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CONCURRENT BREAKOUT

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CONSUMER LAW UPDATE

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Supreme Court on discharge violations. In unanimous opinion the Court rejected the Ninth Circuit's good faith defense to discharge violation, as well as a strict liability standard, holding that "civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order." The Court evaluated contempt for discharge violations in the context of what had been the result in prior nonbankruptcy holdings. In *California Artificial Stone Paving Co. v. Molitor,* 113 U.S. 609, 618 (1885), the Court had said that civil contempt was not appropriate "where there is a fair ground of doubt as to the wrongfulness of the defendant's conduct." A party's subjective belief of compliance with an order "ordinarily will not insulate her from civil contempt if that belief was objectively unreasonable." However, the opinion states that subjective intent is not always irrelevant, because it could influence an appropriate sanction. The opinion creates some questions, including its impact on violations of the automatic stay, with the Court stating that it "need not, and do not, decide whether the word "willful" [in § 362(k)] supports a standard akin to strict liability." Taggart v. Lorenzen, 139 S.Ct. 1795 (2019).

Automatic Stay

Seventh Circuit—City violated stay by retention of impounded vehicles. Without mention of another Panel's decision in Matter of Steenes*,* 918 F.3d 554 (7th Cir. 2019), in which the Circuit was critical of Chapter 13 debtors retaining in the bankruptcy estates their vehicles that were subject to City of Chicago traffic and parking fines, the Seventh Circuit now rejected the City's arguments that it did not violate the stay by keeping vehicles that had been impounded pre-bankruptcy for those same fines. The Circuit affirmed its prior holding in *Thompson v. General Motors Acceptance Corp.,* 566 F.3d 699 (7th Cir. 2009), declining the City's request to overrule that precedent. The Court held that the City's retention of the vehicles upon Chapter 13 filings violated § 362(a)(3), saying that it was in agreement with the majority of Circuits and noting that the Tenth Circuit's *Cowen* opinion was still the minority view on that Code section. "At bottom, the City wants to maintain possession of the vehicles not because it wants the vehicles but to put pressure on the debtors to pay their tickets. That is precisely what the stay is intended to prevent." The City was not protected by either §§ 362(b)(3) or (b)(4), with the Court finding that the City's interests were primarily pecuniary rather than police or regulatory,

and that the City had means to perfect its alleged liens other than by possession. In re Fulton, 926 F.3d 916 (7th Cir. 2019).

Postpetition divorce judgment not stay violation. The state court entered final divorce judgment after the filing of an individual's Chapter 11 case, with that judgment awarding marital home title to the debtor's former spouse. Entry of judgment related back to prepetition oral ruling and was a ministerial act, found not to be a stay violation. The debtor was judicially estopped from asserting that the home was property of the Chapter 11 estate. The award of legal fees in that final judgment to the former spouse was a domestic support obligation, also excepted from the stay; however, attempt to collect that fee was a stay violation. In re Golan, 600 B.R. 697 (Bankr. S.D. Fla. 2019). See also In re Dougherty-Kelsay, 601 B.R. 426 (Bankr. E.D. Ky. 2019) (Although continuation of prepetition contempt action by ex-husband for nonpayment of child support did not violate stay, state court order of payment did violate stay because no finding was made that non-estate funds were available for payment. Section 362(b)(2)(B) only applies to payments from non-estate property.); In re Welsch, ___ B.R. ___, 2019 WL 3425185 (Bankr. N.D. Ill. July 30, 2019))(Writing to "provide guidance to parties and state courts," the ex-spouse's motion for stay relief to pursue modification of state court order for domestic support was not necessary. The Court reviewed § 362(b)(2)(A)(ii)'s exception from the stay, as well as identified those state court proceedings that the automatic stay does and does not stop.).

Landlord violated stay by eviction action. Applying § 326(b)(22)'s exception from stay, the Court found that § 362(*l*)'s statutory procedure was compulsory. The proper procedure is for the landlord to file an objection in the bankruptcy court to the debtor's certification about the residential lease on Official Form 101A. The bankruptcy court would then conduct an expedited hearing on the objection. Instead of following that procedure, the landlord pursued state court eviction, and while the state court had concurrent jurisdiction to decide if the automatic stay was in effect, only the bankruptcy court could "adjudicate the accuracy of a debtor's certifications in a properly filed Official Form 101(a)" under § 362(*l*). Monetary damages were awarded for the stay violation. In re Shrum, 597 B.R. 845 (Bankr. E.D. Mich. 2019).

Tax sale purchaser violated stay. Tax sale purchaser of Chapter 13 debtor's home willfully violated the automatic stay by interfering with possession multiple time, calling police and demanding that debtor vacate the property, and the actions were taken after the purchaser had knowledge of the Chapter 13 filing and after the purchaser's counsel advised that actions were in violation. Actual, emotional distress and punitive damages were awarded, plus $24,000 attorney fees of pro bono counsel who assisted the debtor. The opinion cites other courts awarding fees to pro bono counsel for efforts to remedy egregious stay violations. In re Johnson, 601 B.R. 365 (Bankr. E.D. Pa. 2019).

Affirmative duty to prevent state court's stay violation. The Chapter 13 debtor's spouse and her attorney pursued sentencing in state court for civil contempt, after the debtor had been found in contempt for failure to pay property division. The state court sentenced the debtor to 30 days in jail, although that court was aware of the bankruptcy filing. The Bankruptcy Appellate Panel first determined that the bankruptcy court was not prevented by the *Rooker-Feldman* Doctrine from considering whether a stay violation had occurred, because the state and bankruptcy proceedings were parallel litigations. Addressing the automatic stay, the BAP noted that collection of property division was debt collection, which was stayed upon the bankruptcy filing, and the sentencing and confinement for civil contempt were not exceptions from the stay, distinguishing criminal contempt. Here, the contempt order required the debtor to pay a civil debt, and there was nothing in the state court record to indicate that the contempt was intended to uphold the state court's dignity. The BAP observed generally that "the responsibility to enforce the automatic stay is placed on creditors," and both the former spouse and her attorney "had a duty to take affirmative action to prevent the use of the sentencing hearing and Wohleber's confinement to coerce payment of the dischargeable property settlement." In re Wohleber, 596 B.R. 554 (B.A.P. 6th Cir. 2019).

Under § 362(c)(3), automatic stay was not terminated as to property of estate. Examining the split in judicial authority on interpretation of § 362(c)(3), the Court adopted the position that when a debtor's case is filed within one year of the dismissal of a prior case, the automatic stay terminates thirty days after the second filing only as to the debtor. The Court acknowledged that as a result of the contrary interpretation by *In re Smith,* 910 F.3d 576 (1st Cir. 2018), "the majority opinion may be shifting." This Court concluded

that the statutory language supported its reasoning, and the property of the estate, which included the residence, remained under protection of the automatic stay. In re Smith, 596 B.R. 872 (Bankr. E.D. Tenn. 2019).

Avoidance Actions

Fraudulent transfer liability of commingled entireties account. In judgment creditor's removed state-law fraudulent transfer litigation, the Third Circuit held that in calculation of the liability of a commingled entireties account into which deposits had been made of fraudulently transferred wages and other non-fraudulent sources, future courts should apply pro rata approach; however, in the current case the bankruptcy court did not err in applying the prior "non-necessities approach" in calculating the fraudulent transfer liability of the debtor and his non-debtor spouse. In re Titus, 916 F.3d 293 (3d Cir. 2019).

Trustee's strong-arm avoidance overcame state "savings" statute. The Ohio Legislature enacted a savings statute in 2013, and the Ohio Supreme Court had interpreted that statute as giving constructive notice to the world of recording of a defectively executed mortgage. The result is that a bankruptcy trustee cannot avoid a defectively executed but recorded mortgage as bona fide purchaser. However, the Sixth Circuit held that a trustee could still avoid a defectively executed mortgage in the status of lien creditor under § 544(a)(1), because "notice is not relevant to the status of a judicial lien creditor." The mortgage was defectively executed and was not perfected, but the trustee's judicial lien position was perfected upon the bankruptcy filing, taking priority over the unperfected mortgage lien. In re Oakes, 917 F.3d 523 (6th Cir. 2019).

University receiving refundable tuition payments from parents for adult children was not initial transferee. The Chapter 7 trustee sued for recovery of tuition payments made by the debtors for their adult children. The District Court held that "whether the schools were mere conduits or initial transferees of the tuition payments depends on when the payments were made," distinguishing payments made into an account that was subject to refund, if the student withdrew, from payments that were not subject to potential refund. As to refundable payments, the Court agreed with the reasoning of *Bonded Financial Services, Inc. v. European American Bank,* 838 F.2d 890 (7th Cir. 1988), and "even though the schools received the tuition payments directly from the debtor and eventually applied those payments toward his children's incurred tuition charges, the

schools did not have dominion over the tuition payments until the children no longer had any legal right to a refund." Until the point in time of no refund potential, the "schools had insufficient dominion and control to be considered initial transferees. . . .By the same logic, the schools were the initial transferees of any nonrefundable tuition payments." Pergament v. Brooklyn Law School, et. al, 595 B.R. 6 (E.D. N.Y. 2019). See also In re Hamadi, 597 B.R. 67 (Bankr. D. Conn. 2019) (Fact issue remained as to whether university accepted nonrefundable tuition payments in good faith and for value.).

Property of Estate and Exemptions

Judgment lien against one tenant impaired exemption on tenancy by entirety property. The Eighth Circuit held that registration of a foreign judgment against only the debtor-husband created a cloud on the tenancy by entirety property, enabling the Chapter 7 debtor to avoid the lien as impairing an otherwise tenancy exemption under Missouri law. Only the husband filed Chapter 7, scheduling the property and claiming homestead under Missouri law. The judgment creditor argued that its lien was not enforceable now and was only a "contingent future interest that may vest upon the happening of a future event." Although under Missouri law on tenancy by entirety, the judgment against one spouse would not constitute a presently enforceable lien on the property, it created a cloud on the title, and that cloud was sufficient to be a lien under the broad federal definition of a lien, which includes a "charge against or interest in property." 11 U.S.C. § 101(37). The Eighth Circuit concluded that the cloud on title created by the recording of the judgment was subject to avoidance under § 522(f). In re O'Sullivan, 914 F.3d 1162 (8th Cir. 2019).

Debtors may amend schedules in reopened case. Holding that Rule 1009(a) did not create a specific period within which schedules may be amended, the Bankruptcy Appellate Panel remanded for consideration of whether the debtors properly claimed exemptions in their amended schedules. The bankruptcy court had read Rule 1009 in conjunction with Rule 9006(b) to hold that upon failure to amend exemptions before the case was closed, Rule 9006(b) required a showing of excusable neglect to amend the exemptions after a closed case was reopened. The BAP disagreed that Rule 9006(b) applied to Rule 1009(a), holding that the latter Rule's "any time before the case is closed" did not create a "specified period" for debtors to amend schedules. "A reopening renders

a case open, and Rule 1009(a) contains no distinction between an original case and a case closed and then reopened. Nor does the Rule limit amending schedules to any time prior to the first closing of the case. . . .With this conclusion, we join a number of courts in holding 'the debtor, under Rule 1009, may amend schedules without limitation of whether the case is open or reopened after closing.'" In re Mendoza, 595 B.R. 849, 856-57 (B.A.P. 10th Cir. 2019).

Judicial estoppel application in *pro se* debtor's bankruptcy filings. The Second Circuit reviewed its applications of judicial estoppel to omissions from schedules. When the *pro se* Chapter 7 debtor did not properly list his pending district court whistleblower lawsuit as an asset but he did disclose it in other initial filings and to the trustee and bankruptcy court, he was not barred by judicial estoppel from pursuing the district court action. Because the bankruptcy case was filed in New Jersey, the Circuit looked first to Third Circuit law on judicial estoppel, and under that law application of the doctrine "depends upon the facts and circumstances of the case," with that Circuit leaning against application of the doctrine in facts similar to these. Under its own Second Circuit precedent, four factors are relevant: (1) advancement of an inconsistent position: (2) adoption of former position by the court in earlier proceeding; (3) unfair advantage to party or imposing unfair prejudice on opposing party; and (4) impact on judicial integrity. The Second Circuit found critical distinctions between this case and other bankruptcy cases where it had approved use of judicial estoppel. "We therefore hold that where, as here, a *pro se* debtor has listed his pending litigation on the SOFA, rather than the Schedule B . . ., and then disclosed it to the trustee and the bankruptcy court prior to discharge of his debt, and the trustee and the bankruptcy court were on sufficient notice to take steps to protect the creditors' interests, the debtor is not estopped from pursuing the litigation by virtue of the doctrine of judicial estoppel." In re Ashmore, 923 F.3d 260 (2d Cir. 2019).

IRA not exempt due to self-dealing transactions. Pointing out that State exemption requirements may be more strict that Federal, here the debtor had engaged in self-dealing transactions in violation of the IRA's governing documents, causing the IRA to lose its tax exempt status under Internal Revenue Code § 408. The debtor argued that the IRA was still exempt under Florida's exemption statute, which required the IRA to be maintained

in accordance with the plan or governing instrument. The claimed exemption failed to meet that requirement. In re Yerian, 927 F.3d 1223 (11th Cir. 2019).

Chapter 7 debtors' legal malpractice action arose postpetition and did not become property of estate. Derivative standing had been given by the bankruptcy court to a creditor to pursue the debtors' legal malpractice claims against their former bankruptcy attorneys. The creditor asserted that the cause of action was part of the bankruptcy estate, but the Bankruptcy Appellate Panel held that it arose postpetition because it related to the attorneys' alleged negligence resulting in denial of discharge. That cause of action arose postpetition, and under *In re Underhill,* 579 F.App'x 480 (6th Cir. 2014), the alleged prepetition conduct of the attorneys was not sufficient to make the cause of action a prepetition injury. In re Blasingame, 597 B.R. 614 (B.A.P. 6th Cir. 2019). See also In re Blasingame, 598 B.R. 864 (B.A.P. 6th Cir. 2019) (No abuse of discretion in allowing trustee's abandonment of cause of action.); In re Blasingame, 920 F.3d 384 (6th Cir. 2019) (Claims and causes of action sold by trustee to creditor included legal theory that investment trust was self-settled.).

Property was fully encumbered by mortgage. The Chapter 7 trustee filed proceeding alleging that debtor/wife had only signed mortgage to release her dower interest, but bankruptcy court correctly found that property was fully encumbered by mortgage. Although the mortgage itself was ambiguous, suggesting that only the husband was borrower, the wife's signature supported that she too pledged her interest. The term "borrower" was subject to two competing and reasonable interpretations; therefore, the bankruptcy court properly considered parol evidence on the parties' intentions. In re Perry, 600 B.R. 584 (B.A.P. 6th Cir. 2019).

Amendment of exemptions cannot be disallowed based on debtor's bad faith. Noting the *Law v. Siegel* overruled prior Fifth Circuit authority, *Siegel* precludes "courts from disallowing an amendment to debtor's exemptions based on bad faith or prejudice to creditors." The opinion applies "snap-shot" rule on exemptions as of the petition date and makes findings about exemption under Texas trust law. Although the debtor requested withdrawal from a 401(k) pre-bankruptcy, the funds were not received until postpetition, and the debtor did not lose the claimed Texas exemption even though the

funds were not invested in another retirement account within sixty days. In re Cyr, ___ B.R. ___, 2019 WL 3213053 (Bankr. W.D. Tex. July 16, 2019)

Expectancy interest in annual bonus not property of estate. Applying Illinois law, the Chapter 7 debtor had only an expectancy interest in receiving a future annual bonus, because the potential bonus was revocable at the employer's discretion until paid. That expectancy was not a present property interest at commencement of the case that came into the bankruptcy estate, with the trustee's turnover denied. In re Brown, 601 B.R. 514 (Bankr. C.D. Ill. 2019).

Prepetition sales contract did not destroy homestead exemption. The Chapter 7 debtor had entered into a prepetition contract to sell the home, but the debtor then claimed homestead exemption under New York law, asserting that under the proposed sale the net proceeds would be less than maximum homestead. The trustee objected to the exemption on the grounds the debtor did not intend to continue living in the home, but the sale did not close. New York law did not require intent to permanently reside in the homestead, and the debtor was entitled to the homestead exemption notwithstanding the prepetition contract to sell. Such a contract was immaterial when the debtor still owned the property and resided there on the petition date. In re Ward, 595 B.R. 127 (Bankr. E.D. N.Y. 2018).

Discharge Issues

Bankruptcy Rule 4007 not subject to equitable tolling. A creditor filed motion to extend the time to file § 523(a)(2)(A) complaint but that request was not filed until after the original 60 days had expired. With no binding authority in the Third Circuit, the Court examined the split on whether Rule 4007 is subject to equitable tolling, concluding it was not. The Supreme Court had not decided equitable tolling in *Kontrick v. Ryan,* 540 U.S. 443 (2004), but in *Nutraceutical Corp. v. Lambert,* 139 S.Ct. 710, 714 (2019), the Court considered Fed. R. Civ. P. 23(f) and stated: "Whether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether the text of the rule leaves room for such flexibility." The language of Rule 4007 did not support flexibility for equitable tolling and the motion for extension was denied. In re Zakarin, ___ B.R. ___, 2019 WL 2296807 (Bankr. D. N.J. May 9, 2019). See also In re Bressler, 600 B.R. 739 (Bankr. S.D. N.Y. 2019) (Agreeing with majority of courts, deadline to file an objection or

seek extension expires 60 days after first date set for § 341 meeting, and purported reliance on representation by debtor's counsel to extend was not sufficient, because only the court can extend the deadline. Extensions should be liberally granted by the court, but a timely motion to extend is required.); In re Peralta, 599 B.R. 759 (Bankr. D. N.J. 2019) (Third Circuit had left "door open for late filings where the equities warrant tolling of a deadline to file, …whether the doctrine of equitable tolling *could* be applied is a distinct and separate question, however, from whether the doctrine *should* be applied." Creditors failed to establish grounds for equitable tolling to allow late-filed nondischargeability complaint.). See also Hill v. Snyder, 919 F.3d 1081 (8th Cir. 2019) (Bankruptcy court did not abuse discretion in extending Rule 4004 deadline for U.S. Trustee to file complaint, after state law receiver had moved for extension.).

Misrepresentations to landlord supported § 523(a)(2)(A) exception from discharge. Debtor had made misrepresentations to landlord to persuade one-half compromise of past due rent, to be paid over time, but debtor defaulted. Misrepresentations resulting in settlement "constituted a refinancing or extension of credit" for purposes of § 523(a)(2)(A), with total rent claim nondischargeable. In re Johnson-Battle, 599 B.R. 769 (Bankr. D. N.J. 2019). Compare In re Bolling, 600 B.R. 838 (Bankr. D. Colo. 2019) (Alleged fraud of debtor's husband could not be imputed to debtor, and creditor did not justifiably rely on alleged misrepresentations because of numerous red flags.); In re Graham, 600 B.R. 90 (Bankr. D. Kan. 2019) (Debtor's ex-husband, who overpaid maintenance, did not prove the debtor misrepresented her "marriage-like" relationship in order to continue receiving maintenance.).

Unscheduled debt not discharged. Debtors' failure to schedule a known debt resulted in nondischargeability under § 523(a)(3). The debtors were lessees of a commercial lease and they were allegedly told by the lessor of no intention to pursue personal liability for breach of the lease. Based on authority from the Ninth Circuit, "when applying Bankruptcy Code section 523(a)(3), the reason why a debt was omitted from a debtor's schedules is not relevant to whether the debt is dischargeable. The appropriate inquiry is whether the debtor listed the debt and provided notice in time for the creditor to timely file a proof of claim or whether the creditor otherwise had notice or actual knowledge of the bankruptcy case in time for such a filing. Equitable considerations have no place in

the analysis." In re Menaker, ___ B.R. ___, 2019 WL 3064875 (Bankr. C.D. Cal. July 8, 2019). Compare In re Phillips, 599 B.R. 133 (Bankr. D. Kan. 2019) (Finding that the Chapter 13 debtor had no knowledge of a creditor's claim until after bar date for claims expired, the § 523(a)(3) discharge exception for unscheduled claims did not apply. That section specifically refers to "if known to the debtor," which the Court construed to modify "debts," citing other authority in agreement.).

Prevailing creditor on dischargeability complaint entitled to attorney fees under state law. A state-court judgment was nondischargeable under §§ 523(a)(4) and (6), and under Texas Theft Liability Act, the prevailing creditor was entitled to recovery of attorney fees. The debtor had sold a vehicle belonging to the creditor, which amounted to larceny and embezzlement under § 523(a)(4). Fees would not have been recoverable under § 523(a)(6) for the debtor's willful and malicious breach of contract. In re Kakal, 596 B.R. 335 (Bankr. S.D. Tex. 2019). See also In re Davis, 595 B.R. 818 (Bankr. C.D. Cal. 2019) (Debtor as prevailing party in § 523(a)(2)(A) proceeding was entitled to attorney fees under parties' agreement and applicable California statutes.).

Civil damages under federal child pornography statute were preclusively nondischargeable under § 523(a)(6). In pre-Chapter 7 litigation in the District Court, an attorney who served as expert witness for criminal defendants in child pornography trials was found to have violated a federal statute for having images of child pornography on his computer. He had downloaded innocent images of minors from the internet, for use in his trial testimony, manipulating innocent poses and combining them with other images to depict the innocent minors as engaging in sexually explicit conduct. He had entered into pre-trial diversion with the United States Attorney, and then had been sued by two of the minors under 18 U.S.C. § 2252A(f) for statutory civil damages, with actual damages not less than $150,000 for each victim. The defendant filed Chapter 7 and the Bankruptcy Appellate Panel held that Sixth Circuit authority established a subjective standard for purposes of § 523(a)(6). Because of the debtor's entry into pre-trial diversion, he had admitted to violation of 18 U.S.C. § 2252A(a)(5)(B), which prohibits a person knowingly possessing or accessing material that contains child pornography, which has been obtained by any means of interstate commerce. The pertinent issue in the civil litigation was whether the plaintiffs suffered "personal injury" as a result of the violations of 18

U.S.C. § 2252A(f), entitling them to damages, and the Sixth Circuit had previously held that injury had occurred, in *Doe v. Boland,* 698 F.3d 877 (6th Cir. 2012). That prior opinion found an injury to include "the invasion of any legally protected interest of another." 698 F.3d at 881. To be nondischargeable under § 523(a)(6), the "injury must invade the creditor's legal rights . . .' in the technical sense, not simply harm to a person.'" *In re Musilli,* 379 Fed.App'x 494, 498 (6th Cir. 2010). It is not necessary that the defendant intended the precise injury. The prior Sixth Circuit decision had characterized the minors' injuries "as a violation of the children's legally protected interests in their reputation, emotional well-being and right to privacy." In re Boland*,* 596 B.R. 532 (B.A.P. 6th Cir. 2019).

Application of § 523(a)(6) to intentional breach of contract. Reviewing the split of authority on whether a breach of contract may support nondischargeability under § 523(a)(6), the bankruptcy court concluded that it was an open issue in the Tenth Circuit, citing *In re Sanders,* 2000 U.S. App. LEXIS 5763 (10th Cir. 2000). The debtor had borrowed $30,000 from the seller of a restaurant to fund part of the purchase price, and nothing was repaid, with a prepetition state-court judgment entered. In the subsequent dischargeability complaint, the plaintiff alleged that the debtor never intended to repay the loan. The opinion cites Sixth Circuit authority that breach of contract does not fall within the scope of § 523(a)(6), but the Fifth and Ninth Circuits have held that intentional breach of contract may be within that exception from discharge. Based on the state-court judgment, the court found that the debtor never intended to pay and that the injury was willful, knowing that the damages would be $30,000. In re Rylant, 594 B.R. 783 (Bankr. D. N.M. 2018).

Discovery sanctions related to state bar disciplinary proceeding excepted from discharge under § 523(a)(7). Under *In re Findley,* 593 F.3d 1048 (9th Cir. 2010), the costs reimbursements ordered by the California Supreme Court in a bar disciplinary proceeding were excepted from discharge, including discovery sanctions that were intended to be rehabilitative, serving the State's interest in regulating attorneys. In re Sheridan, 2019 WL 1594012 (B.A.P. 9th Cir. Apr. 11, 2019).

Fifth Circuit reaffirms *Brunner* test. The Circuit panel rejected argument that the *Brunner* test was due for reconsideration, holding that it was bound by the Circuit's

adoption of that test in *In re Gerhardt,* 348 F.3d 89 (5th Cir. 2003). The debtor admitted that she could not satisfy the second prong of *Brunner* that her current physical impairment would prevent her employment and persist throughout a significant portion of the loan repayment period. The opinion appears to expand the *Brunner* prong by referring to a "plain meaning of the words chosen by Congress…that student loans are not to be discharged unless requiring repayment would impose intolerable difficulties on the debtor." Some may see the word "intolerable" as more harsh that "undue hardship." The panel noted that the majority of Circuit Courts had adopted the *Brunner* test, making a critical comment about "a nebulous 'totality of circumstances' standard," as risking "intolerable inconsistency of results." Ultimately, the panel observed that absent an en banc reversal of *Gerhardt,* a change in the § 523(a)(8) requirement was up to Congress. In Matter of Thomas, ___ F.3d ___, 2019 WL 3419379 (5th Cir. July 30, 2019).

Debtor's equity in homestead was not dispositive in undue hardship determination. The Bankruptcy Appellate Panel held that the First Circuit's totality-of-circumstances test for undue hardship did not support "ascribing dispositive weight to the mere existence of exempt equity in [the debtor's] home that exceeds the amount of her outstanding student loans." Deciding lack of undue hardship based solely on exempt equity was inconsistent with protection of exemptions under § 522(c) or the policies expressed in case law including *Law v. Siegel.* Remand was ordered for consideration of factors under the totality-of-circumstances test, including the debtor's "future earnings capacity through other potential employment opportunities as well as the impact, if any, of her health conditions other future financial prospects." In re Schatz, ___ B.R. ___, 2019 WL 3432801 (B.A.P. 1st Cir. July 26, 2019).

Application of totality of circumstances test. In an illustration of contrasting results from the Fifth Circuit's *Thomas*, under the Eighth Circuit's totality of circumstances test, most of a couples' student loan debts were discharged, with the Court finding that eligibility for Income Based Repayment (IBR) plans was a factor but that in this case the debtors were not required to enter into those plans when the current IBR payment would be zero and the debtors' income was unlikely to increase meaningfully in the future, while the total debt increased by interest accruals. The mounting debt placed a "heavy emotional and mental toll" on the debtors. Under the totality of circumstances test, partial

discharge was not permitted but the Court could look at each debt for discharge purposes. With the wife's one student loan debt and five of the husband's debts discharged, the Court found that the husband's income would support repayment of three other debts totaling almost $24,000. In re Swafford, ___ B.R. ___, 2019 WL 3026974 (Bankr. N.D. Iowa, July 10, 2019).

Bipolar disorder was additional circumstance for *Brunner* test. The 46-year old debtor satisfied three prongs of *Brunner* test when she had been diagnosed with PTSD and bipolar disorder. Her only income was minimal Social Security disability, and good faith prong was satisfied, even though no payments were made on student loan prior to onset of mental conditions. Participation in a repayment program was not required by law nor was it feasible for the debtor who could not maintain a minimal standard of living if forced to repay her student loans. In re Hill, 598 B.R. 907 (Bankr. N.D. Ga. 2019). Compare In re Tuttle, 600 B.R. 783 (Bankr. E.D. Wisc. 2019) (Although debtor's income, at 120% of federal poverty guideline, was insufficient to allow repayment of $59,000 student loan debt, he failed to show good faith efforts to repay.).

Debtor's religious contributions not determinative in § 523(a)(8) undue hardship. Finding a split of judicial authority on whether Congress intended religious and charitable contributions to be permissible expenses in undue hardship determinations, the District Court found the debtor's reliance on § 707(b) unavailing, because that section addresses only case dismissal. The bankruptcy court properly "applied a context-specific analysis" to the debtor's donations, concluding that Congress "has mandated neither inclusion nor exclusion of charitable and religious donations from the scope of the § 523(a)(8) analysis." The bankruptcy court did not err in considering reasonableness of those donations, and the debtor did not meet the three prongs of the *Brunner* test. The debtor's arguments that the denial of discharge violated the Religious Freedom Restoration Act and First Amendment were rejected. In re Lozada, ___B.R. ___, 2019 WL 2453837 (S.D. N.Y. June 12, 2019).

Partial discharge of student loan upheld. The District Court affirmed discharge of accrued interest on student loans. With no requirement in Tenth Circuit that borrowers participate in income-based repayment plans, participation is one of good-faith factors under *Brunner* test, and bankruptcy court properly considered it. "While ECMC argues

against discharging the interest in this case, ECMC does not make a colorable argument that Metz could ever truly repay her loan. Rather ECMC touts the income-based repayment plans and the fact that Metz's outstanding debt, which will balloon significantly over her retirement years, will ultimately be forgiven and without tax consequences. While the court believes that the income-based repayment plans offer a benefit to some borrowers, the circumstances of this case lend to a finding that such a plan would thwart the fresh start policy." In footnote 7, the District Court questioned ECMC's contention that the ultimate forgiveness would be meaningful: "The import of that argument is that under ECMC's plan, the debtor will be kept insolvent, if not entirely impoverished, until she is eighty years old and the debt is forgiven—what a pleasant system." Educational Credit Management Corp. v. Metz, ___ B.R. ___, 2019 WL 1953119 (D. Kan. May 2, 2019).

Debtor caused lack of earning capacity, with no undue hardship discharge. The debtor was an attorney employed as IRS revenue agent, but he took bribe in audit that resulted in criminal conviction and disbarment. He then tried to discharge $260,000 in student loans, but Bankruptcy Appellate Panel affirmed decision that when the debtor caused his own loss of earning potential through criminal conduct, which was within the control of the debtor and precluded his satisfaction of *Brunner*'s good-faith requirement. In re Hurley, ___ B.R. ___, 2019 WL 2613308 (B.A.P. 9th Cir. June 26, 2019).

Debt for overpayment of spousal maintenance obligation is excepted from discharge under § 523(a)(15). In a Chapter 7 case, the debtor's former spouse had obtained a prepetition state court judgment for spousal maintenance that she had overpaid to the debtor after he had remarried. Under Montana law, the spousal maintenance had terminated upon remarriage. The overpayment debt was not a domestic support obligation, but it was incurred in the course of or in connection with a divorce decree; as a result, the debt was covered by § 523(a)(15) and excepted from Chapter 7 discharge. The court applied *In re Taylor,* 737 F.3d 670 (10th Cir. 2013), for its holding that an overpayment of maintenance was not a domestic support obligation under § 101(14)(A)(i), but that it was a § 523(a)(15) debt. In re Acord, 2019 WL 2070732 (Bankr. D. Kan. Apr. 8, 2019).

Continuous concealment under § 727(a)(2)(A). Chapter 7 debtor concealed his income from creditors by changing deposit accounts from normal usage, with intent to

hinder, delay or defraud them. Although initial concealment began before one-year lookback, it continued into that year. In re Antonucci, ___ B.R. ___, 2019 WL 3383906 (Bankr. E.D. Pa. July 25, 2019).

Ten-year lookback for recordkeeping under § 727(a)(3) appropriate. Reviewing factors for determination of sufficiency of debtor's business records, the bankruptcy court appropriately looked back ten years. While two years may be the normal lookback period, a longer period was within the bankruptcy court's discretion. In re Katsiroumbas, 600 B.R. 472 (N.D. N.Y. 2019).

Omissions on schedules and statement supported discharge denial under § 727(a)(4). Section 727(a)(4)'s knowledge requirement does not necessitate awareness of legal obligation to disclose particular information; rather, debtor's "actual knowledge of the omitted information itself suffices to fulfill this element." Finding of fraudulent intent is appropriate when "the totality of the omissions and errors rises above mere negligence to the level of reckless disregard for the truth." In re Chlad, 922 F.3d 856 (7th Cir. 2019). See also In re Grigsby, 598 B.R. 606 (Bankr. E.D. Ark. 2019) (Large number of omissions from schedules and statement of financial affairs included inaccurate income for three years and failure to disclose interests in a limited liability company of which debtor was sole member.).

Failure to disclose former fiancé's personal property did not support false oath under § 727(a)(4)(A). The Chapter 7 debtor's former fiancé filed complaint to deny discharge for the debtor's failure to schedule that she had personal property that the plaintiff did not take when the two ceased sharing a residence. Reviewing the requirements under § 727(a)(4)(A), the Court found no evidence of intent to deceive or how the omissions obstructed the trustee's or creditors' investigation of the debtor's financial affairs. In re Milton, 595 B.R. 699 (Bankr. W.D. Pa. 2019).

Unaccounted-for withdrawals from accounts supported discharge denial under § 727(a)(5). Although creditor's false oath claims were not proven, the debtor's failure to account for cash withdrawals from several accounts supported denial of discharge under § 727(a)(5). The Court reviewed the requirements under that section, including its shifting burden of proof. Section 727(a)(5) does not require that "the debtor acted fraudulently or in bad faith; rather, the issue turns on whether a satisfactory explanation is—or is not—

forthcoming." In this case, expert testimony about unaccounted-for cash withdrawals shifted the burden to the debtor for explanation. In re Fustolo, 597 B.R. 1 (Bankr. D. Mass. 2019).

Revocation of Discharge

Application of psychotherapist-patient privilege in discharge revocation discovery. The Ninth Circuit Bankruptcy Appellate Panel examined the application of *Jaffee v. Redmond,* 518 U.S. 1 (1996), and the psychotherapist-patient privilege asserted by the debtor in discovery dispute related to discharge revocation proceeding. The opinion discusses waiver concepts, finding that the bankruptcy court properly balanced the interests of the debtor's asserted privilege and protected against dissemination of confidential information. In re Jakubaitis, ___ B.R. ___, 2019 WL 3426258 (B.A.P. 9th Cir. July 22, 2019). See also In re Zilberbrand, ___ B.R. ___, 2019 WL 3231191 (Bankr. N.D. Ill. July 18, 2019) (Reviewing requirements for alleging fraud in procurement of discharge, Chapter 7 trustee's complaint sufficiently alleged claim for revocation.).

Chapter 7 Attorney Fees

Chapter 7 debtor's attorney could bifurcate fees and be paid for postpetition work. The Bankruptcy Court examined both legal and ethical issues when an attorney uses bifurcated fee arrangements to facilitate a consumer debtor's filing of Chapter 7 rather than Chapter 13. The debtor lacked funds to pay the attorney prepetition for the filing, and the evidence established that the debtor was provided necessary legal services to obtain a discharge. The attorney offered three options to the client: (1) pay an up-front retainer of $2,400; (2) pay $500 up-front, which would cover a skeletal petition filing and then either proceed *pro se*, hire another attorney for postpetition completion of the case, or enter into a postpetition fee agreement for the completion; or (3) pay zero up-front and still obtain the skeletal filing, while entering into a postpetition agreement to pay $2,400 (including filing costs) for representation through discharge, with the $2,400 paid at $240 monthly. The evidence established that the attorney fully explained the options to the client, who chose to enter into the postpetition fee agreement, which did include a factoring arrangement with BK Billing, under which the attorney would receive $1,800 of the agreed fee. The opinion explains the challenges facing debtors and their attorneys when the client is unable to pay the front-end fee, pointing out the risks inherent in *pro se*

filings. The Court also discussed the option for debtors in need of Chapter 7 relief filing for "zero-down" Chapter 13 instead, an option perhaps not in the debtor's best interest and posing ethical issues for the attorney. The Court notes, at footnote 34, other opinions addressing the issue, with the Court finding under the facts of this case that a bifurcated fee arrangement had a "reasonable, legal basis." Distinguishing between bifurcated fees and unbundling of legal services, under the bifurcated fee the attorney is agreeing to represent the debtor throughout the case, contingent only on the debtor executing the postpetition fee agreement.

The Court had the benefit of a recent Utah State Bar Ethics Opinion on use of postpetition fee agreements, which stressed the need for full disclosure to the client. Also, Code § 329 and Rule 2016(b) require full disclosure to the Court of all terms of such fee agreements. "[B]ased on its review of the Utah Ethics Opinion, the Bankruptcy Code, and applicable law, the Court finds that the use of bifurcated fee arrangements in consumer Chapter 7 cases to effectuate affordable legal services are not *per se* prohibited by the Bankruptcy Code and applicable law, they do not *per se* implicate ethical issues, and they are not *per se* unfair."

The Court then set out essential attorney practices that would be required in the future to justify use of bifurcated fee agreements: (1) Dealings and decisions with the client, including methods of payment, must be based on the client's best interest, not the attorney's financial interest. (2) All fees for legal services must be reasonable and necessary. (3) All fee arrangements must be fully disclosed in Form B2030, including the details of both pre- and postpetition fees, payment plan and any interest charges. (4) If the client subsequently elects to proceed *pro se* or hire another attorney, the original attorney must comply with a local rule about withdrawal or substitution of attorney. In re Hazlett, ___ B.R. ___, 2019 WL 1567751 (Bankr. D. Utah Apr. 10, 2019).

Conversion and dismissal

High-income doctor had primarily non-consumer debt, with conversion and dismissal denied. A creditor moved to convert the doctor's Chapter 7 case to Chapter 11, arguing cause under §§ 706(b), 707(a) and 707(b), but § 707(b) only applied in consumer cases and the debtor primarily had non-consumer debt. The moving party had the burden to show grounds for conversion under § 706(b), with conversion in the

discretion of the court. The schedules indicated that the debtor could not fund a Chapter 11 plan and other findings supported the denial of conversion. Under § 707(a), the Eighth Circuit had held that a debtor's ability to pay was not cause for dismissal, citing *In re Huckfeldt,* 39 F.3d 829 (8th Cir. 1994). In re Cook, 599 B.R. 323 (Bankr. W.D. Ark. 2019).

Conversion denied when Chapter 7 filed just before sheriff's sale. Under § 706(a) and the Supreme Court's holding in *Marrama,* the Chapter 7 debtors' motion to convert to Chapter 13 was not in good faith when the case had been filed a day before sheriff's sale. The debtors had filed a prior Chapter 13 just before the first sheriff's sale and there was no reasonable likelihood that they could fund a Chapter 13 plan. In re Campbell, 598 B.R. 775 (Bankr. M.D. Pa. 2019).

Reconversion to Chapter 7 denied. The debtor had previously converted her Chapter 7 case to 13, but now moved to reconvert to 7. Citing opinions where some courts had interpreted § 706(a) as precluding reconversion, while other courts concluded they had discretion to allow it, the Court denied the debtor's motion. Assuming it had discretion, under the circumstances of this case, the debtor had not shown that reconversion was appropriate. In re Sherman, 600 B.R. 453 (Bankr. D. N.M. 2019).

Conversion of one debtor not barred by § 109(g) but other debtor barred. Interpreting both § 706 and § 109(g)(2), the Court adopted the requirement of causal connection between a voluntary dismissal of a case and filing of a motion for stay relief. In a prior Chapter 13 case, the wife debtor had voluntarily dismissed after the filing of a stay-relief motion by mortgage creditor, resulting in consent order for foreclosure in event of default. That order established a causal connection, and the wife was not eligible to be debtor in either Chapter 7 or Chapter 13 under § 109(g)(2), with her case dismissed. The husband debtor in the current Chapter 7 was not a debtor in the prior case; therefore, he could convert to Chapter 13. In re Fletcher, 599 B.R. 282 (Bankr. E.D. Va. 2019).

Debtor's Statement of Intention

Delay of discharge not remedy to force compliance with statement of intention. The debtor's timely statement of intention was to retain manufactured home and make regular payments, but the statement did not specify reaffirmation. After the creditor moved to compel compliance with one of § 521(a)(2)'s options, the debtor filed an amended statement providing for reaffirmation, but it raised a presumption of undue hardship

because of negative disposable income. The creditor moved to delay discharge until debtor performed one of the three options, but the Court held that the Code provided a remedy and delay of discharge was not a remedy. Sections 362(h)(1) and 521(a)(6) provide that the automatic stay is terminated as to personal property of the estate or of the debtor when the debtor fails to timely perform. The § 521(a)(6) remedy applies here because the debtor did not enter into a reaffirmation or redeem the property within 45 days after the first meeting of creditors, resulting in termination of the stay, removal of the property from the estate, and permission for the creditor to take nonbankruptcy action against the property. The fact that the debtor may be current in payments on the manufactured home does not allow the court to create a delay-of-discharge remedy. In re Frazier, 599 B.R. 275 (Bankr. D. S.C. 2019). See also In Seiffert, ___ B.R. ___, 2019 WL 1284299 (Bankr. N.D. Tex. Mar. 8, 2019) (Only remedy for secured creditor under §§ 521(a)(2) and (6) is termination of automatic stay, and debtor's failure to actually surrender the manufactured home does not justify delay of discharge.).

Debtor given thirty days from order authorizing redemption to pay in lump sum. In dispute over amount required to redeem pickup, the petition date, rather than valuation date, was appropriate time to determine retail value of personal property, and Court allowed debtor 30 days from entry of order authorizing redemption to pay lump sum amount. Section 722 requires payment in full at time of redemption, but Court had discretion to allow additional time. In re Maynes, 598 B.R. 648 (Bankr. D. N.M. 2019).

Discharge Injunction

Secured creditor violated discharge injunction by forbearance of foreclosure of liens to convince debtors to sign post-discharge notes. Affirming, the Eighth Circuit found no abuse of discretion in the sanctions against the secured creditor that used forbearance of its foreclosure remedy to persuade the former Chapter 7 debtors to sign new post-discharge notes. The opinion discusses pre-discharge reaffirmation and the potential for debtors to voluntarily repay debt, but "when assessing the voluntariness of the debtor's actions, we consider the creditors' use of pressure and coercion and its impact on the debtor." Actions alleged to be in violation of the discharge injunction, including coerciveness, must be assessed under the particular facts. Here, the debtors had obtained discharge but the bank continued to hold security interests in land and

equipment. The bank obtained new notes for amounts in excess of the value of its security. In state-court litigation, the former debtors alleged that the new notes were unenforceable as improper reaffirmations of discharged debt, and the bank asserted counterclaims, including its forbearance from foreclosing. Before the state court could rule, the former debtors filed an adversary proceeding in the bankruptcy court for contempt and violation of the discharge injunction. The bankruptcy court abstained to allow the state court to rule, but observed that the debtors could return to the bankruptcy court if the state court held that the bank had impermissibly attempted to collect discharged debt. The Eighth Circuit held, under these facts, that the abstention was not preclusive on the bankruptcy court's ability to rule on the merits in the contempt proceeding. First State Bank of Roscoe v. Stabler, 914 F.3d 1129 (8th Cir. 2019).

Mortgagee did not violate discharge injunction. Affirming grant of summary judgment to mortgagee, the Bankruptcy Appellate Panel held that nineteen loss-mitigation communications sent by the mortgagee to the debtor's attorney during a consensual mediation process were not attempts to coerce payment and did not violate the discharge injunction. Also, escrow account disclosures, private mortgage insurance notice, and right-to-cure notice were not discharge injunction violations. The debtor did not establish that the correspondence coerced or harassed him to pay a discharged debt. In re Kirby, 599 B.R. 427 (B.A.P. 1st Cir. 2019).

Judgment creditor violated discharge injunction by attempting to revive stale judgment. Under § 542(a)(2), an attempt by judgment creditor, whose lien had expired under state law, to revive that lien was deemed to be in personam action against Chapter 7 debtor, because liability for judgment must be established. Under applicable Colorado law, if judgment creditor allowed lien to expire and did not revive judgment within six-year period, the expired judgment has no effect. In re Kellogg, 601 B.R. 537 (Bankr. D. Colo. 2019).

Chapter 13 Issues

Property of Chapter 13 Estate

Inheritance was property of estate. Under § 1306(a)(1), an inheritance received by the Chapter 13 debtor after commencement of the case but before closing, dismissal or conversion, is property of estate. That Code section does not incorporate and is not

limited by § 541(a)(5)'s general rule that inheritances received only within 180 days of commencement are included in estate. The Court reviewed case law on the interplay of the two Code sections, agreeing with the Fourth Circuit's conclusion in *Carroll v. Logan,* 735 F.3d 147 (4th Cir. 2013), that § 1306 was a congressional expansion of the bankruptcy estate in Chapter 13 cases. In re Moore, 602 B.R. 40 (Bankr. E.D. Tenn. 2019).

Gavel rule applied and stay did not toll state-law redemption period. Examining interface of the automatic stay and Iowa's real estate redemption period, under § 1322(c)(1), the gavel rule was applied. The property was considered sold when the foreclosure occurred, and one year for redemption began on date of the sale. The debtor did not redeem within that period; therefore, at filing of the Chapter 13 case, the debtor had only possessory interest. In re Lieber, 600 B.R. 408 (Bankr. N.D. Iowa 2019). See also In re Woodruff, 600 B.R. 616 (Bankr. N.D. Ill. 2019) (Although debtor's time for redeeming property sold at tax sale had expired prior to filing, debtor could treat purchaser's claim in proposed plan. Purchaser's claim was in rem for payment of redemption amount, and the claim was allocated and valued, with part secured, perfected and noncontingent, while other portion was unsecured and contingent. Latter portion represented purchaser's equitable right to seek recovery on certificate of purchase through issuance of tax deed.).

Confirmation

Section 1308(a)'s tax return requirement. The trustee had objected to confirmation under § 1325(a)(9), based on the debtor's alleged failure to file all required tax returns under § 1308(a). Interpreting the statute, the Court examined case authority and the legislative history of §§ 1308(a) and 521(j), concluding that two interpretations could apply: (1) debtors are required to file, before the date on which the meeting of creditors is first scheduled to be held, all tax returns for specified taxable periods that were *due* to be filed before that date; or (2) as held by *In re French,* 354 B.R. 258 (Bankr. E.D. Wis. 2006), debtors must file before that first meeting date all tax returns for the prior tax year, even if those returns are not yet delinquent under nonbankruptcy law. Because § 521(j) permits taxing authorities to compel debtors to file delinquent post-petition tax returns, this Court found the first interpretation to be preferable. The Court overruled the trustee's

objections, concluding that § 1308(a) did not apply to tax returns that became due under nonbankruptcy law after the date on which the first meeting of creditors was first scheduled to be held. In re Long, ___ B.R. ___, 2019 WL 3294077 (Bankr. E.D. Wis. July 22, 2019).

Debtors could not deduct ownership costs for vehicle secured by non-purchase money lien. The above-median debtors claimed ownership deduction of $497 from projected disposable income, when the title loan payments on the vehicle were only $66.67. The difference in these amounts meant unsecured creditors could receive $25,819.80 over the 60-month plan, and the trustee objected to confirmation. Reviewing *In re Ransom,* 562 U.S. 61 (2011), for "what constituted an applicable vehicle ownership expense under the IRS Local Standards," the word "applicable" means "'appropriate, relevant, suitable, or fit,'" such that the deduction must qualify under the debtor's particular circumstances." If these debtors were below-median, they would only have the actual $66.67 deduction for the title loan payment, and allowing above-median debtors to claim more than the actual payment would give them preferred treatment over their creditors. Under *Ransom's* direction, "the Court is to interpret the Means Test in a way that accomplishes the Congressional intent of ensuring 'that [debtors] repay creditors the maximum they can afford' so that creditors receive 'payments that the debtor could easily make.'" The IRS Local Standards "only allow an ownership deduction for the 'lease or purchase' of a vehicle, [therefore,] a non-purchase money security interest is not a specified expense deduction under the IRS Local Standards." The Court's research revealed that most bankruptcy courts and one district court agreed with this analysis, citing the most recent decision, *Feagan v. Townson,* 572 B.R. 785 (N.D. Ga. 2016). See footnote 39 and 40 for other decisions. Allowing the above-median debtors to obtain windfall of $25,819.80 at the expense of unsecured creditors cannot be reconciled with the Means Test. In re Taylor, 595 B.R. 419 (Bankr. D. Utah 2019).

Separate classification of gambling debt was unfairly discriminatory. The debtor's proposed plan separately classified debt to a Maryland casino that would pay nothing while paying other unsecured debt 52%, but the separate classification would unfairly discriminate under § 1322(b)(1). The casino's debt was an unsecured claim, just like others, rejecting the debtor's contention that gambling debt was unenforceable as a

matter of public policy in Virginia. The Court concluded that Virginia's public policy against gambling is not so fundamental that the Court can ignore the choice of law provision in the casino agreement that Maryland law would control, and that state has no public policy against gambling. Moreover, Virginia has state-approved lotteries and had recently approved reopening of a horse racetrack that will include gaming devices. In re Chu, 599 B.R. 519 (Bankr. E.D. Va. 2019).

Cure and maintain could be attempted through loan modifications but surrender could not be delayed. Mortgage creditors objected to confirmation of plans that proposed to cure defaults through negotiation of loan modifications, but the Court held that § 1322(b)(5) does not define "cure" nor require that it be accomplished by cash payments. The creditors did not cite statutory or case law that would prohibit a method of cure through loan modifications; therefore, the debtors could attempt such cure proposals. However, the proposed surrender of the property if loan modifications were unsuccessful was not an appropriate surrender. Surrender under § 1325(a)(5)(C) cannot be delayed and must occur at or before the time of confirmation. The debtors were required to file amended plans. In re Unacha, et al., 598 B.R. 693 (Bankr. D. Mass. 2019). See also In re Keokuk, 600 B.R. 593 (Bankr. E.D. Ky. 2019) (Cramdown plan that proposed surrender of manufactured home but retention of real estate could not be confirmed because it did not provide for stream of payments with present value equal to creditor's remaining secured claim.).

Debtor could cure default beyond 60 months. Agreeing with *In re Klaas,* 858 F.3d 820 (3d Cir. 2017), bankruptcy court had discretion to permit debtors to cure plan default, allowing a reasonable grace period beyond the 60 months of confirmed plan. Dismissal of the case for plan default was not required under § 1307(c), because dismissal was discretionary. Section 1328 does not expressly require that all payments under the plan be made within 60 months. Remand was ordered for the bankruptcy court to consider the non-exclusive factors identified in *Klaas.* In re Touroo, ___ B.R. ___, 2019 WL 2590751 (E.D. Mich. June 25, 2019).

Effects of confirmation

Vesting of property. In consolidated appeals to the Seventh Circuit, the City of Chicago prevailed on the effect of a local plan confirmation provision that maintained the debtors'

vehicles in the Chapter 13 estates until completion of the plan. The Circuit panel considered the deviation from § 1327(b)'s normal vesting in the debtors upon confirmation to open the door for debtors "treat[ing] this provision as permission to violate traffic laws." The City's Municipal Code, "makes a car's owner, rather than its driver, liable for many fines, including those for speeding, running a red light, and illegal parking." The panel's decision repeats the City's representation that the seven debtors had incurred 72 fines, aggregating $12,000, since confirmations, and the Panel assumed that the fines would never be paid. The relief sought by the City was vacating the confirmation orders' suspension of vesting, and the Court granted the relief of "an order restoring the estates' assets to the debtors' personal ownership." With that determination, the Panel found it unnecessary to rule on whether the postpetition fines should be treated as administrative expenses. The thrust of the opinion is that the bankruptcy courts had not provided clear or sufficient reasons for retaining the vehicles in the bankruptcy estates, with the Panel commenting: "A case-specific order, supported by good case-specific reasons, would be consistent with § 1327(b), but none was entered in any of these cases." Although that section gives the bankruptcy court discretion to keep assets in the estates, exercise of such discretion "requires a good reason," and the Panel found it "hard to see how the court could justify routinely doing the opposite of what the statute provides." In Matter of Steenes, 918 F.3d 554 (7th Cir. 2019), motion for rehearing filed as to two debtors in the consolidated appeals.

Confirmation order controlled over conflicting valuation order. Commenting that the "case shows that the belt-and-suspenders approach . . .can cause trouble," the debtor had stripped off a second mortgage lien both in valuation at zero and confirmation of a plan. The valuation order provided stripping when the debtor both completed plan payments and received discharge, and because of a prior Chapter 7 discharge the debtor was not eligible for discharge in the 13 case. The confirmation order, however, provided only for stripping when the plan payments were completed. The mortgagee tried to rely on the valuation order but the confirmation order controlled, and the creditor violated that order by not releasing its lien. Although the creditor was in contempt, it was easily purged by release of the lien. No attorney fees were awarded to the debtor because the problem

was as much the debtor's fault as the creditor's. In re Ranieri, 598 B.R. 450 (Bankr. N.D. Ill. 2019).

Debtor bound by confirmation. The confirmed plan had fixed the prepetition arrearage and amount of ongoing payments on a fully secured mortgage claim, but 18 months later the debtor filed an adversary proceeding to value and bifurcate the mortgage claim. The Court granted the creditor's motion to dismiss the complaint, holding that the attempt to reconsider the mortgagee's secured claim was barred by res judicata effect of confirmation. In re Fraser, 599 B.R. 830 (Bankr. W.D. Pa. 2019). See also In re Edwards, ___ B.R. ___, 2019 WL 2194114 (Bankr. S.D. Fla. May 22, 2019) (Debtor's amended plan mistakenly stated incorrect ongoing payment, causing debtor to underpay ongoing mortgage by $5,000, but creditor received notice of the amended plan and did not object or appeal. Creditor later objected to trustee's notice of final cure, but was bound by confirmation, applying *Espinosa*.).

Lien Issues

Fourth Circuit adopts majority view on § 1322(c)(2). Overruling its twenty-year old precedent, *In re Witt,* 113 F.3d 508 (4th Cir. 1997), the Circuit en banc (with dissents) aligned itself with other circuits, holding that the plain text of § 1322(c)(2) authorizes modification of undersecured home mortgages that mature prior to last payment under a plan. That Code section "authorizes modification of such claims, not just the payment schedule for such claims, including through bifurcation and cram down." Hurlburt v. Black, et al., 925 F.3d 154 (4th Cir. 2019). See also In re Mendez, 600 B.R. 321 (Bankr. D. N.J. 2019) (Finding that § 1322(c)(2) applied to mortgage that matured years ago and on which final prepetition judgment had been entered, giving debtor only option to pay debt in full over life of plan. With question of amount of attorney fees allowable under defaulted mortgage, stay relief was granted to allow state court to resolve fee dispute.).

In Chapter 20 case, junior lien with no value did not have unsecured claim. Making a distinction between cases in which the debtor had not received prior discharge of personal liability and those with such a discharge, where the Chapter 13 debtor had previously obtained Chapter 7 discharge of her personal liability on a junior mortgage and where the Chapter 13 debtor then avoided the wholly unsecured lien, there was no allowed unsecured claim for that lienholder. Under *In re Zimmer,* 313 F.3d 1220 (9th Cir.

2002), a Chapter 13 debtor may avoid a wholly unsecured lien without violating § 1322(b)(2). If that lien is determined under § 506(a) to have no value, but there has been no discharge, "the junior lienholder will ordinarily be left with an allowed unsecured claim that must be provided for in the debtor's plan in the same manner as other general unsecured claims." But, courts have differed on the treatment of such claims when the debtor had previously received a discharge. Citing and agreeing with *In re Rosa,* 521 B.R. 337 (Bankr. N.D. Cal. 2014), the Bankruptcy Appellate Panel held that "in the chapter 20 context, a junior lienholder whose secured claim has been valued at zero in the chapter 13 case is not entitled to an unsecured claim." This result "did not run afoul of *Johnson [v. Home State Bank,* 501 U.S. 78 (1991),] because the Supreme Court in that case did not mandate that the in rem claim becomes an allowed unsecured claim if a § 506(a) motion renders the secured claim valueless." In a prior decision by another BAP panel, *In re Free,* 542 B.R. 492 (B.A.P. 9th Cir. 2015), in an eligibility context, the Court held that when *in personam* liability had been discharged in a prior Chapter 7 case, the debt was not counted toward the unsecured debt limitation of § 109(e). That analysis was relevant to the current claim allowance issue. In re Washington, ___ B.R. ___, 2019 WL 3454052 (B.A.P. 9th Cir. July 30, 2019).

Manufactured home did not become accession to real property. The creditor holding security interest in a manufactured home objected to confirmation, on the basis that § 1322(b)(2)'s anti-modification provision prevented bifurcation of its claim into secured and unsecured parts. The Eighth Circuit noted that the Bankruptcy Code does not resolve the issue of whether a manufactured home is real or personal property, and the Court looked to Iowa common law for when personal property may become a fixture. The intention of the party making the annexation is key, and there was no error in the bankruptcy court's finding that the method of attachment in this case did not indicate an intention to make the home a permanent accession to real property. The fact that the debtors owned the home but the creditor owned the lot, charging a monthly fee for its use, was important, and the home was supported by concrete blocks, rather than permanent foundation, with the transportation structure still underneath. In re Bennett, 917 F.3d 676 (8th Cir. 2019).

Purchase money security interest in non-personal vehicle could not be bifurcated. Interpreting the hanging paragraph of § 1325(a), the Court concluded that the final part

of the paragraph prevents cramming down of a security interest in any collateral that has value when the debt was incurred during the one-year of the bankruptcy filing. "The phrase 'any other thing' in the second provision signals that the provision addresses any residual PMSI collateral. That is, 'any other" PMSI collateral not covered in the first provision." The Court concluded that the plain reading of the statute means "if the first provision narrowly applies to motor vehicles acquired for the debtor's personal use, the second provision must apply to 'any other thing' including motor vehicles not acquired for the debtor's personal use." The statute "broadly prohibits bifurcation of PMSI claims, subject only to particular timing limitations. The opinion acknowledges this is a minority view. In re Sandifer, ___ B.R. ___, 2019 WL 3227050 (Bankr. M.D. Ga. July 17, 2019).

State tax lien stripping and waiver of sovereign immunity. The state Department of Revenue asserted that sovereign immunity protected it from the debtors' attempts to strip off or strip down underwater liens, but the Court held that the filing of secured proofs of claim waived that immunity, in conjunction with § 106(a)'s abrogation. Although § 1322 is not listed among § 106(a)'s provisions, § 1327 is included, and it is the enabling clause for Chapter 13 confirmed plans. In re Berger, 600 B.R. 491 (Bankr. W.D. Pa. 2019).

Chapter 13 debtor had no authority under § 544. Discussing the split of authority, the Court adopted the majority view that the Code gives § 544 avoidance authority exclusively to the trustee, and the Chapter 13 debtor could not use that power to avoid a mortgage lien. In re Dobbs, 597 B.R. 74 (Bankr. E.D. N.Y. 2019).

Plan Modification

Plan modification based on distribution of exempt retirement funds. In two opinions involving debtors who took distributions from their otherwise exempt retirement funds, the trustee moved for plan modifications; although the funds lost their exempt status by distribution and failure to roll over into another qualified plan within sixty days, the Court exercised discretion to deny modification. In one case, the exemptions had been claimed and allowed without objection under § 522(d)(12), while in the other case Texas exemption had been claimed. As to § 522(d)(12) exemption, §§ 522(b)(4)(C) and (D) address impact of distribution and provide that distributed funds remain exempt if rolled over within sixty days. In the case using Texas exemptions, the Court was bound by *In re Hawk,* 871 F.3d 287 (5th Cir. 2017); although a Chapter 7 case rather than 13, *Hawk*

applied the Texas statute, requiring that distributions be rolled over to retain exempt status. Notwithstanding the distributed funds becoming nonexempt, the trustee's motions to modify to increase payments to unsecured creditors were denied, based on particular facts in each case. In both cases, the debtors had good-faith reasons for the distributions, needing to use the funds for unexpected home repair and medical bills. In re Sullivan, 596 B.R. 325 (Bankr. N.D. Tex. 2019); In re Arlin, 596 B.R. 516 (Bankr. N.D. Tex. 2019).

Modification denied for exceeding 60 months. The debtors, who were short on payments to complete the plan, proposed modification to pay $2,219 within approximately one month and to have the trustee use "post-expiration" funds on hand along with that additional payment to complete the plan, but the Court concluded that it could not approve the modification, because to do so would permit the plan to exceed 60 months. The confirmed plan's 60 months had already expired when the motion was filed. In re Talison, 597 B.R. 87 (Bankr. 2019). Compare In re Touroo, ___ B.R. ___, 2019 WL 2590751 (E.D. Mich. June 25, 2019) ((Agreeing with *In re Klaas,* 858 F.3d 820 (3d Cir. 2017), bankruptcy court had discretion to permit debtors to cure plan default, allowing a reasonable grace period beyond the 60 months of confirmed plan. Dismissal of the case for plan default was not required under § 1307(c), because dismissal was discretionary. Section 1328 does not expressly require that all payments under the plan be made within 60 months. Remand was ordered for the bankruptcy court to consider the non-exclusive factors identified in *Klaas.).*

Bar on modification after 60 months, but reasonable grace period is discretionary. In its recent decision on the meaning of the phrase "payments under the plan," the Ninth Circuit Bankruptcy Appellate Panel also held that for purposes of modification under § 1329(c), the debtors could not obtain modification of their plan to surrender the residence when the attempt came seven months after the sixty-month plan had otherwise expired. The bankruptcy court "had no authority to modify a plan that allowed for payment beyond the 60-month time limit." The BAP opinion notes a distinction between modification beyond the sixty months and "a case where the debtors sought a reasonable extension of time beyond the 60 months to catch up on some missed plan payments or fees," citing *In re Profit,* 283 B.R. 567, n. 11 (B.A.P. 9th Cir. 2002). In re Mrdutt, 600 B.R. 72 (B.A.P. 9th Cir. 2019).

Plan could be modified to reduce interest rate on vehicle loan. Section 1329(a) is statutory exception to § 1327's binding effect of confirmation, and under § 1329(a)(1) and (2)'s plain language a debtor may propose not only to extend or reduce the time for payment but to increase or reduce the amount of payments on a claim. Such modification may include reduction of the contractual interest rate, so long as the requirements of § 1329(b) are met. The proposed modified interest rate is appropriate under *Till* and in accordance with § 1325(a)(5)(B). Because the debtor had previously defaulted as disbursing agent on the vehicle loan it was appropriate to require future loan payments to be disbursed by the trustee. Under § 1329(b)(2), the modification became effective retroactively to the date of filing of the debtor's motion. In re Smith, 600 B.R. 570 (Bankr. S.D. Tex. 2019).

Discharge

Direct payments to creditor. The Ninth Circuit Bankruptcy Appellate Panel adopted the view of an "overwhelming majority of courts which have interpreted the term 'payments' in § 1328(a) to include direct payments by the debtor to a creditor." The issues were whether the debtors' plan payments were complete when they had paid the trustee but had defaulted on direct mortgage payments and whether they could modify the plan to surrender the residence after the sixty months of the plan had expired. The BAP's interpretative meaning of the phrase "payments under the plan" was in the context of § 1329(a) rather than § 1328(a), but the BAP concluded that the same meaning applied in both Code sections; "[a]lthough the language in § 1328(a) is slightly different from that in § 1329(a)--§ 1328(a) uses the phrase 'payments under **the** plan' while § 1329(a) uses the phrase 'payments under **such** plan'—we see no reason to interpret these phrases differently. The word 'such' simply describes the plan which has been confirmed." This confirmed plan required the debtors to make fixed monthly payments to the trustee, plus either obtain a loan modification from the mortgagee or pay the arrearage directly, as well as make all postpetition mortgage payments directly to the creditor. The BAP's opinion discusses decisions from the majority of courts, citing *In re Coughlin,* 568 B.R. 461 (Bankr. E.D. N.Y. 2017), as an example, while disagreeing with the conclusions reached by the *Gibson* and *Rivera* opinions, which are summarized below. In re Mrdutt, 600 B.R. 72 (B.A.P. 9th Cir. 2019).

In contrast, the Bankruptcy Court in *In re Rivera,* 599 B.R. 335 (Bankr. D. Ariz. 2019), concluded that debtors' default in making all direct postpetition mortgage payments was not a failure to complete payments required "under the plan." The debtors had made all payments required to made through the trustee, including mortgage arrearages, but they had defaulted on postpetition mortgage payments in the last months of the plan. The local plan form contained check boxes, specifically indicating that the debtors would make direct payments monthly on their postpetition mortgage obligations, while curing prepetition arrearages through the trustee. The opinion reviews the split of judicial authority and discusses the majority opinion that "payments under the plan" for purposes of § 1328 refers to any payment, including direct postpetition mortgage, made "pursuant to the plan," citing *In re Finley,* 2018 WL 4172599 (Bankr. S.D. Ill. 2018). The minority position was represented by *In re Gibson,* 582 B.R. 15 (Bankr. C.D. Ill. 2018). The *Rivera* Court concluded that "payments under the plan," when read in "the context of Chapter 13 as a whole brings clarity to the meaning and confirms that such words should only refer to the debtor's payments *paid to the trustee* pursuant to the plan's terms." The Court adopted the reasoning in *Gibson* that "provided for by the plan" and "payments under the plan" have different meanings, with "under the plan" being a narrower term.

The *Rivera* Court also agreed with the *Gibson* Court that Rule 3002.1 was being misapplied by some courts in their denial of discharge and case dismissal, concluding that the Rule was "designed to be a rule of creditor disclosure, not a procedure for denial of discharge." Moreover, the long-term mortgage debt is already excepted from discharge under § 1328(c), and dismissal of a case for default in direct payments was found to be fundamentally unfair to debtors. The direct-pay mortgage creditor is not materially affected by the default, because the creditor retains state-law and contractual remedies after the debtors receive discharge of other debts.

Refunds by creditor after plan completion and discharge. After the debtor completed plan payments, received discharge and the case was closed, two unsecured student loan creditors receiving distributions refunded those to the trustee. The debtor had been approved for administrative total disability discharge of those debts. The trustee moved to reopen the case, and the issue was whether the refunds would go to the debtor or to other creditors. Citing authority from other bankruptcy courts, because the plan had not

paid 100% dividend to unsecured creditors, the debtor remained bound by the terms of the confirmed plan to pay the refunds to creditors. It was too late for the debtor to attempt plan modification, and passing the refund on to the debtor would essentially be a modification. Section 1326(a)(2) requires the trustee to distribute in accordance with the plan, and the refunds put money back into the trustee's hands for distribution. In re Hoffman, ___ B.R. ___, 2019 WL 1271457 (Bankr. W.D. Va. Mar. 15, 2019).

In joint case, one spouse not eligible for discharge due to unpaid domestic support obligation, but other spouse granted discharge. Considering the issue whether in a joint case one debtor's ineligibility for discharge due to his failure to pay required post-petition domestic support obligations prevented the other spouse's discharge, the Court concluded that the plain language of § 1328(a) provided that the co-debtor who had completed her required plan payments was entitled to discharge. Section 1328(a) refers to a singular "debtor," and the DSO certification requirement added in 2005 also referred to a singular "such debtor," who must certify payment of required obligations. The spouse who was not liable on the domestic support obligation was not "such a debtor" required to certify payment of that obligation, and she was entitled to a full-completion discharge. In re Hernandez, ___ B.R. ___, 2019 WL 642841 (Bankr. N.D. Tex. Feb. 14, 2019).

Revocation of discharge denied. Finding no binding authority in the Seventh Circuit on § 1328(e), there is substantial authority under § 727(d)(1), and the two statutes should be read in the same manner, requiring proof of "fraud in fact" that the debtor acted with intent to deceive. The debtor's scheduling of the cause of action with "unknown value" did not establish such fraudulent intent, even though the cause of action was settled shortly after the bankruptcy filing. The debtor had told his attorney and the Chapter 13 trustee of the settlement. In re Maxwell, 597 B.R. 418 (Bankr. N.D. Ill. 2019). Compare In re McCutcheon, 598 B.R. 339 (Bankr. M.D. Ga. 2019) (Denying Chapter 13 debtor's motion for summary judgment in former business partner's complaint seeking revocation of confirmation under § 1330(a), due to material issues of fact, the opinion observed that plaintiff's alleged awareness of fraud prior to entry of confirmation order did not prevent his seeking to revoke confirmation as having been obtained by fraud. Section 1330(a), unlike § 1328(e)(2), does not require that the plaintiff lack pre-confirmation knowledge of the fraud.).

Discharge Injunction

Violation of discharge injunction by failure to correct reporting of discharged debt. Holding that mortgage claim was "provided for" in plan's listing debt under surrendered property, the debtor's personal liability had been discharged. The mortgage creditor violated the discharge injunction by failing on demand to correct its reporting of the debt. In re Van Pelt, 599 B.R. 1 (Bankr. E.D. Ky. 2019).

Dismissal and Conversion

Dismissal for failure to comply with credit counseling. The bankruptcy court did not abuse discretion in dismissing the serial filer's sixth case for failure to satisfy the prepetition credit counseling requirement. Despite checking the box on the petition to indicate receiving that counseling, the debtor did not demonstrate actual receipt within the 180 days, and the certificate of completion was not filed. The bankruptcy court also had authority to dismiss with bar to another filing within 180 days. In re Marshall, 596 B.R. 366 (B.A.P. 8th Cir. 2019).

Upon dismissal, funds held by trustee must be distributed to debtors. Discussing split of authority subsequent to *Harris v. Viegelahn,* 135 S.Ct. 1829 (2015), on distribution of funds held by trustee post-confirmation and upon dismissal, the Court concluded that any distinction between conversion of cases, as involved in *Harris,* and dismissal did not "warrant a different conclusion as to the disposition of the funds held by the Trustee." The Chapter 13 case ceased to exist upon dismissal and § 349 required all property rights as they existed at commencement of the case. "Returning any funds to the debtors paid to the Trustee from the debtors' earnings, personal injury claims, or other income most closely serves to restore the parties to the positions they held at the time the case was filed." The Court's conclusion was consistent with pre- and post-*Harris* authority, including two circuit opinions. In re Elms, ___ B.R. ___, 2019 WL 3302398 (Bankr. S.D. Ohio July 16, 2019).

Debtor's absolute right to dismiss. Reviewing the split of authority on whether a Chapter 13 debtor has an absolute right to dismiss under §1307(b), the Court cited *Law v. Siegel,* 571 U.S. 415 (2014), for proposition that bankruptcy courts have no authority to override express provisions of the Code, and § 1307(b) provides that the court shall dismiss a case upon the debtor's request. On a motion to reconsider voluntary dismissal,

the creditor did not show a legal or factual basis for reconsideration. In re Marinari, 596 B.R. 809 (Bankr. E.D. Pa. 2019).

Dismissal for bad faith. Reviewing standards for dismissal for cause under § 1307(c), "cause" may include lack of good faith under *In re Alt,* 305 F.3d 413 (6th Cir. 2002). Finding that this case was filed with the motive of forestalling or escaping post-judgment collection proceedings in U.S. District Court, the case was lacking good faith. Judgment had been entered against the debtor's former husband, but collection efforts could include assets that were transferred to the debtor by the former spouse. In re Curtis, 596 B.R. 624 (Bankr. W.D. Mich. 2019). See also In re Feldman, 597 B.R. 448 (Bankr. E.D. N.Y. 2019) (Debtor, who was attorney, filed case in bad faith, finding numerous misstatements and omissions in petition and schedules; dismissal was with prejudice to refiling for one year.). Compare In re Hernandez, 754 Fed.Appx 632 (9th Cir. 2019) (Affirming denial of dismissal, none of bad-faith factors in *In re Blendheim,* 803 F.3d 477 (9th Cir. 2015), were present.).

Conversion not in bad faith. Reviewing the good-faith factors in the Eleventh Circuit, under *In re Kitchens,* 702 F.2d 885 (11th Cir. 1983), the fixed-income, older debtors did not convert from Chapter 7 to 13 in bad faith, even though conversion allowed them to discharge what might be a nondischargeable debt under § 523(a)(6) in Chapter 7. In re Wade, 598 B.R. 34 (Bankr. N.D. Ga. 2019)

Case converted from 13 to 7 could be converted to 11. After debtors' Chapter 13 case was converted to Chapter 7 because of exceeding debt limits, the debtors moved to convert to Chapter 11 and a secured lender objected on basis of bad faith filing to stop foreclosure. Debtors established by preponderance of evidence that they had sufficient assets and that opportunity to restructure in Chapter 11 should be permitted. In re Clark, 599 B.R. 149 (Bankr. E.D. Okla. 2019).

Attorney Fees

Bankruptcy court had discretionary authority to allow reimbursement of filing fees. The Fifth Circuit upheld the bankruptcy court's interpretation of its standing order but vacated the lower court's opinion on whether it lacked authority to ever allow reimbursement of filing fees, credit counseling and credit report fees that had been advanced by the debtors' attorneys. In the district, attorneys were allowed a "no-look" fee

in Chapter 13 cases, and that practice had been approved previously by the Circuit in *In re Cahill,* 428 F.3d 536 (5th Cir. 2005). Attorneys contested the denial of reimbursement of expenses advanced by them. The bankruptcy court had a standing order on its no-look fees, and its prior standing order had stated that such advances were not separately reimbursable, but an amended standing order had not specified whether advanced pre-filing expenses were part of no-look fee. The bankruptcy court interpreted its revised standing order to exclude separate reimbursement, relying on the purpose of the no-look fees as one of simplifying the fee approval process. That interpretation was affirmed by the Circuit, holding that the no-look fee option was "an administrative creation of the bankruptcy court designed to quickly identify a level of debtor's counsel compensation that is presumptively reasonable and easy to administer. Given that purpose, it seems intuitive that silence on a given expense (particularly a routine expense) means that expense is supposed to be accounted for under the pre-approved no-look fee amount." Moreover, the advanced expenses and fees were not necessary expenses to preserve the estate under § 503(b)(1). However, the Circuit vacated that portion of the bankruptcy court's decision that "all bankruptcy courts lack the discretion to ever award debtor's counsel compensation that includes reimbursement for advancing the costs of those three fees." Section 330(a)(4)(B) vests bankruptcy courts with discretion to determine what is included in "reasonable compensation," and the Circuit "concludes that § 330(a)(4)(B) permits bankruptcy courts to reimburse debtor's counsel for the costs of advancing such fees as reasonable compensation, but it does not require them to do so." In re Riley, 923 F.3d 433 (5th Cir. 2019).

Chapter 13 debtor's attorney sanctioned for frivolous appeal. The Seventh Circuit affirmed the district court's sanction of debtor's attorney for filing frivolous appeal and raising arguments that had been barred by *Rooker-Feldman* Doctrine after foreclosure had been affirmed by Wisconsin Court of Appeals. The sanctions were appropriate under Fed. R. Bankr. P. 8020(a) and 28 U.S.C. § 1927, and the district court properly suspended the attorney from practice in the district for a period of months. In re Lisse, 921 F.3d 629 (7th Cir. 2019).

Order requiring partial disgorgement of fees was final for purposes of appeal. The bankruptcy court sanctioned Chapter 7 debtors' attorney for failure to fully disclose all

fees received ($350,000), requiring disgorgement to the bankruptcy estate of $25,000 rather than entire fee, and creditor appealed. The Bankruptcy Appellate Panel first held that the order was final for purposes of appeal. The debtors had interests in multiple businesses and involuntary petitions had been filed in another state, with transfer of venue and then an avoidance proceeding filed. "Even if compensation is not determined to be excessive under § 329(b), a bankruptcy court may order disgorgement or a sanction based on a failure to disclose under § 329(a)." Here, the "bankruptcy court did not abuse its discretion when it considered relevant factors from other cases and courts in deciding to impose a sanction of less than the full amount of fees received by an attorney who violated the disclosure requirements of § 329(a) and Rule 2016(b)." In re Stewart, 600 B.R. 425 (B.A.P. 10th Cir. 2019).

Debtor's attorney and appearance counsel sanctioned. Attorney's disclosure indicated payment for representation at meeting of creditors, but that attorney did not attend, instead using appearance counsel. The primary attorney improperly shared compensation with appearance counsel who was not member of her firm, and appearance counsel did not disclose compensation or file notice of appearance. Both attorneys were sanctioned by disgorgement of fees to the debtor. In re Schatz, 601 B.R. 864 (Bankr. D. Conn. 2019). See also In re Nunez, 598 B.R. 696 (Bankr. E.D. N.Y. 2019) (Attorney retained postpetition by *pro se* debtor failed to disclose fees paid in connection with the case, and attorney was sanctioned by disgorgement of fees to debtor's girlfriend who had paid them.).

Filing schedules and statements that debtors had not seen in multiple cases resulted in suspension from practice, criminal referral and recommendation of disbarment. In lengthy opinion with exhibits, the bankruptcy court found the consumer debtor's attorney grossly incompetent. The Court had ordered the attorney to produce all files on bankruptcies filed in two years, but only partial production revealed that the debtors in multiple cases had never seen or verified the accuracy of documents filed with the clerk. Finding violations of Rule 9011 and bad faith in the production, the Court suspended the attorney from practice in the district for two years and referred her to state and federal authorities for consideration of disbarment and criminal investigation. In re Pina, 602 B.R. 72 (Bankr. S.D. Fla. 2019).

Interim fee order was not appealable. The Chapter 13 debtors' attorney sought award of interim fee for work related to adversary proceedings, which was granted in part by the bankruptcy court, requiring further documentation of balance. Creditors objected to the interim fee application and then appealed. The Bankruptcy Appellate Panel held that orders granting interim fees to debtors' attorney are not final orders from which appeal is of right, and leave to appeal was denied, because the Panel found no question of law that would materially advance the litigation. A requirement of finality was stressed. In re Lane, 598 B.R. 595 (B.A.P. 6th Cir. 2019).

Chapter 13 debtor's attorney not entitled to recovery under § 330 of fees that were incurred in defending prior attorneys' sanctions motion. The debtor's prior attorneys had sought to impose sanctions on the current attorney, and that attorney successfully defended against sanctions. However, the fees incurred by the attorney did not benefit the bankruptcy estate. The issue was not whether those fees were necessary or reasonable as to the attorney, but the fees were not necessary for administration of the estate and were not allowable under § 330(a)(1). In re Schaller, 595 B.R. 730 (Bankr. E.D. Mich. 2019).

Claims

Overpayments by Illinois Department of Human Services not domestic support obligation. Two debtors had received overpayments of benefits under the State's Child Assistance Program or Supplemental Nutrition Assistance Program and the State filed claims for priority status as domestic support obligations. The Seventh Circuit held that the State's assertion of priority "would expand the definition of domestic support obligation far beyond what is intended by the Bankruptcy Code." These debtors did not owe money to the Department for support payments; rather, "they owe DHS because they received money they were not statutorily entitled to. Because such a payment is not in the nature of alimony, maintenance, or support, we agree with the bankruptcy court decision that this is merely an overpayment of benefits and not a domestic support obligation." In re Dennis & Halbert, 927 F.3d 1015 (7th Cir. 2019). Compare In re Hawk, 595 B.R. 556 (Bankr. C.D. Ill. 2019) (Debtor's obligation to Illinois Department of Human Services for its overpayment of child care benefits was a first priority claim under § 101(14A)'s definition of domestic support obligations and § 507(a)(1)'s priority. Noting the split of

authority on whether overpayment of government assistance benefits is in the nature of support, the Court agreed with the reasoning of *In re Etnire,* 568 B.R. 80 (Bankr. C.D. Ill. 2017), giving "full effect to the text of the definition of a DSO. . . .A debtor's direct liability to reimburse assistance payments made by a governmental unit is plainly encompassed by the definition of a DSO and is eligible for priority status under section 507(a)(1)(B).").

Domestic support obligation accrues interest. Although § 502(b)(2) prevents allowance of claims for unmatured interest, under § 101(14A) a domestic support obligation includes interest that accrued prepetition and accrues postpetition; therefore, child support debt, with its interest accrual, was allowed priority claim in Chapter 13. In re Hairston, IV, 2019 WL 1750902 (Bankr. D.C. Apr. 12, 2019). Accord In re Moore-McKinney, 2019 WL 2082153 (Bankr. N.D. Ga. May 10, 2019), holding that § 101(14A)'s express inclusion of interest in domestic support obligation controlled over § 502(b)(2), because § 101(14A) specifically provides that accruing interest is part of the debt "notwithstanding any other provision of this title." This interest must be paid notwithstanding § 1322(b)(10)'s provision that postpetition interest may only be paid on nondischargeable debt if all allowed claims are paid in full, concluding that the predicate to § 1322(b) provides that all of its subsections are "subject to subsection (a)." The accruing interest is part of priority claim that must be paid in full in Chapter 13 plan under § 1322(a)(2). In both cases, the allowed interest rate was determined under applicable state law.

Lack of notice to mothers of debtor's children. The Chapter 7 debtor listed the Illinois Department of Healthcare and Family Services as an unsecured creditor, and the minor children's' mothers had sought support enforcement services from that government entity prior to the bankruptcy filing. The debtor scheduled one of the mothers with an incorrect address and he omitted the other from schedules, so neither received notice of the filing. The Department had received notice but did not file timely claims for the large child support debts ($58,257 and $242,550), and the trustee objected to the late claims. The bankruptcy court allowed the claims as tardy under § 726 (a)(2), rather than under § 726(a)(1), which had effect of no distribution, notwithstanding $71,000 in the trustee's hands after payment of timely secured and administrative claims. In a strict application of the term "creditor" and applying Illinois law, the Fifth Circuit held that the Illinois

Department, rather than the two mothers, had the sole authority to collect money from the debtor: "Under Illinois law, when a custodial parent receives enforcement services from the Department, the non-custodial parent must make all child support payments to the state disbursement unit, rather than to the custodial parent." The Department was the creditor and it received notice, while the clerk of the bankruptcy court was not obligated to provide notice to the mothers. The Department's claims were properly denied § 726(a)(1) classification because they were untimely. In re Clark, IV, 921 F.3d 566 (5th Cir. 2019).

Lack of assignment proof prevented claim allowance. eCAST Settlement Corp. filed proof of claim in Chapter 13 case, to which debtor objected for lack of documentation and proof of assignment. Claim for credit card debt was allegedly assigned by Citibank, but claimant did not comply with Rule 3001(c)(3)(B)'s requirement to produce copy of the writing upon which claim was based, and evidence offered into evidence was inadmissible hearsay. Under Rule 3001(c)(2)(D), with no evidence to support the assignment, no need was found for further sanctions, but claim was disallowed. Opinion addressed other theories upon which claimant attempted allowance. Nicholson v. eCAST Settlement Corp., ___ B.R. ___, 2019 WL 2246720 (Bankr. M.D. Pa. May 24, 2019).

Proof of claim for stale debt. Granting creditor's motion to dismiss class action complaint for filing of proofs of claim for time-barred debts, the Court held that under applicable Maryland law after expiration of three-year limitations period, the credit card debts were unenforceable and subject to disallowance, but the creditor still had right to file the proofs of claim under the holding of *Midland Funding, LLC v. Johnson,* 137 S.Ct. 1407 (2017). "In summary, the common law rule applicable in Maryland is that the expiration of the limitations period terminates the creditor's remedy, but not the right to payment. . . .[W]here state law provides that the right to payment remains, federal law preempts any state law that imposes liability on a creditor filing a proof of claim on a time-barred debt in a bankruptcy case." In re Jaley, ___ B.R. ___, 2019 WL 2017347 (Bankr. D. Maryland Apr. 29, 2019).

Oversecured creditor could not amend claim for pendency interest. Oversecured creditor's original claim had not asserted interest for postpetition, pre-confirmation period, and it allowed plan to be confirmed without provision for such pendency interest. When

the vehicle collateral was destroyed by accident, that interest was added and paid by the insurance coverage, and the debtor moved to modify the confirmed plan to recover the overpayment to the creditor. Timely notice of a claim to pendency interest was required and the confirmed plan was res judicata, barring the asserted claim for pendency interest. In re Shealy, 599 B.R. 397 (Bankr. M.D. Ga. 2019).

Arbitration denied in complaint implicating allowance and disallowance of claims. Applying *Moses v. CashCall,* 781 F.3d 63 (4th Cir. 2015), the bankruptcy court held that a complaint presented constitutionally core claims and "referring those core claims to arbitration would inherently conflict with the purposes of the Bankruptcy Code in contravention of Fourth Circuit precedent." Moreover, the Virginia Attorney General's motion to intervene had been granted, allowing that office to object to the creditor's proof of claim, and a contract with an arbitration clause could not bind the nonparty Attorney General. In re Taylor, 2018 WL 6131473 (Bankr. E.D. Va. 2018).

Standing to file proof of claim. In an individual's Chapter 11 case, the Court reviewed requirements for standing to file a proof of claim, finding that the assignee of a note and mortgage may have standing, conditioned upon the assignee providing proof of assignment of the note, or that the note was endorsed in blank with the assignee having physical possession of the endorsed note. The claimant also failed to show that it was servicer of the note, because a servicer must show that it is the authorized agent of an entity with the right to enforce the note. In re Benyamin, 596 B.R. 789 (Bankr. S.D. N.Y. 2019).

Mortgagee entitled to recover postpetition attorney fees and $300 flat fee for preparing proof of claim. Applying Alabama law on recovery of attorney fees for an oversecured mortgage creditor, postpetition fees incurred by the creditor were recoverable as additional obligations secured by the mortgage. The opinion also discusses authorized fees and charges by the creditor under the most recent HUD Mortgagee Letter. In addition, the Court discussed recovery of a flat $300 fee for preparation of a proof of claim by the attorney for an oversecured creditor, rejecting that such activity was merely ministerial. "The risks and penalties associated with a flawed proof of claim are not insignificant, particularly for a residential mortgage creditor." Although preparation may not be complicated, "the consequences of an incomplete or

inaccurate claim travel with the creditor throughout the case and potentially have significant legal and evidentiary repercussions." In re Mandeville, 596 B.R. 750 (Bankr. N.D. Ala. 2019).

Debtor's objection to claim for attorney fees. Ford Motor Credit's proof of claim included $4,402.86 in attorney fees, and the debtor objected, asserting that reasonable attorney fees would be only $750. The Court overruled the objection, finding that a valid objection must include one or more of the grounds under § 502(b). The objecting party has the obligation to point out which statutory basis exists, and the secured creditor is entitled to seek attorney fees in its proof of claim, "if it had an enforceable right under applicable state law to collect the fees," citing *Travelers Cas. & Sur. Co. of Am. V. Pac. Gas & Elec. Co.,* 549 U.S. 443 (2007). Ford's claim to "contract-based attorneys' fees" was an enforceable right under applicable Louisiana law. The opinion also overruled an objection to another claim, based on assertion that the claim was time-barred under Louisiana's three-year prescription period, because the debtor had acknowledged the claim within the three-year period by scheduling it in her prior bankruptcy case. That acknowledgement caused the prescription period to run anew. In re Stephenson, ___ B.R. ___, 2019 WL 1423089 (Bankr. W.D. La. Mar. 28, 2019).

Proof of claim requirements did not create FDCPA cause of action. In a three-count complaint, the Chapter 13 debtor alleged violations by the debt buyer of the FDCPA, as well as of Rule 3001, and the defendant moved for dismissal. Citing *Midland Funding, LLC v. Johnson,* 137 S.Ct. 1407 (2017), the Court concluded that "the Supreme Court has determined that when a creditor's alleged misconduct involves the filing of a proof of claim in a bankruptcy case for a debt that would be enforceable under state law, the Bankruptcy Code and Rules provide the exclusive means for addressing the allowance of the claim and the creditor's misconduct." Stopping short of holding that a FDCPA action "may never be brought in the context of a bankruptcy," the Court found no FDCPA cause of action here when the alleged misconduct involved a disputed proof of claim and failure to follow the Rule's requirements, with the FDCPA count dismissed. Under its prior review of "requirements of Rule 3001(c)(2)(A) and the implications of a creditor's failure to follow them," *Maddux v. Midland Credit Management, Inc.,* 567 B.R. 489 (Bankr. W.D. Va.

2016), causes of action for violation of that Rule survived dismissal. In re Derby, ___ B.R. ___, 2019 WL 1423084 (Bankr. W.D. Va. Mar. 28, 2019).