](#), [1108](#), [1203](#), [1204](#), or [1304](#) of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease [cash collateral](#) under paragraph (1) of this subsection unless—

(A)

each [entity](#) that has an interest in such [cash collateral](#) consents; or

(B)

the court, [after notice and a hearing](#), authorizes such use, sale, or lease in accordance with the provisions of this section.

(3)

Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this

section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4)

Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any [cash collateral](#) in the trustee's possession, custody, or control.

Right to Dismiss:

In re Macomber (Bankr. D. Me. 2018) Adv. Case No. 12-10720 . Debtors' failure to contribute inheritance to trustee, after including the inheritance funds in a confirmed plan, and dissipating those funds, causes court to dismiss case with 6 month bar to re-filing and all listed debts non-dischargeable.

11 U.S.C. 1307(b)

On request of the debtor at any time, if the case has not been converted under section [706](#), [1112](#), or [1208](#) of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

11 U.S.C. 349(a)

Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in [section 109\(g\) of this title](#).

11 U.S.C. 105(a)

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11U.S.C.109(g) Notwithstanding any other provision of this section, no individual or [family farmer](#) may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if—

(1)

the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or

(2)

the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by [section 362 of this title](#).

Employing Professionals:

In re Jones, 505 B.R. 229 (Bankr. E.D. Wisc. 2014) and **In re Scott**, 531 B.R. 640 (Bankr. N. D. Miss. 2015). Chapter 13 debtor is not a trustee and does not have the authority or duties of a debtor-in-possession. A Chapter 13 debtor does not need to seek prior approval of the employment of a professional. The Court still has the power under Section 329 and 330 to regulate the compensation of any professionals. But see **In re Wright** 578 B.R. 570 (Bankr. S.D. Tx. 2017) and **In re Goines** 465 B.R. 704 (Bankr. N. D. Ga. 2012).

11 U.S.C Section 327

(a)

Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more [attorneys](#), [accountants](#), appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

(b)

If the trustee is authorized to operate the business of the debtor under section [721](#), [1202](#), or [1108](#) of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.

(c)

In a case under chapter [7](#), [12](#), or [11](#) of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

(d)

The court may authorize the trustee to act as [attorney](#) or [accountant](#) for the estate if such authorization is in the best interest of the estate.

(e)

The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an [attorney](#) that has represented the debtor, if in the best interest of the estate, and if such [attorney](#) does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such [attorney](#) is to be employed.