



AMERICAN
BANKRUPTCY
INSTITUTE

2020 Central States Virtual Bankruptcy Workshop

Hot Consumer Topics

Hon. James W. Boyd, Moderator

U.S. Bankruptcy Court (W.D. Mich.); Grand Rapids

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Chapter 13 Trustee; Kalamazoo, Mich.

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CONSUMER TOPICS:

**BEST PRACTICES FOR TRICKY CHAPTER 7s, CHAPTER 13 PLAN
MODIFICATIONS FILED PURSUANT TO THE CARES ACT,**

TIPS FOR ENSURING PROPER SERVICE, AND

**A DISCUSSION OF THE CURRENT CASE LAW ON 401(k)
CONTRIBUTIONS AND *NUNC PRO TUNC* ORDERS**



<p>Presented by:</p> <p>Barbara Foley, Esq. Chapter 13 Trustee Kalamazoo, Michigan</p>	<p>Nauri Manty, Esq. Manty & Associates, PA Minneapolis, Minnesota</p>	<p>Charissa Potts, Esq. Freedom Law, PC Eastpointe, Michigan</p>	<p>Hon. James W. Boyd U.S. Bankruptcy Court Western District of Michigan</p>
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How many years have you practiced consumer bankruptcy?

- A. I do not practice consumer bankruptcy
- B. 0-5 years
- C. 6-10 years
- D. More than 10 years

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Chapter 7 From the Trustee's Perspective

By: Nauni Manty, Esq., Minneapolis, Minnesota

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Tips for Working with a Chapter 7 Trustee . . .

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The Debtor Has Assets That Cannot Be Exempted:

Often the trustee will sell these items back to the debtor. If the debtor has several non-exempt assets, do not “cherry pick” the non-exempt assets, by selecting only a few of the items to purchase from the estate. Make an offer to purchase all of the assets from the estate.

If the non-exempt assets are turned over, the trustee must find a buyer. Often times, the trustee hires an auctioneer and sells the items at auction. In order for that process to work, the trustee generally needs to have a critical mass of value and thus will want to sell **all** of the non-exempt items at auction, not just a few of them.

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Insider Preferences or Fraudulent Transfers:

If the debtor has voluntarily repaid a relative or friend or transferred property for less than reasonably equivalent value, the trustee may resolve the matter directly with the debtor before going to the insider. In this way, the debtors may save their relatives from lawsuits. Also, there may be the need to provide additional documentation regarding the transfers. Alert your client to this, so the debtor does not dispose of the information. Ideally, you will have the information in your file, anticipating that the trustee will request it.

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Not Every Asset is a “Jointly Owned” Asset:

When filing a joint case, not every asset is owned by both debtors. Make sure that you designate who owns what asset. Even though debtors file a joint bankruptcy petition, the Bankruptcy Code views them as separate debtors with separate estates. See 11 U.S.C. § 522(m), *In re Carlson v. Moratzka*, 394 B.R. 491, 493 (B.A.P. 8th Cir. 2008) (a spouse who did not pay any of the withholdings to which a joint income tax refund is attributable has no ownership in the refund). If the asset is owned or titled in the name of only one debtor it cannot be scheduled as a “joint” asset. It must be scheduled separately.

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When in Doubt, Do Not Leave it Out:

Debtors must honestly and accurately disclose their assets, liabilities, and financial affairs in order to obtain a discharge of their debts, maintain their exemptions, and stay out of jail. The petition and schedules are signed statements under penalty of perjury that the information provided is true and correct. Debtors are required to make all disclosures honestly, accurately, and completely. The schedules and statements must be reliable “without the necessity of digging out and conducting independent examinations to get the facts.” *Mertz v. Rott*, 955 F.2d 596, 597 (8th Cir. 1992); *In re Mascolo*, 505 F.2d 274, 278 (1st Cir. 1974). The successful functioning of the bankruptcy process hinges on the debtor’s “veracity and ... willingness to make a full disclosure.” *Mascolo*, 505 F.2d at 278.

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Claim Proper Exemptions:

The goal, of course, is to protect as many of the debtor's assets as possible under the exemptions available in your jurisdiction. But, in protecting the debtor's assets, exemptions must be proper. A boat is not a motor vehicle unless you can drive it legally on the roadway. A snowmobile is not a motor vehicle. If the debtor owns two watches, but can only exempt one—exempt one, not both. Schedule them separately.

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Adequately Describe the Debtor's Assets:

An adequate asset description may lessen the testimony the trustee will require of the debtor at the meeting of creditors. The meeting may be much easier for the debtor. The trustee does not have an intimate knowledge of the debtor's assets. The schedules are the only information the trustee has to determine if there may be non-exempt assets to administer. If the asset description is very limited, such as "boat", "jewelry", "artwork", "guns", "collectibles", the trustee will ask additional questions at the meeting of creditors in order to ascertain its value.

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Meeting of Creditors and Special Circumstances:

Safety issues: If the debtor has a restraining order against a particular person or otherwise fears that a creditor or former spouse could present a physical danger at the meeting, please advise the trustee or the U.S. Trustee. A court security officer can be present during the meeting.

Interpreters: If the debtor requires an interpreter, the debtor's attorney should request one through the U.S. Trustee's office in plenty of time, so the U.S. Trustee's office can alert the trustee and an interpreter can be arranged. Or, if the debtor needs someone to sign language, this can be pre-arranged as well.

Impairments: If the debtor is hard of hearing, please let the trustee know that before the 341 meeting commences, so the trustee speaks up.

Special needs: If the debtor has special needs or circumstances, please notify the trustee. The trustee will try to accommodate the meeting accordingly.

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Miscellaneous Issues –
Concealing Assets and Exempting Retirement Funds
Transferred Pursuant to a Divorce Decree to Debtor:

Claiming bad-faith exemptions or fraudulently concealing assets, amending the schedules and trying to exempt the fraudulently concealed assets. Are there any remedies for the trustee after Law v. Siegel, 571 U.S. 415, 134 S.Ct. 1188, 188 L.Ed.2d 146 (2014)?

IRAs/401Ks – not from debtor's earnings and transferred in dissolution of marriage are not exempt. *In re Lerbakken*, 949 F.3d 432 (8th Cir. 2020).

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When do you anticipate consumer case filings will substantially increase?

- A. They won't
- B. By August 31
- C. By November 30
- D. By February 28, 2021

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Current Topics in Consumer Bankruptcy

By: Charissa Potts, Esq., Eastpointe, Michigan

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Chapter 7 Topics:

Valuation, Fraudulent Transfers,
and Best Practices

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Pre-Filing Best Practices

Checklists are essential; each person who assists in preparation of the debtor's petition and schedules should be working off a checklist to ensure the same questions are asked of the debtor in each case. Really important questions should be asked multiple times and in different ways.

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Valuation Issues – Examples of Difficult Valuation Situations

- Debtor's Residence – How to Determine Valuation
- Potential or Pending lawsuits

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Fraudulent Transfers

Extremely important to ask about transfers is several different ways. For example, “have you transferred an interest in real estate in the last two years” will go over many debtor’s heads. Consider other ways of asking. “At any point in the last two years, have you been on a deed for real estate?”

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Chapter 13 Topics:

401(k) Contributions
and
Chapter 13 Practice During COVID-19

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401(k) Contributions Are Not Disposable Income

Davis v. Heibling (In re Davis)
19-3117 (6th Cir. June 1, 2020)

Facts: In 2017, Camille T. Davis (“Davis”) filed a petition for relief under chapter 13 of the Bankruptcy Code. Davis’ income was above median, and she proposed a plan that did not provide a 100% dividend to unsecured creditors. Davis’ expenses included a monthly retirement contribution that she engaged in long before her bankruptcy and sought to continue during her bankruptcy.

Holding: The statutory text is best read to *exclude* voluntary 401(k) retirement contributions from disposable income so long as those contributions were regularly withheld from the debtor’s wages prior to her bankruptcy. The bankruptcy court’s order was vacated and remanded for further proceedings.

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Chapter 13 Practice During COVID-19;
CARES Act Bankruptcy Provisions in Practice

Key points of bankruptcy-related provision of the CARES Act:

- Plan modification of up to 84 months for plans confirmed before March 27, 2020, provided need for modification is related to coronavirus.
- Amends definition of “income” under section 101(10A)(B)(ii) to exclude coronavirus-related payments from the federal government, and excludes coronavirus-related payments from “disposable income” under section 1325(b)(2).
- Plan modification must be filed within one (1) year of March 27, 2020; after that date, the bankruptcy-related provisions of the CARES Act expire.

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The United States Trustee has extended telephonic 341 meetings to all cases filed through October 10, 2020. When do you believe in-person 341 meetings will commence?

- A. December 1, 2020
- B. January 15, 2021
- C. When an effective vaccine is widely available
- D. Never – 341 meetings will continue telephonically

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Hot Topics Chapter 13

By: Barbara P. Foley, Kalamazoo, Michigan

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NOTICE, NOTICE, NOTICE

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11 U.S.C. § 506 – Determination of Secured Status

An allowed claim of a creditor secured by a lien on property in which the estate has an interest, ..., is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, ..., and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim.

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Allowed Claim vs. Plan Treatment

Proof of claim "deemed allowed" under § 502 and entitled to the prima facie evidentiary effect in Bankruptcy Rule 3001(f).

But treatment in confirmed plan does not constitute an objection to claim.

Which controls as to valuation of the collateral?

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Rule 3012 – Determining the Amount of Secured and Priority Claims

(a) Determination of amount of claim. On request by a party in interest and after notice—to the holder of the claim and any other entity the court designates—and a hearing, the court may determine:

- (1) the amount of a secured claim under §506(a) of the Code; or
- (2) the amount of a claim entitled to priority under §507 of the Code.

(b) Request for determination; how made. Except as provided in subdivision (c), a request to determine the amount of a secured claim may be made by motion, in a claim objection, or in a plan filed in a chapter 12 or chapter 13 case. When the request is made in a ... chapter 13 plan, the plan shall be **served** on the holder of the claim and any other entity the court designates in the manner provided for service of a summons and complaint by **Rule 7004**. *(Emphasis added.)*

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Rule 3012 – Determining the Amount of Secured and Priority Claims

[continued . . .]

But note:

(c) Claims of Governmental Units. A request to **determine the amount of a secured claim** of a governmental unit may be made only by motion **or** in a claim objection after the governmental unit files a proof of claim or after the time for filing one under Rule 3002(c)(1) has expired. *(Emphasis added.)*

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JUNE 25-26, 2020



Rule 7004 -- Process; Service of Summons, Complaint

(b) Service by **First Class Mail**.

(1) Upon an **individual** . . . by mailing . . . to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.

(3) Upon a **domestic or foreign corporation** or upon a partnership or other unincorporated association, by mailing . . . to the **attention of an officer, a managing or general agent**, or to any other agent authorized by appointment or by law to receive service and the statute so requires, by also mailing a copy to the defendant (**by name – best practice**). *(Emphasis added.)*

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JUNE 25-26, 2020



Rule 7004 -- Process; Service of Summons, Complaint [continued . . .]

(4) Upon the **United States, by mail**... addressed to the civil process clerk at the office of the United States attorney for the district in which the action is brought and by mail... to the Attorney General of the United States at Washington, District of Columbia... .

(h) Service of **Process on an Insured Depository Institution**. Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) . . . shall be made by **certified mail** addressed to an officer of the institution unless –

- (1) the institution has **appeared by its attorney**, in which case the attorney shall be served by first class mail ;
- (2) the court orders otherwise ... or
- (3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service. *(Emphasis added.)*

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What is “Amount of the Secured Claim?”

Determination of the amount of a secured claim under 11 U.S.C. § 506(a)

- QUERY: failure to properly serve!
- QUERY: regarding amount of secured debt: Only amount of the debt or interest rate too?

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Consequences of Failure to Serve?

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Nunc Pro Tunc

“Put colorfully, ‘[n]unc pro tunc orders are not some Orwellian vehicle for revisionist history—creating ‘facts’ that never occurred in fact.’ *United States v. Gillespie*, 666 F. Supp. 1137, 1139 (ND Ill. 1987). Put plainly, the court ‘cannot make the record what it is not.’ *Jenkins*, 495 U. S., at 49, 110 S.Ct. 1651.” *Roman Catholic Archdiocese Of San Juan, Puerto Rico v. Acevedo Feliciano*, 140 S.Ct. 696, 701, 206 L. Ed. 2d 1 (2020).

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JUNE 25-26, 2020



When Has a Chapter 13 Plan Gone on Too Long?

Debtors in this case have failed to do so and the statutory constraints discussed above prevent this Court from modifying their plan term from sixty months to sixty-two and one-half months. *In re Kinney*, No. BR 13-27912 EEB, 2019 WL 7938816, at *6 (Bankr. D. Colo. Nov. 22, 2019).

The first is best exemplified by the case of *In re Klaas*, 858 F. 3d 820 (3rd Cir. 2017).

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JUNE 25-26, 2020



Who Affirms or Rejects an Executory Contract in Chapter 13?

The Court of Appeals, Newsom, Circuit Judge, held that as a matter of apparent first impression for the court, a Chapter 13 debtor's decision to assume an unexpired lease of personal property does not obligate the bankruptcy estate independent of any action by the Chapter 13 trustee, and thus a debtor's post-confirmation default under a lease assumed in a Chapter 13 plan does not entitle the lessor to an administrative expense claim for damages.

In re Cumbess, No. 19-12088, 2020 WL 2897260 (11th Cir. June 3, 2020).



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Presented by:

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Hon. James W. Boyd
United States Bankruptcy Court
for the Western District of Michigan

Chapter 7 from the Trustee's Perspective

Nauni Manty, Esq., Minneapolis, Minnesota

The chapter 7 trustee is a fiduciary for all of the creditors in the bankruptcy case. The trustee has several statutory duties set forth in Section 704 of the Bankruptcy Code. Specifically, the trustee shall:

- i. collect and reduce to money the property of the estate and close the estate as expeditiously as is compatible with the best interests of parties in interest;
- ii. be accountable for all property received;
- iii. ensure that the debtor performs his intentions as to the retention or surrender of property of the estate that secures consumer debts;
- iv. investigate the financial affairs of the debtor;
- v. if a purpose would be served, examine proofs of claim and object to the allowance of any claim that is improper;
- vi. if advisable, oppose the discharge of the debtor (but not the discharge of a particular debt since only the creditor to whom it is owed may do so);
- vii. unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest.
- viii. if the business of the debtor is authorized to be operated, file with the court and with any governmental unit charged with the responsibility for collection or determination of any tax arising out of such operations, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the court or the United States Trustee requires; and
- ix. make a final report (TFR) and file a final account (TDR) of the administration of the estate with the United States Trustee and the court.

In addition, the trustee conducts the Section 341 meeting of creditors and examines the debtor under oath at that meeting.

Tips in working with a chapter 7 trustee:

1. The debtor has assets that cannot be exempted:

Often the trustee will sell these items back to the debtor. If the debtor has several non-exempt assets, do not "cherry pick" the non-exempt assets, by selecting only a few of the items to purchase from the estate. Make an offer to purchase all of the assets from the estate.

If the non-exempt assets are turned over, the trustee must find a buyer. Often times, the trustee hires an auctioneer and sells the items at auction. In order for that process to work, the

trustee generally needs to have a critical mass of value and thus will want to sell **all** of the non-exempt items at auction, not just a few of them.

2. Insider Preferences or Fraudulent Transfers:

If the debtor has voluntarily repaid a relative or friend or transferred property for less than reasonably equivalent value, the trustee may resolve the matter directly with the debtor before going to the insider. In this way, the debtors may save their relatives from lawsuits. Also, there may be the need to provide additional documentation regarding the transfers. Alert your client to this, so the debtor does not dispose of the information. Ideally, you will have the information in your file, anticipating that the trustee will request it.

3. Not every asset is a “jointly owned” asset:

When filing a joint case, not every asset is owned by both debtors. Make sure that you designate who owns what asset. Even though debtors file a joint bankruptcy petition, the Bankruptcy Code views them as separate debtors with separate estates. See 11 U.S.C. § 522(m), *In re Carlson v. Moratzka*, 394 B.R. 491, 493 (B.A.P. 8th Cir. 2008)(a spouse who did not pay any of the withholdings to which a joint income tax refund is attributable has no ownership in the refund). If the asset is owned or titled in the name of only one debtor it cannot be scheduled as a “joint” asset. It must be scheduled separately.

4. When in doubt, do not leave it out:

Debtors must honestly and accurately disclose their assets, liabilities, and financial affairs in order to obtain a discharge of their debts, maintain their exemptions, and stay out of jail. The petition and schedules are signed statements under penalty of perjury that the information provided is true and correct. Debtors are required to make all disclosures honestly, accurately, and completely. The schedules and statements must be reliable "without the necessity of digging out and conducting independent examinations to get the facts." *Mertz v. Rott*, 955 F.2d 596, 597 (8th Cir. 1992); *In re Mascolo*, 505 F.2d 274, 278 (1st Cir. 1974). The successful functioning of the bankruptcy process hinges on the debtor's "veracity and ... willingness to make a full disclosure." *Mascolo*, 505 F.2d at 278.

The United States Supreme Court has held "there is no 'oops' defense to the concealment of assets." *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 369–70 (2007). In *In re Bauer*, 298 B.R. 353, 357 (B.A.P. 8th Cir. 2003), the Eighth Circuit Bankruptcy Appellate Panel, affirming Judge O'Brien, said:

The opportunity for a completely unencumbered new beginning is limited to the honest but unfortunate debtor. The cost to the debtor for an unencumbered fresh start is minimal: the debtor must honestly and accurately disclose his or her financial affairs and must cooperate with the trustee. The debtor's duty of disclosure requires updating schedules as soon as reasonably practical after he or she becomes aware of any inaccuracies or omissions.

This is not a game of hide and seek. *In re Barrows*, 399 B.R. 506, 510 (Bankr. D. Minn. 2009). Full and accurate disclosure is incumbent on any debtor. *In re Soost*, 290 B.R. 116, 129 (Bankr. D. Minn. 2003); *In re Sears*, 246 B.R. 341, 347 (B.A.P. 8th Cir. 2000). “A debtor cannot, merely by playing ostrich and burying his head deeply enough in the sand, disclaim responsibility for the statements which he made under oath.” *In re Mathern*, 137 B.R. 311, 325 (Bankr. D. Minn. 1994), aff’d 141 B.R. 667 (D. Minn. 1992).

So based on the above, disclose, disclose, disclose. Over disclosing will not cause problems. Under disclosure causes problems. All assets and transfers must be disclosed no matter how insignificant. Under disclosing assets may lead to denial of the debtor’s discharge or revocation of discharge. If the under disclosure is significant, it may also lead to criminal prosecution by the U.S. Attorney’s office.

5. Claim proper exemptions:

The goal, of course, is to protect as many of the debtor’s assets as possible under the exemptions available in your jurisdiction. But, in protecting the debtor’s assets, exemptions must be proper. A boat is not a motor vehicle unless you can drive it legally on the roadway. A snowmobile is not a motor vehicle. If the debtor owns two watches, but can only exempt one—exempt one, not both. Schedule them separately.

Trustees may resolve these issues informally with the debtor. If the trustee cannot, he/she will file motions objecting to the improper exemptions. Court intervention costs the debtor and the estate money. It also burdens the court with unnecessary motions. If trustees observe the same attorneys continuing to make unwarranted exemption claims, the trustees may take additional action, including seeking disgorgement of the attorneys’ fees received by debtor’s counsel and perhaps even objecting to the debtor’s discharge.

6. Adequately describe the debtor’s assets:

An adequate asset description may lessen the testimony the trustee will require of the debtor at the meeting of creditors. The meeting may be much easier for the debtor. The trustee does not have an intimate knowledge of the debtor’s assets. The schedules are the only information the trustee has to determine if there may be non-exempt assets to administer. If the asset description is very limited, such as “boat”, “jewelry”, “artwork”, “guns”, “collectibles”, the trustee will ask additional questions at the meeting of creditors in order to ascertain its value. Better descriptions: “1985 16’ Lund Fishing Boat, with 35 hp motor with trailer value determined per XYZ Boat dealer”. Costume Jewelry, two necklaces, one ring, three bracelets, no precious stones or metals, purchased for \$50.00 five years ago. Two prints purchased at Target for \$5.00 a piece or Terry Redlin signed print, number 10 of 250. Similar prints selling on eBay for \$150.00. One shotgun, 25 years old, good condition, value from XYZ Gun shop \$25.00; one rifle 50 years

old, has not been fired in 20 years, XYZ Gun shop \$5.00. Antique Dresden vase, valued on eBay for \$22.00. Also, have support in your file on how the debtor valued the asset.

7. Meeting of creditors and special circumstances:

- a. Safety issues: If the debtor has a restraining order against a particular person or otherwise fears that a creditor or former spouse could present a physical danger at the meeting, please advise the trustee or the U.S. Trustee. A court security officer can be present during the meeting.
- b. Interpreters: If the debtor requires an interpreter, the debtor's attorney should request one through the U.S. Trustee's office in plenty of time, so the U.S. Trustee's office can alert the trustee and an interpreter can be arranged. Or, if the debtor needs someone to sign language, this can be pre-arranged as well.
- c. Impairments: If the debtor is hard of hearing, please let the trustee know that before the 341 meeting commences, so the trustee speaks up.
- d. Special needs: If the debtor has special needs or circumstances, please notify the trustee. The trustee will try to accommodate the meeting accordingly.

8. Miscellaneous issues – Concealing assets and exempting retirement funds transferred pursuant to a divorce decree to debtor:

- a. Claiming bad-faith exemptions or fraudulently concealing assets, amending the schedules and trying to exempt the fraudulently concealed assets. Are there any remedies for the trustee after *Law v. Siegel*, 571 U.S. 415, 134 S.Ct. 1188, 188 L.Ed.2d 146 (2014)? Justice Scalia, in dicta, observed that federal law provides no authority for the bankruptcy courts to deny an exemption on the grounds not specified in the Code, e.g., based on debtor's fraudulent concealment of the asset subsequently claimed as exempt. The United States Supreme Court observed that federal law provides no authority for bankruptcy courts to deny an exemption on a ground that is not specified in the bankruptcy code. However, in *Law*, Justice Scalia also observed, in dicta, that if the debtor chooses a state exemption, the exemption scope is "determined by state law, which may provide that certain types of misconduct warrant denial of the exemption." Citing *In re Sholdan*, 217 F.3d 1006 (8th Circuit case). He also observed that "ample authority remains to address debtor misconduct" – denial of discharge, § 727(a)(2)-(6) sanctions for bad-faith conduct, § 105(a) can be used for the enforcement of monetary sanctions, and possible criminal prosecution.

Keep in mind the Code provision of § 522(g) is a Code provision that may also address the problem. Section 522(g) it deals with transfers, exemptions and concealment issues.

- b. IRAs/401Ks – not from debtor’s earnings and transferred in dissolution of marriage are not exempt. *In re Lerbakken*, 949 F.3d 432 (8th Cir. 2020).

The state court order adopted the parties’ stipulated settlement which awarded the debtor a one-half interest in his ex-wife’s 401K and all of his wife’s IRA prior to filing. The state court order directed counsel to submit a Qualified Domestic Relations Order relating to these retirement accounts. This was not done prior to filing. The retirement funds or accounts were also subject to an attorney’s lien, which exceeded the value of the accounts. The debtor had not transferred the retirement accounts into his own name as of the date of filing, so he could not access the 401K without a QDRO. He could not make additional contributions to the 401K as of the filing because the additional contributions must be made by the employee/employer, not an ex-spouse. He could, however, contribute funds to the IRA. The debtor exempted the 401K and IRA under 11 U.S.C. § 522(b)(3)(C).

The bankruptcy court disallowed the exemption as they were not retirement funds as defined in *Clark v. Rameker*, 573 U.S. 122, 134 S.Ct. 2242, 189 L.Ed.2d 157 (2014). In *Clark*, the Supreme Court considered whether an inherited IRA qualified as a retirement fund for purposes of exemption under federal law and disallowed the debtor’s exemption because they were not. The Supreme Court focused on three characteristics regarding the Account holders ordinary retirement accounts: 1) are they able to make additional contributions to the funds; 2) are not obligated to withdraw the funds, and 3) must pay a penalty to withdraw the funds at any time for any purpose prior to the age of 59 ½. *Id.* At 128, 134 S.Ct. 2242. The retirements funds are moneys set aside for one’s retirement, not a pot of money that can be used for current consumption. *Id.* at 128-29, 134 S.Ct. 2242.

On appeal, both the BAP and the 8th Circuit looked to *Clark* for guidance. As stated by the BAP, “the opinion clearly suggests that the exemption is limited to individuals who create and contribute funds into the retirement account. Retirement funds obtained or received by any other means do not meet this definition.” Any interest that the debtor holds is a “property settlement”. *In re Lerbakken*, 590 B.R. 895 (8th Cir. B.A.P. 2018). 11 U.S.C. § 522(d)(12) contains two requirements (1) that the amount must be retirement funds; and (2) that the retirement funds must be in an account that is exempt from taxation under one of the provisions of the Internal Revenue Code. Both of these elements must be established. *Id.* 590 B.R. at 897. The BAP further noted that retirement funds are funds set aside for a specific purpose. Retirement means withdrawal from one’s occupation, business or office.” *Id.* The BAP reasoned that any interest held in the accounts resulted from nothing more than a property settlement and were not exempt.

The Eighth Circuit observed that Lerbakken has failed to roll over the funds from his ex-wife’s accounts into his own accounts prior to filing and the debtor’s exemptions are determined at the time of filing. *In re Lerbakken*, 949 F.3d 432, 436 (8th Cir. 2020).

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The Eighth Circuit analyzed the IRA and the 401k separately, noting that the retirement accounts were liened and a QDRO was not finalized so the debtor could not access of the 401K. The possibility that the debtor “may use the funds for retirement purposes, does not meet the legal characteristics of retirement funds.” The dissolution attorney had a lien on the retirement funds and the debtor was attempting to exempt the accounts in order to prevent the attorney from enforcing its lien. Strong language was used by the Eighth Circuit in relying on *Clark*, “permitting debtors to enjoy cash windfalls through exemption ‘would convert the Bankruptcy Code’s purposes of preserving the debtors’ ability to meet their basic needs and ensuring they have a ‘fresh start’ into a ‘free pass’”. *Id.* 949 F3d 432, 438. As the Eighth Circuit noted that it was the debtor’s strategy to that the accounts were exempt to prevent the attorney from enforcing the lien against the accounts. *Id.*

Would the result had been different if the debtor has transferred the funds into his own name so it was not a conditional interest? If the QDRO had been established prior to filing? Or, if the accounts would not have been fully liened?

HOT TOPICS - CHAPTER 13 MATTERS

Barbara Foley, Chapter 13 Trustee, Kalamazoo Michigan

NOTICE, NOTICE, NOITCE

Federal rules of Bankruptcy procedure amended effective 12/1/2017. And the procedure for valuation of personal property in chapter 13.

What was the issue:

- Pursuant to 11 USC 506 determination of secured status: “An allowed claim of a creditor secured by a lien on property in which the estate has an interest, ..., is a secured claim to the extent of the value of such creditor’s interest in the estate’s interest in such property, ..., and is an unsecured claim to the extent that the value of such creditor’s interest or the amount so subject to setoff is less than the amount of such allowed claim”
 - such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition
 - Replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined
- proof of claim “deemed allowed” under § 502 and was entitled to the prima facie evidentiary effect in Bankruptcy Rule 3001(f)
- but treatment in plan may differ as to valuation and treatment in the plan does not constitute an objection to claim. The issue is which documentation of the value of the personal property collateral for the loan controls?

RESOLUTION:

The valuation of the collateral by inclusion in the chapter 13 plan will control, absent objection.

FRBP 3012 Subdivision (b) is added to provide that a request to determine the amount of a secured claim may be made in a chapter 12 or chapter 13 plan, as well as by a motion or a claim objection.

The qualifier though when the request is made in a plan, the plan must be served on the holder of the claim and any other entities the court designates according to Rule 7004.

FRB 3012 Determining the Amount of Secured and Priority Claims On request by a party in interest and after notice—to the holder of the claim and any other entity the court designates—and a hearing, the court may determine:

- (1) the amount of a secured claim under §506(a) of the Code; or
- (2) the amount of a claim entitled to priority under §507 of the Code.

But note, regarding claims of Governmental Units. A request to determine the amount of a secured claim of a governmental unit may be made only by motion or in a claim objection after the governmental unit files a proof of claim.

The process of having this hearing on determination of the value of the collateral.

1. Motion by the creditor
2. Objection to POC
3. In a plan filed in a chapter 12 or chapter 13 case.

Notice require when the request is made in the chapter 13 plan: “the plan shall be served on the holder of the claim and any other entity the court designates in the manner provided for service of a summons and complaint by Rule 7004.

HOW TO SERVE UNDER RULE 7004:

FIRST CLASS MAIL

“an individual individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.” Serving a Post Office Box is most likely NOT good service under this rule, for this purpose.

“domestic or foreign corporation or upon a partnership or other unincorporated association to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process” In this case the name of the individual rather than “officer” would be best practices.

“United States, by mail... addressed to the civil process clerk at the office of the United States attorney for the district in which the action is brought and by mail... to the Attorney General of the United States at Washington, District of Columbia”

CERTIFIED MAIL

“Insured Depository Institution. Service on an **insured depository institution** (as defined in section 3 of the Federal Deposit Insurance Act)

Addressed to an officer of the institution (by name) unless

- the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;

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- the court orders otherwise ... or
- the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

What constitutes the “amount of the secured claim triggering the notice requirements?”

- “An allowed claim of a creditor secured by a lien on property in which the estate has an interest, ..., is a secured claim to the extent of the value of such creditor’s interest in the estate’s interest in such property, ..., and is an unsecured claim to the extent that the value of such creditor’s interest or the amount so subject to setoff is less than the amount of such allowed claim” 11 USC 506
 - A chapter 13 plan that reduces the interest rate on the loan to the “Till” rate, would generally would not be valuation of the creditor’s interest. It appears the notice rules would NOT be invoked for modification of the interest rate on the loan.

FAILURE OF SERVICE? Arguably the valuation of the collateral is provided for the plan as confirmed is not good as to the creditor holding the loan.

WHAT WAS IS AND WILL ALWAYS BE: DEFINING NUNC PRO TUNC

Chapter 13 cases are a challenge to the debtors' attorneys and the chapter 13 trustee. Chapter 13 debtors entering this new realm of bankruptcy do not always grasp that the action they take, common in situations where there is no bankruptcy oversight, are not allowed absent court approval. Such instances include the obtaining credit to purchase vehicles, the sale of the home and distributions from retirement accounts. Debtor's counsel become aware of these activities after the trustee questions a budget line item for a vehicle loan not in existence at the prior year's budget review or when the debtor calls to let the attorney know the real estate closing is tomorrow and the title company needs some papers.

Many times, in the debtor's attorney arsenal of pleadings is a motion to allow the event "nunc pro tunc". That intent is to obtain an order that allows a previous action. The United States Supreme Court in Roman Catholic Archdiocese Of San Juan, Puerto Rico V. Yali Acevedo Feliciano, et Al., 589 U. S. ____ (2020) discussed this concept stating "Federal courts may issue nunc pro tunc orders, or 'now for then' orders, Black's Law Dictionary, at 1287, to 'reflect[] the reality' of what has already occurred, *Missouri v. Jenkins*, 495 U. S. 33, 49 (1990). 'Such a decree presupposes a decree allowed, or ordered, but not entered, through inadvertence of the court.' *Cuebas y Arredondo v. Cuebas y Arredondo*, 223 U. S. 376, 390 (1912). Put colorfully, '[n]unc pro tunc orders are not some Orwellian vehicle for revisionist history—creating 'facts' that never occurred in fact.' *United States v. Gillespie*, 666 F. Supp. 1137, 1139 (ND Ill. 1987). Put plainly, the court 'cannot make the record what it is not.' *Jenkins*, 495 U. S., at 49." at 7.

While the facts of this supreme court case are not relevant to our bankruptcy practice it stands as a reminder of the rationale for a nunc pro tunc motion and it is not to obtain a court order to retroactively approve the otherwise disallowed actions of a debtor.

WHEN HAS A CHAPTER 13 PLAN GONE ON TOO LONG?

In Re: Kinney, November 2019 Bankruptcy court of the District of Colorado 13-27912, holding the debtor could NOT cure plan payments defaults beyond 60 sixty-month months. **BUT See In Re Klaas 858 F. 3d 820 (3d Cir 2017)** allowing curing of plan payment default after sixty-month relying on

Section 1307 which does not require dismissal due to a material plan default.

Section 1328 which requires discharge after all payments due under the plan but does not require timely payments.

A The legislative history of the sixty-month plans, legislative history shows the limitation on length of the plan was to protect debtor, not to hinder the completion of the plan. The protection was against forcing debtors into never ending plans.

Review of the plan amendment provisions allowed in the CARES ACT may support the proposition that cures of the proposed and allowed plan payments exceeding the sixty-month limit is reasonable.

AFFIRM OR REJECT AN EXECUTORY CONTRACT IN CHAPTER 13?

Microf LLC v. Cumbess (In re Cumbess) 19-12088 (11th Cir. June 3, 2020) discusses assumption of leases and resulting estate liability for the lease breach post confirmation. Chapter 13 plan state the executory contracts are rejected or assumed. Rejection of the executory contract results in general unsecured debt. Assumption of the executory contract may lead to an administrative claim against the estate if the lease is breached post confirmation. The question is what entity can assume the executory contract, the debtor by stating so in the plan or must the trustee also on behalf of the estate expressly assume the executory contract. Does this put the chapter 13 trustee in the position of having to test drive all lease vehicles or check the sturdy ness of the rent to own furniture, before recommending confirmation?

In support of the trustee required duties the court stated: “Section 365’s very first subsection demonstrates that the trustee plays an important role in the assumption of unexpired leases: it states that “the trustee, subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a).” at page 10. And further discusses the roles of the trustee and the debtor in the chapter 13 process to conclude “there is simply no way around the fact that when § 365(p)(1) refers to the “trustee,” it means the trustee—and, accordingly, that if the trustee does not assume an unexpired lease, it drops out of the debtor’s bankruptcy estate.” at page 14. On the basis that the executory contract was not assumed because the trustee did not assume it, the court determined the administrative claim of the lessor was disallowed.

Current Topics in Consumer Bankruptcy

Charissa Potts, Esq., Eastpointe, Michigan

Chapter 7 Topics: valuation, fraudulent transfers, and best practices

From the consumer practitioner's perspective, Chapter 7s are fraught with potential land mines. Problems cannot always be avoided, but it is best for the practitioner to expect what the issues will be in the case and plan (and charge attorney fees) accordingly.

1. Pre-Filing Best Practices
 - a. Checklists are essential; each person who assists in preparation of the debtor's petition and schedules should be working off a checklist to ensure the same questions are asked of the debtor in each case. Really important questions should be asked multiple times and in different ways.
2. Valuation Issues – examples of difficult valuation situations
 - a. Debtor's residence – how to determine valuation
 - i. Review online resources, such as Zillow and property tax valuation
 - ii. Obtain a market analysis from a real estate agent – a home is worth what someone is willing to pay for it, and often a real estate agent has a better sense of that than an appraiser. Market analysis is also less expensive than an appraisal (\$100 vs. \$400)
 - iii. If there is a potential equity issue with the home, then:
 1. Explain risks to client of Chapter 7, and have them sign waiver [attach sample of waiver my office uses in these cases]
 2. Explain benefits of Chapter 13
 3. If client is unable/unwilling to appreciate risks associated with Chapter 7, the practitioner may want to consider withdrawing representation
 - iv. When scheduling home valuation in Schedules A/B, consider adding the phrase "*valuation based on market analysis, and is not an attestation by the debtor of value*"
 - b. Potential or Pending lawsuits
 - i. Potential lawsuits – this is where a network of other professionals is helpful. Refer your client to a trusted colleague who will give you an honest valuation of the debtor's claim
 - ii. Pending lawsuits – it can be difficult to connect with an attorney already hired on a matter, and be even more difficult to get information on the value of the pending lawsuit. Unless the pending litigation is relatively predictable, it is probably best to wait to file until matter is settled.
 - iii. When scheduling the valuation of a pending lawsuit in Schedules A/B, be mindful of potential estoppel issues

3. Fraudulent Transfers

- a. Extremely important to ask about transfers is several different ways. For example, “have you transferred an interest in real estate in the last two years” will go over many debtor’s heads. Consider other ways of asking. “At any point in the last two years, have you been on a deed for real estate?”
- b. Discussion of options for when there is a fraudulent transfer

Chapter 13 Topics: *401(k) contributions and Chapter 13 practice during COVID-19*

- 401(k) contributions are not disposable income

Davis v. Heibling (In re Davis)
19-3117 (6th Cir. June 1, 2020)

Facts. In 2017, Camille T. Davis (“Davis”) filed a petition for relief under Chapter 13 of the Bankruptcy Code. Davis’ income was above median, and she proposed a plan that did not provide a 100% dividend to unsecured creditors. Davis’ expenses included a monthly retirement contribution that she engaged in long before her bankruptcy and sought to continue during her bankruptcy.

Procedural history. In 2017, Camille T. Davis (“Davis”) filed a petition for relief under Chapter 13 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Ohio. The Trustee objected to her plan. The court granted Trustee’s objection and cited *Seafort*. The Debtor amended her plan to increase the plan payment and thereafter objected to her own plan to preserve her right to appeal. The court confirmed notwithstanding her objection. Davis then obtained certification from the bankruptcy court authorizing an appeal to the Sixth Circuit.

Issue. Whether the hanging paragraph in Section 541(b)(7) excludes from her disposable income (as defined in section 1325(b)(2) the amount Davis contributed to her 401(k) prior to bankruptcy.

Holding. The statutory text is best read to *exclude* voluntary 401(k) retirement contributions from disposable income so long as those contributions were regularly withheld from the debtor’s wages prior to her bankruptcy. The bankruptcy court’s order was vacated and remanded for further proceedings.

Reasoning. The Court reasons that the basic canons of construction support the argument that 401(k) contributions are to be excluded from disposable income. BAPCPA’s addition of the hanging paragraph into Section 541(b)(7) excluding voluntary 401(k) contributions were a substantial change to the provision; substantial changes in language are presumed to demand a change in meaning. Furthermore, ignoring 541(b)(7)’s plain language would make the provision meaningless. Additionally, ruling reading the Section to include 401(k) deductions as disposable income would provide no more insight than 1325(b)(2), and therefore make the paragraph an unnecessary addition. The court rejected the argument that this reasoning would “invite abuse

by debtors,” because there are multiple BAPCPA provisions that protects retirement savings. The court also noted that this holding does not curtail the good-faith requirement of Section 1325(a)(3).

Key takeaways:

- If the debtor was making retirement contributions before the petition is filed, then that debtor is permitted to continue making those contributions post-petition and deduct them from disposable income.
- A debtor not making pre-petition contributions cannot start making post-petition contributions and deduct those contributions.
- A debtor cannot increase contributions post-petition and deduct the increase amount.
- A debtor cannot redirect a paid off retirement loan contribution into an increased retirement contribution; the funds directed to a retirement loan contribution must, when paid off, be directed to creditors.

Questions for discussion:

- How is the pre-petition amount a debtor was contributing to retirement determined?
 - *Modified CMI Theory* – debtor would be able to contribute the average monthly amount contributed of the 6 calendar months preceding the case filing
 - *Seafort Theory* – debtor can contribute whatever they were contributing at the petition date, even if that amount is higher than CMI calculated contributions
- The Court referenced “good faith” as a factor to consider – what does this mean in effect?
- What about confirmed cases where the debtor ceased contributions at the time of filing?

➤ **Chapter 13 practice during COVID-19; CARES Act bankruptcy provisions in practice**

Background. The COVID-19 virus was and is expected to have an impact on Chapter 13 debtors. New filings are down about 50% for April and May, and many defaults are expected. In anticipation of these issues, Congress approved and the President signed the CARES Act, which includes several bankruptcy-related provisions. There are other legislative initiatives currently pending in Congress, such as H.R. 6800 (The HEROES Act).

Key points of bankruptcy-related provision of the CARES Act

2020 CENTRAL STATES VIRTUAL BANKRUPTCY WORKSHOP

- Plan modification of up to 84 months for plans confirmed before March 27, 2020, provided need for modification is related to coronavirus;
- Amends definition of “income” under section 101(10A)(B)(ii) to exclude coronavirus-related payments from the federal government, and excludes coronavirus-related payments from “disposable income” under section 1325(b)(2).
- Plan modification must be filed within one (1) year of March 27, 2020; after that date, the bankruptcy-related provisions of the CARES Act expire.

Discussion topics

- Many debtors have applied for mortgage forbearances; it is still not entirely clear how this will be handled after forbearance period expires.
- A large percentage of debtors have defaulted on their Chapter 13 plan payments because they have been laid off or furloughed. These debtors are often still receiving unemployment and other cash payments at or even above pre-COVID income. A tool to track debtor payment delinquencies is ndc.org, where one can run reports on debtors who have failed to make a payment for 30+ days.
- Communication with debtors is key during this time so they understand obligations and are apprised of their options.
- Expectation is a flood of plan modifications utilizing CARES Act provisions as the economy starts up again and people resume work; there is room for a lot of creativity in CARES Act plan modifications and debtors’ counsel should avail themselves of flexibility from the Chapter 13 Trustee and bench. Important to remember the CARES Act exists for the benefit of the debtors.