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*Consumer Track*

## **Update on Consumer Bankruptcies**

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**OVERVIEW OF ISSUES RELATING TO PROOFS OF CLAIM AND  
OBJECTIONS TO CLAIMS IN CONSUMER BANKRUPTCY CASES**

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TABLE OF CONTENTS

I. Proofs of Claim..... 4

    A. Section 501 – Filing of Proofs of Claim or interest ..... 4

        Who May File Proofs of Claim..... 4

        Secured Creditors..... 4

        Filing a Proof of Claim Submits Claimant to Bankruptcy Jurisdiction ..... 5

        Withdrawal of a Bankruptcy Claim – Rule 3006..... 5

    B. Section 1305 – Postpetition Claims in Ch. 13 Reorganization Cases..... 5

    C. Rule 3001 – The Proof of Claim..... 6

        Form of the Proof of Claim..... 6

        Who Can Execute a Proof of Claim..... 6

        Special Requirements in Consumer Cases..... 7

        When the Claim Is Based on an Open-End Consumer Credit Agreement ..... 7

        Failure to Comply with Rule 3001(c)’s Special Documentary Requirements Is Not  
Grounds for Denial of Claims in Itself ..... 8

        Secured Claims Require Evidence of Perfection ..... 9

        Transferring a Claim ..... 9

        Amending Existing Proofs of Claim..... 9

    D. Rule 3002 – Filing a Proof of Claim ..... 10

        Timing of Filing Proofs of Claim ..... 10

        Necessity of Filing a Proof of Claim by Secured Creditors..... 11

        Special Provisions Relating to Secured Claims in Ch. 13 ..... 12

    E. Rule 3004 – Filing of Claims by the Debtor or Trustee..... 12

II. Objections to Claims..... 13

    A. Rule 3007 ..... 13

B. Section 502 – Allowance of Claims or Interests and Bases for Disallowance. .. 15

- 1. The Claim is Unenforceable against the Debtor ..... 15
- 2. Claims for Unmatured Interest..... 15
- 3. Reasonable Value of Services Performed by an Insider or Attorney ..... 16
- 4. Unmatured Domestic Support Obligations ..... 16
- 5. Lease Rejection Claims..... 17
- 6. Employee Termination Claims ..... 17
- 7. Untimely Claims ..... 17
- Creditors’ Right to File a Proof of Claim in Wake of Avoidance Action ..... 18
- Reconsideration of a Claim Disallowance ..... 18

I. PROOFS OF CLAIM

The purpose for filing a proof of claim is to have an allowed claim that may form the basis of a distribution from the bankruptcy estate. *In re Faitalia*, 561 B.R. 767, 774 (9th Cir. B.A.P. Dec. 6, 2016). The rules and procedures governing proofs of claim and equity security interests are set forth in 11 U.S.C. §§ 501 and 502 and Rules 3001, 3002, 3003, 3005, 3006, 3007 and 3008 of the Federal Rules of Bankruptcy Procedure. The focus of this outline is on proofs of claim in consumer bankruptcy cases under Chapters 7 and 13.

A. Section 501 – Filing of Proofs of Claim or Interest

**Who May File Proofs of Claim**

Section 501(a) allows any creditor to file a proof of claim and an equity security holder to file a proof of interest. A “creditor” is defined under the Bankruptcy Code as an “entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor . . . .” 11 U.S.C. §101(10)(A). A “claim” is defined as a “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.” 11 U.S.C §101(5)(A). So the scope of who may file a proof of claim is broad.

Section 501(b) allows an entity that is liable to a creditor with the debtor to file a proof of claim for contribution, and it also allows a secured creditor of a creditor to file a proof of claim. In addition, § 501(c) provides that the debtor or trustee may also file a proof of claim on behalf of a creditor. Rule 3004 expressly provides a debtor or a trustee an extra 30 days following Rule 3002(c)’s 90-day deadline under to file a proof of claim on the creditor’s behalf.

**Secured Creditors**

Secured creditors are not required to file a proof of claim in order to preserve their lien. *Va Bene Trist, LLC v. Washington Mut. Bank*, 556 F. App’x 647, 650 (9th Cir. 2014). Secured liens pass through bankruptcy unaffected. *In re Schlegel*, 526 B.R. 333 (9th Cir. B.A.P. 2015) (citations omitted). However, as discussed *infra*, there are instances in Ch. 13 cases where the debtor or a

creditor should file a proof of claim in order to receive payments from the Ch. 13 Trustee through the debtor's Ch. 13 plan.

**Filing a Proof of Claim Submits Claimant to Bankruptcy Jurisdiction**

The filing of a proof of claim triggers the claims allowance process, and subjects a claimant to the jurisdiction of the bankruptcy court. 28 U.S.C. 157(b)(2)(B) states that the “allowance and disallowance of claims against the estate” are core bankruptcy proceedings. In the landmark decision of *Stern v. Marshall*, 564 U.S. 462, 497, 131 S. Ct. 2594, 2617, 180 L. Ed. 2d 475 (2011), the U.S. Supreme Court explained the act of filing a proof of claim against the debtor subjects a creditor to the jurisdiction of the bankruptcy court to hear counterclaims that the debtor may file in response to the proof of claim, when the counterclaim “become[s] integral to the restructuring of the debtor-creditor relationship.” *Id.* at 497 (citing *Langenkamp v. Culp*, 498 U.S. 42, 44, 111 S. Ct. 330, 331, 112 L. Ed. 2d 343 (1990)) (by filing proof of claim, one submits to bankruptcy court jurisdiction)).

**Withdrawal of a Bankruptcy Claim – Rule 3006**

Once a creditor has filed a proof of claim, he or she may withdraw the claim as a matter of right, unless an objection has been filed or an adversary proceeding has been commenced against the creditor. Rule 3006. *In re Condor Sys., Inc.*, 296 B.R. 5, 11 (9th Cir. B.A.P. July 18, 2003). In those instances, the claim may only be withdrawn after a notice and hearing and an order of court is issued. Rule 3006. In *In re Condor Sys.*, the Ninth Circuit B.A.P. explained that Rule 3006 is “an application of the considerations underlying Federal Rule of Civil Procedure 41(a).” *In re Condor Sys., Inc.*, 296 B.R. at 11.

**B. Section 1305 – Postpetition Claims in Ch. 13 Reorganization Cases**

Claims that arise against a Ch. 13 debtor postpetition are generally speaking not claimable in the debtor's Ch. 13 case. However, §1305 permits creditors to file a proof of claim against debtors for taxes that become due while the Ch. 13 case is pending. Some courts have held that a §1305 tax claim is a priority claim that must be paid in full under a chapter 13 plan pursuant to section 1322(a)(2). *In re King*, 217 B.R. 623, 625 (Bankr. S.D. Cal. 1998). In *In re King*, the

court reasoned that “[a]lthough in reality the IRS claim arose postpetition, it is allowed under § 502(b) as though it arose pre-petition. As a pre-petition claim, § 507(a)(8) becomes applicable and the IRS claim becomes a priority claim.”

Section 1305 also permits an entity who has a claim against the debtor for a consumer debt that arises after the petition date and is for property or services necessary for the debtor’s performance under the plan to file a proof of claim. 11 U.S.C. §1305(a)(2). This type of claim may arise when the debtor with an already tight budget suffers financial hardship during the plan of reorganization. A claim filed under §1305(a)(2) should be disallowed if the holder of the claim knew that prior approval by the trustee was practicable and was not obtained. 11 U.S.C. §1305(c).

**C. Rule 3001 – The Proof of Claim**

**Form of the Proof of Claim.**

Under Rule 3001(a) a proof of claim must conform to Official Bankruptcy Form B410 which was recently revised by the Judicial Conference in December 2015. In addition, the judicial conference created form B410A to be used by mortgagees. This new form requires the claimant to provide a loan history to review when payments were received, how they were applied, when fees and charges were incurred, and when escrow charges were satisfied. Fed. R. Bankr. P. OFFICIAL Form B410A (Advisory Committee Notes). The Advisory Committee Notes also provide some guidance as to how creditors should create a loan history:

“loan history should begin with the first date on which the borrower failed to make a payment in accordance with the terms of the note and mortgage, unless the note was subsequently brought current with no principal, interest, fees, escrow payments, or other charges immediately payable.”

*Id.*

**Who Can Execute a Proof of Claim**

Rule 3001(b) allows a “creditor or the creditor’s authorized agent. . . .” to execute a proof of claim. A proof of claim is a signed and sworn statement, and it is subject to Rule 9011 sanctions if the court determines there was no reasonable basis of the claims.

**The General “Writing Rule”**

In most instances, the claimant filing a proof of claim will need to provide some form of evidence of the claim other than the claim form. Under Rule 3001(c)(1), if the claim is based on a writing, the proof of claim must be accompanied by a copy of the writing. If the writing has been lost or destroyed, the claimant may file a statement detailing the circumstances of the loss or destruction. Rule 3001(c)(1).

**Special Requirements in Consumer Cases**

Rule 3001(c)(2) imposes additional requirements in an individual debtor cases under Ch. 7, 12 and 13:

- (a) If there is, in addition to the principal amount due, interest, fees, or other charges an itemized statement shall be filed.
- (b) If a security interest is claimed, then a statement of the amount necessary to cure the amount shall be filed.
- (c) If a security interest is claimed in property that is the debtor’s principal residence, an escrow account statement prepared as of the date of the petition shall be filed as an attachment to the proof of claim.

Failure to comply with Rule 3001(c) is not a basis for disallowance of claim, even if it results in a denial of the presumption of prima facie validity under Rule 3001(f). *In re Heath*, 331 B.R. 424, 426 (9th Cir. B.A.P. Sep. 29, 2005). 11 U.S.C. 502(b) contains the exclusive grounds for disallowing a claim. *Id.*

**When the Claim Is Based on an Open-End Consumer Credit Agreement**

There is an exception to the to the general “Writing Rule” under Rule 3001(c)(1) when the claim is based upon an open-end or revolving consumer credit agreement. Rule 3001(c)(3) applies in these circumstances, and requires a statement with the following information:

- 1. The name of the entity from whom the creditor purchased the account;
- 2. The name of the entity to whom the debt was owed at the time of an account holder’s last transaction on the account;

3. The date of an account holder's last transaction;
4. The date of the last payment on the account; and
5. The date on which the account was charged [off] to profit and loss.

When the claim is based on an open-end or revolving consumer credit agreement, the claimant is excused from complying with Rule 3001(c)(1) as long as they have complied with Rule 3001(c)(3). *In re Juarez*, 2017 WL 1169529 (Bankr. D. Idaho March 28, 2017). In *Juarez*, Debtors listed a debt in their Schedules E/F in the amount of \$3,166.00 owed to Synchrony Bank. A creditor who had purchased the credit card debt, Midland Funding LLC, filed a proof of claim asserting that Debtors owed the \$3,166.00. *Id.* at \*1. The proof of claim asserted that Midland Funding had acquired the debt owed to Synchrony bank, and it listed the charge-off date for the debt as "07/03/2016." *Id.* Debtors objected to Midland Funding's claim asserting that the creditor had not provided adequate documentation pursuant to Rule 3001(c)(1)'s "Writing Rule" to show that it owns the claim. *Id.* at \*2.

The court held that compliance with Rule 3001(c)(3)'s special requirements for claims based on credit card debt negated the requirement that a claimant has to comply with Rule 3001(c)(1). *Id.* at \*6. The result is that a proof of claim filed in accordance with 3001(c)(3)'s special requirements constitutes prima facie evidence of the validity and amount of the claim. *Id.* at \*7.

**Failure to Comply with Rule 3001(c)'s Special Documentary Requirements Is Not Grounds for Denial of Claims in Itself**

In the recent case of *In re Norris*, 2017 WL 1476120, (Bankr. W.D. Wash April 18, 2017) the Court considered a Ch. 13 Trustee's objections to three proofs of claim. The basis of the objections was that the proofs of claim lacked evidentiary support. *Id.* at \*1. The creditor had provided statement pursuant to Rule 3001(c)(2)(A) with each of its three proofs of claim, in addition to a copy of the consumer installment loan agreement. The creditor did not respond to the Ch. 13 Trustee's objection, but the court lodged the Ch. 13 Trustee's proposed order disallowing the claim, and held a hearing. The Ch. 13 Trustee stated that the concern was that the claim failed to state the "last payment date." *Id.* at \*2. The Court, relying on two 2005 B.A.P. cases, *Heath v. American Express Travel Related Svcs. Co. (In re Heath)*, 331 B.R. 424 (9th Cir. B.A.P. 2005) and *Campbell v. Verizon Wireless S-CA (In re Campbell)*, 336 B.R. 430 (9th Cir.

B.A.P. 2005), held that Section 502(b) identifies the exclusive bases for disallowing claims, and failure to comply with Rule 3001(c) is not included as a ground for disallowance under 11 U.S.C. §502(b). *Id.* In *In re Heath*, the court noted that the “minority decisions do not explain how they can disregard [the statutory mandate of §502(b) that a court “shall allow such claims.”] In addition, the court noted that Rule 3001(c)(2)(D) proscribes its own remedy for a failure to comply with the specific evidentiary requirements of Rule 3001(c): (1) either to preclude the use of that information in further proceedings; or (2) award reasonable attorney’s fees and expenses caused by the failure.

#### **Secured Claims Require Evidence of Perfection**

If the claimant wishes to assert a secured claim, the “proof of claim shall be accompanied by evidence that the security interest has been perfected.” Rule 3001(d).

#### **Transferring a Claim**

A claim may be transferred by a creditor before or after a proof of claim has been filed. Rule 3001(e). Once a claim has been transferred, a proof of claim may only be filed by the transferee.

After a proof of claim has been filed, a claim transferee must file evidence of the transfer. Rule 3001(e)(2). The clerk is supposed to notify the transferor of the alleged transfer, and to provide the transferor with 21-days’ notice to object. *Id.* If a timely objection is not filed by the alleged transferor, the transferee shall be substituted for the transferor. *Id.* Absent an objection by the transferor, the transfer of a claim and substitution of the transferee in the place of the original creditor is designed to be self-executing. *In re Integrated Knowledge Mktg., Inc.*, No. BAP CC-07-1092-PABAK, 2007 WL 7540949, at \*7 (9th Cir. B.A.P. Nov. 6, 2007), *aff’d*, 433 F. App’x 566 (9th Cir. 2011).

#### **Amending Existing Proofs of Claim.**

The Ninth Circuit has long recognized a liberal policy permitting amendments to proofs of claim. *In re Roberts Farms Inc.*, 980 F.2d 1248, 1251 (9th Cir. 1992) (citing Rule 7015 and FRCP 15). The crucial inquiry is whether the opposing party would be unduly prejudiced by the amendment. *In re Roberts Farms Inc.*, 980 F.2d 1248, 1251 (9th Cir. 1992). “[I]n determining

prejudicial effect [a court should] look to such elements as bad faith or unreasonable delay in filing the amendment, impact on other claimants, reliance by the debtor or other creditors, and change of the debtor's position." *In re Wilson*, 96 B.R. 257, 262 (9th Cir. B.A.P. Dec. 30, 1988). *But see* discussion of *Law v. Siegel*, *infra*.

**D. Rule 3002 – Filing a Proof of Claim**

This rule determines three things: (a) unsecured creditors and equity security holders must file proofs of claim in order for their claims to be allowed, (b) proofs of claim or interest must be filed in accordance with Rule 5005, which determines the place and method of filing claims, and (c) when proofs of claim must be filed.

**Timing of Filing Proofs of Claim**

The time for filing proofs of claim in Ch. 7, 12, and 13 cases is 90 days after the first date set for the meeting of creditors called under §341 of the Code (180 days for governmental units). Rule 3002(c). *But see*, revised Rule 3002, effective December 1, 2017, which reduces the bar date in voluntary chapter 7, chapter 13 and chapter 12 cases to seventy (70) days after petition date. Under the new iteration of the rule, a Court may extend the time to file a claim up to 60 days based on a court's determination that notice to a particular creditor was insufficient (but only for unlisted creditors or creditors with insufficient notice mailed to a foreign address. Mortgage creditors secured by the debtor's principal residence will have until 120 days from the petition date to file the supplement and attachments required under Rule 3001(c-d).

a. Six Enumerated Exceptions to the Deadlines for Proofs of Claim

The six exceptions enumerated in Rule 3002(c) include the following: (1) claims by governmental units (other than tax claims) are timely filed 180 days after the order for relief, and they can enlarge that time upon a showing of cause; (2) for infants, incompetent persons, or guardians of both; (3) for secured creditors whose claims have been crammed down (a claim for the unsecured portion may be filed within 30 days from the date of the judgment) *see also In re Schlegel*, 526 B. 333, 342-43 (2015); (4) claims for the rejection of executory contracts or unexpired leases; (5) when a Trustee initially files a no asset report but then later reveals that there

may be a dividend to creditors (the clerk shall give creditors 90 days' notice by mail); and (6) if the initial notice of the claims deadline was mailed to a foreign address, the court may extend the deadline "by not more than 60 days if the court finds that the notice was insufficient under the circumstances."

b. Deadline Not to Be Enlarged Under Rule 9006's Excusable Neglect

Excusable neglect under Rule 9006 is **not** a basis for enlarging the deadline to file proofs of claim in Chapter 7 and 13 cases. Rule 9006(b)(3) ("the court may enlarge the time for taking action under Rule[ ] . . . 3002(c) . . . only to the extent and under the conditions stated in those rules. . . ."); *In re Avitabile*, No. 8:14-BK-14381-ES, 2017 WL 586430, at \*3 (9th Cir. B.A.P. Feb. 13, 2017); *In re Coastal Alaska Lines, Inc.*, 920 F.2d 1428, 1432 (9th Cir. 1990) ("90-day deadline for filing claims under Rule 3002(c) cannot be extended for excusable neglect"). Rule 3002(c) controls the expansion of the deadline under which creditors must file a proof of claim against the estate, and that rule lists only the six exceptions stated above, which do not include "excusable neglect." *Id.* In *In re Barker*, 839 F.3d 1189 (9th Cir. 2016), the Ninth Circuit noted that the reason for the rigidity is that the debtor must ascertain the full extent of the debts to determine whether the plan will be feasible given the debtor's assets and disposable income. *Id.* at 1197.

**Necessity of Filing a Proof of Claim by Secured Creditors**

In both Ch. 7 and Ch. 13 cases, a secured creditor "may disregard the bankruptcy proceeding, decline to file a claim and rely solely upon his security if that security is properly and solely in his possession"). See *U.S. Nat'l Bank in Johnstown v. Chase Nat'l Bank of N.Y.C.*, 331 U.S. 28, 33, 67 S.Ct. 1041, 91 L.Ed. 1320 (1947); *In re Blendheim*, 803 F.3d 477, 485 (9th Cir. 2015). However, a secured creditor who wishes to receive distributions in a Ch. 13 bankruptcy case **must** file a valid proof of claim. See *In re HSBC Bank USAS, Nat'l Ass'n v. Blendheim (In re Blendheim)*, 803 F.3d 477, 485 (9th Cir. 2015) (holding that a secured creditor who filed proofs of claim four months after the deadline was not entitled to receive distributions from the Ch. 13 Trustee); see also the revision to Rule 3002, effective December 1, which clarifies that a secured creditor's failure to file a claim does not render it void. The mere fact that the debtor has scheduled a debt in his or her schedules does not entitle a secured creditor to receive a distribution. *In re Barker*, 839 F.3d 1189, 1195 (9th Cir. 2016) (holding that "In a Chapter 13 case, a creditor must

file a timely proof of claim in order to participate in the distribution of the debtor's assets, even if the debt was listed in the debtor's bankruptcy schedules"). The revision to Rule 3002 makes clear that a secured creditor must file a claim to receive distributions through the plan. Rule 3002.1.

**Special Provisions Relating to Secured Claims in Ch. 13**

This Rule applies to secured claims in Ch. 13 cases where the security is in the debtor's residence. It requires secured creditors to serve notice of any change in payment amounts within 21 days of the payments becoming due. Rule 3002.1(b).

Second, a secured creditor may serve a notice itemizing the fees, expenses or charges that were incurred in connection with the claim after the bankruptcy was filed, but the claim "shall be served" within 180 days after the date the fees, expenses or charges were incurred. Rule 3002.1(c). The secured creditor is to file this proof of claim as an amendment to the secured creditor's original claim. Rule 3002.1(d). A debtor may challenge any such fees "on motion . . . filed within one year of service" of the notice. Rule 3002.1(e). Finally, within 30 days of a debtor's completion of all payments under his or her plan, a secured creditor shall file (as a supplement to the proof of claim) and serve a notice that the debtor "has paid in full the amount required to cure any default on the claim." Rule 3002.1(f). The debtor may also file such statement if the secured creditor does not comply. *Id.* Both the notices filed by the secured creditor are not entitled to the presumption of validity under Rule 3001(f).

The secured creditor can use Official Form 410S1 to file the Notice of Mortgage Change and Form 410S2 to file the Notice of Postpetition Mortgage Fees, Expenses and Charges.

The sanction for not complying with Rule 3002.1 is set forth within the rule: (1) the secured creditor will be barred from offering the omitted information as evidence in a contested matter, unless the court determines that "the failure was substantially justified or is harmless" or (2) the court may award other appropriate relief, including reasonable expenses and attorney's fees "caused by the failure." Notably absent from these options is a "disallowance of a secured creditor's claim."

**E. Rule 3004 – Filing of Claims by the Debtor or Trustee**

If a creditor does not timely file a proof of claim under Rule 3002(c) or 3003(c), the debtor or trustee may file a proof of the claim within 30 days after the expiration of the time for filing

under Rule 3002 (for Ch. 7, 11, and 13 - 90 days after the §341 meeting) or Rule 3003 (for Ch.'s 9 and 11 - set by the court).

This Rule may come into play in a number of instances. For example, when a secured creditor neglects to file a proof of claim in a Ch. 13 case and the Debtor wishes to continue paying the claimant through the Ch. 13 plan.

## II. OBJECTIONS TO CLAIMS

### A. Rule 3007

Rule 3007 provides the procedure for claim objections. Rule 3007 requires an “objection to the allowance of a claim shall be in writing and filed.” The objection shall be served on the claimant, the debtor and the trustee at least 30 days before the hearing. Rule 3007(a). Claims objections should be directed at the proof of claim and should not include relief that should be filed in an adversary proceeding. Rule 3007(b). However, an adversary proceeding may also include a claim objection. *Id.* The filing of an objection to a proof of claim “creates a dispute which is a contested matter” within the meaning of Bankruptcy Rule 9014 and must be resolved after notice and opportunity for hearing upon a motion for relief. *Lundell v. Anchor Const. Specialists, Inc.*, 223 F.3d 1035, 1039 (9th Cir. 2000).

Rule 7004 service is not required for a claim objection; the objection need only be served on the person named on the proof of claim at the address stated on the proof of claim. *In re State Line Hotel, Inc.*, 323 B.R. 703, 709 (9th Cir. B.A.P. Mar. 29, 2005), vacated as moot, 242 Fed. Appx. 460 (9th Cir. 2007). *But see*, the revised Rule 3007 requires Rule 7004 service in addition to service at the address on the proof of claim or amended proof of claim, in the case of objections to claims of the United States or its agencies (Rule 7004(b)(4-5); and in the case of objections to claims of insured depository institutions (Rule 7004(h).

Rule 3001(f) provides that a “proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.” This rule supports 11 U.S.C. §502(a), which states that a proof of claim or interest “is deemed allowed, unless a party in interest . . . objects.” So, for example, a creditor that does not comply with the documentary requirements of Rule 3001(c) will not be entitled to the presumption that their claim is valid. *In re Heath*, 331 B.R. 424, 426 (9th Cir. B.A.P. 2005).

An objection must present some evidence to overcome the presumption of validity. *Lundell v. Anchor Constr. Specialists, Inc.*, 223 F.3d 1035, 1039 (9th Cir. 2000). The evidence must have a probative force equal to that of the creditor's proof of claim. *Id.* As a practical matter, “the objector must produce evidence which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency.” *Id.* at 1040 (quoting *In re Allegheny Int'l, Inc.*, 954 F.2d 167, 173–74 (3d Cir. 1992)) (emphasis omitted). If the objecting party successfully rebuts the presumption, the claimant bears the burden of proof to show by a preponderance of the evidence that its claim is valid, and “the ultimate burden of persuasion remains at all times upon the claimant.” *Id.* at 1039. But if the objecting party does not rebut the presumption, the claims litigation ends there; the claim should be allowed without the claimant bearing any further burden to demonstrate the validity of its claim. *Id.* at 1041.

*Quaere*, whether the discussion in the previous paragraph is an accurate state of the law regarding burdens of proof in light of *Law v. Siegel*, 134 S. Ct. 1188 (2014) and subsequent case decisions. *See generally*, Jaime, “Objections to Exemptions Under State Law After *Law v. Siegel*,” ABI Journal (March 2017). Judge Jaime focuses on the dicta in *Law v. Siegel* that while there are no equitable defenses (e.g., bad faith) to claims under federal exemption statutes, state created exemptions are governed by state law “which may provide that certain types of debtor misconduct warrant denial of the exemption.” Judge Jaime goes on to analyze whether state law allocating the burden of proof regarding claims of exemption is substantive law under *Raleigh v. Illinois*, 530 U.S. 15, 20-21 (2000), looking at cases which hold that notwithstanding Rule 4003(c)’s provision placing the initial burden on the party objecting to the exemption, “where a state law exemption statute specifically allocates the burden of proof to the debtor, Rule 4003(c) does not change that allocation. *In re Diaz*, 547 B.R. 329, 337 (9th Cir. B.A.P. Mar. 11, 2016). Judge Jaime points to two federal statutes which support the view that state substantive law regarding the burden of proof prevails over federal rules, the Rules Enabling Act (28 U.S.C. § 2075) and the Rules of Decision Act (28 U.S.C. § 1652).

This raises a similar question when an objection to claim is based on state law, and whether Rule 3001(f)’s statement that proofs of claim “executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim” is accurate, if state law regarding the claim places the burden of proof on the claimant. *See also In Re: Province Grande Olde Liberty, LLC*, 655 F. App'x 971, 972 (4th Cir. 2016), *cert. granted sub nom. PEM*

*Entities LLC v. Levin*, No. 16-492, 2017 WL 2742889 (U.S. June 27, 2017) (whether state law or federal law governs in determining whether to recharacterize debt as equity).

**B. Section 502 – Allowance of Claims or Interests and Bases for Disallowance.**

Section 502(a) provides “[c]laims or [i]nterests . . . are deemed allowed unless a party in interest . . . objects.” Parties in interest include creditors of a general partner. 11 U.S.C. §502(a). Section 502(a) does not define who a “party in interest” is but the term is used throughout the code. Creditors are considered parties in interest under § 502(a). *In re Hall*, No. BAP NV-10-1407-JUHJO, 2011 WL 4485774, at \*10 (9th Cir. B.A.P. Aug. 22, 2011).

Although a claim is “deemed allowed” if no party in interest objects, such a determination is not final until the conclusion of the case. *In re Los Gatos Lodge, Inc.*, 278 F.3d 890, 894 (9th Cir. 2002). Proofs of claims themselves are not final judgments giving rise to res judicata, but the bankruptcy court's allowance or disallowance of a proof of claim is a final judgment. *Siegel v. Fed. Home Loan Mortgage Corp.*, 143 F.3d 525, 529-30 (9th Cir.1998).

Section 502(b) provides that if an objection is made, “the court, after notice and a hearing, shall determine the amount of such claim. . . .” Section 502(b) provides nine bases for disallowing claims, several of which relevant to consumer cases are discussed below.

**1. The Claim is Unenforceable against the Debtor**

In the allowance process, the validity and legality of claims are determined by applicable nonbankruptcy law. *In re S. California Plastics, Inc.*, 165 F.3d 1243, 1247 (9th Cir. 1999). A claim cannot be allowed if it is unenforceable under nonbankruptcy law. *Id.* (citing 11 U.S.C. § 502(b)(1)). An objecting party therefore may raise state law defenses to the claim, including contractual defenses

**2. Claims for Unmatured Interest**

Future unmatured interest (postpetition interest) is not permitted under 11 U.S.C. §502(b)(2). The rule curtailing the accrual of post-petition interest originated in the English bankruptcy system over two centuries ago. *See generally Thrifty Oil Co. v. Bank of Am. Nat. Trust & Sav. Ass'n*, 322 F.3d 1039, 1046–47 (9th Cir. 2003) (citing *Sexton v. Dreyfus*, 219 U.S. 339,

344, 31 S.Ct. 256, 257, 55 L.Ed. 244 (1911) (discussing history of the rule)). In *Thrifty Oil Co.*, the Court explained the modern rationale for the rule:

Today, the Bankruptcy Code maintains the rule to achieve fairness and administrative efficiency in bankruptcy cases. The most significant reasons for the rule include: (1) because a bankruptcy suspends a debtor's ability to pay its debts, requiring payment of post-petition interest penalizes the debtor for something over which it has no control; (2) denying post-petition interest saves the bankruptcy estate the inconvenience of continuously recalculating the amount due each creditor; and most importantly, (3) denying post-petition interest ensures that no party realizes a gain or suffers a loss due to the delays inherent in liquidation and distribution of the estate.

*Thrifty Oil Co.*, 322 F.3d at 1047 Section 502(b)(2). *Id.*

### **3. Reasonable Value of Services Performed by an Insider or Attorney**

11 U.S.C. § 502(b)(4) provides that a prepetition claim for services performed by an attorney or insider of the debtor shall be disallowed to the extent the claim exceeds the reasonable value of the services provided. *In re Placide*, 459 B.R. 64, 72 (9th Cir. B.A.P. Sep. 20, 2011). “The excess amount of the claim beyond such reasonable value fixed by the court is simply disallowed and may not, therefore, share in the distribution of the debtor's assets.” *Id.* Section 502(b)(4) covers attorney's fees for services whether or not they were rendered in contemplation of the filing of the petition, and applies to all prepetition attorney's fees sought. *Id.* Under this section, the attorney or insider bears the burden of proof in showing the reasonableness of the fees sought. *Id.* Bankruptcy courts have wide discretion in determining the reasonableness of fees, and the appellate court will not overturn the bankruptcy court's decision unless it abused its discretion. *Law Offices of David A. Boone v. Derham–Burk (In re Eliapo)*, 468 F.3d 592, 596 (9th Cir. 2006).

### **4. Unmatured Domestic Support Obligations**

11 U.S.C. § 502(b)(5) provides a basis for disallowing a claim is for a debt that is an unmatured domestic support obligation on the date of the filing of the petition. Such claims are excepted from discharge under § 523(a)(5).

### 5. Lease Rejection Claims

11 U.S.C. § 502(b)(6) provides a cap on the claim of a landlord whose lease is rejected by the debtor. *In re El Toro Materials Co., Inc.*, 504 F.3d 978, 980 (9th Cir. 2007). The purpose of this cap is to prevent large claims for un-matured leases, which would consume a larger proportionate share of the estate. Section 502(b)(6) limits the amount of rent a landlord can claim to the greater of (A) one year's rent or (B) 15% of the remaining term of the lease, not to exceed three years, plus any unpaid rent due at the petition date. The starting point is the earlier of the petition date or the date the lessor repossessed or the lessee surrendered the property.

### 6. Employee Termination Claims

A claim from the termination of an employment agreement is limited to one year of compensation, starting from the earlier of the petition date or the date the employment ended, plus any compensation due under the contract as of the petition date. 11 U.S.C. §507(b)(7). The §502(b)(7) cap applies to damages resulting from termination of an employment contract, regardless of when the termination occurs. *Bitters v. Networks Elec. Corp. (In re Networks Elec. Corp.)*, 195 B.R. 92, 100 (9th Cir. B.A.P. 1996) (termination 9-years prebankruptcy). The Ninth Circuit B.A.P. has explained that “[t]he purpose of § 502(b)(7) is to protect the employer/debtor from valid employee claims which would unreasonably compromise the debtor's fresh start, and work to the detriment of other creditors.” *In re Networks Elec. Corp.*, 195 B.R. 92, 100 (9th Cir. B.A.P. 1996).

### 7. Untimely Claims

11 U.S.C. §502(b)(9) provides a basis for objecting to claims which are untimely under the provisions stated above under Rule 3002(c). As described above, there is no enlargement of the time period to file proofs of claim, except as provided in Rule 3002(c). Section 502(b)(9) provides an exception for the allowance of tardily filed claims, allowing them to be paid as tardily filed claims under paragraphs (1)(2) and (3) of §726. However, under the distribution scheme of §726, these claims only receive payment after all of the timely filed unsecured claims have been paid, unless the creditor can show that it holds did not have notice or actual knowledge of the case in time for a timely filing of a proof of claim, and the claim is filed before the assets have been

distributed. 11 U.S.C. §726 (a)(2)(C)(i-ii). Where the creditor cannot show that its failure to file a timely claim is excused, it will only receive a distribution after all other unsecured creditors have been paid. 11 U.S.C. §726 (a)(3).

**Creditors' Right to File a Proof of Claim in Wake of Avoidance Action**

Section 502(h) gives a defendant in an avoidance action the ability to file a late proof of claim for the amount that that defendant paid to the estate. The defendant claim will be treated “the same as if such claim had arisen before the date of the filing of the petition.” 11 U.S.C. §502(h). Typically, a Ch. 7 trustee or debtor will seek a waiver of such claim in settlement negotiations. In cases where there are minimal other claims filed, a defendant who pays money to the estate can receive a substantial distribution through the claims administrative process.

**Reconsideration of a Claim Disallowance**

An allowed or disallowed proof of claim “may be reconsidered for cause.” 11 U.S.C. § 502(j); Fed. R. Bankr. P. 3008. And a “reconsidered claim may be allowed or disallowed according to the equities of the case.” 11 U.S.C. § 502(j). If the time to appeal an order on a claim objection has not expired, a reconsideration request is governed by Civil Rule 59, applied in bankruptcy by Rule 9023. *Wall Street Plaza, LLC v. JSJF Corp. (In re JSJF Corp.)*, 344 B.R. 94, 103 (9th Cir. B.A.P. 2006), *aff'd*, 277 Fed.Appx. 718 (9th Cir. 2008). Note that Rule 9023 requires a Motion to Amend to be filed no later than 14 days after the entry of judgment. When “the time for appeal has expired, a [§ 502(j)] motion to reconsider should be treated as a motion for relief from judgment under Bankruptcy Rule 9024.” *S.G. Wilson Comp. v. Cleanmaster Indus., Inc. (In re Cleanmaster Indus., Inc.)*, 106 B.R. 628, 630 (9th Cir. B.A.P. 1989). Rule 9024 applies Civil Rule 60 in bankruptcy proceedings.

## Rule 3002.1:

### Recent Opinions Construing the Amended Rule

#### **Fed. R. Bankr. P. 3002.1: Notice Relating to Claims Secured by Security Interest in the Debtor**

- a. In General. This rule applies in a chapter 13 case to claims (1) that are secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments. Unless the court orders otherwise, the notice requirements of this rule cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to the residence that secures the claim.
- b. Notice of Payment Changes. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest rate or escrow account adjustment, no later than 21 days before a payment in the new amount is due.
- c. Notice of Fees, Expenses, and Charges. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.
- d. Form and Content. A notice filed and served under subdivision (b) or (c) of this rule shall be prepared as prescribed by the appropriate Official Form, and filed as a supplement to the holder's proof of claim. The notice is not subject to Rule 3001(f).
- e. Determination of Fees, Expenses, or Charges. On motion of the debtor or trustee filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.
- f. Notice of Final Cure Payment. Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision (g). If the debtor contends that final cure payment has been made

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- and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.
- g. Response to Notice of Final Cure Payment. Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).
  - h. Determination of Final Cure and Payment. On motion of the debtor or trustee filed within 21 days after service of the statement under subdivision (g) of this rule, the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts.
  - i. Failure to Notify. If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:
    - 1. preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or
    - 2. award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

*Fed. R. Bankr. P. 3002.1*

**I. History behind Rule 3002.1**

- a. Prior to the enactment of Rule 3002.1 in 2011, many banks in chapter 13 cases were adding false or inflated fees for processing payments or otherwise handling the mortgage accounts, without the homeowners' knowledge. Once the bankruptcy was completed, the bank would demand hundreds or even thousands of dollars in fees to bring the account current, while threatening foreclosure. Once out of the chapter 13 system, many homeowners had no means to pay these fees.<sup>1</sup>
- b. To prevent this, Rule 3002.1 required the bank to file a statement with the court whenever it added a fee or charge to the homeowner's account during the five-year chapter 13 case. The rule also required the bank to file a statement at the conclusion of the chapter 13 case, informing the court whether the homeowner had paid all mortgage payments

<sup>1</sup> Andresen, Craig. "Bankruptcy Rule 3002.1: An Unlikely New Weapon Against Debtors." Blog post. *Bankruptcy Law Network*. 9 Jan. 2016. Web.

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which had come due during the case. The rule allowed the courts to supervise banks' conduct during and after the chapter 13, so that homeowners would not be driven in and out of the bankruptcy system due to bank misbehavior.

**II. Effect of Rule 3002.1**

- a. Pursuant to Rule 3002.1, chapter 13 trustees are routinely served with an official document from the bank detailing the history of payments the debtor paid on the mortgage. Occasionally, this document reveals the debtor missed a payment or two, or stopped paying the mortgage altogether due to a financial crisis. Unexpectedly, this put the debtor in jeopardy of losing his or her right to the all-important chapter 13 discharge of debts.<sup>2</sup>
- b. Most Chapter 13 plans by homeowners contain two important provisions: (1) the debtor will continue making mortgage payments and retain the home, and (2) the debtor will, for three to five years, make a monthly payment to the trustee for distribution to other creditors. At the conclusion of the plan, some debtors had completed all payments to the trustee, but had not maintained all payments on the mortgage. Therefore, trustees began to refuse to certify to the court that the debtor had made "all payments under the plan," as required by § 1328(a) of the Bankruptcy Code.
- c. Rule 3002.1 enables trustees to have notice of the homeowner's delinquency in mortgage payments.

**III. Case Law Construing Rule 3002.1**

- a. *In re Gravel*, 556 B.R. 561 (Bankr. D. Vt. 2016)
  1. Holding: The court determined the lender had violated the court's orders, and that its failure to comply with Rule 3002.1 warranted disallowance of all post-petition charges and an award of sanctions under Rule 3002.1 and 11 U.S.C. § 105. For its failure to comply with Rule 3002.1(c), the court imposed a \$25,000 sanction, along with \$300,000 for violating the court's orders. The court found it most equitable to require the lender to pay the sanctions to a nonprofit legal services entity.
  2. Facts: In three separate cases, a Chapter 13 trustee filed a motion asking the court to make a finding of contempt, disallow certain post-petition fees, and impose sanctions on PHH Mortgage Corporation ("PHH Mortgage") for failing to comply with Rule 3002.1, and for the PHH Mortgage's violations of the court's orders. The facts of each case were very similar: PHH Mortgage sent the debtors a mortgage statement incorrectly asserting amounts were owed for fees or late charges. In fact, in two of the cases, the mortgage statement was sent shortly after the court had issued orders stating the debtors had cured all pre-petition mortgage defaults and were current on all post-petition mortgage payments. In each case, PHH Mortgage (1) admitted the fees were erroneously included in the mortgage statements; (2) conceded it did not file a notice of post-petition fees, as

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<sup>2</sup> *Id.*

required by Rule 3002.1(c); and (3) averred that it promptly waived and removed the fees from the debtors' account when they were given notice of the trustee's motions. PHH Mortgage argued the Court should deny the trustee's motions for sanctions because (1) the debtors suffered no harm since the charges were never paid; (2) the purpose of Rule 3002.1 was not frustrated because PHH Mortgage ultimately removed the charges from the debtors' accounts and waived its right to collect them; (3) its conduct did not constitute civil contempt because its inclusion of the post-petition charges on each mortgage statement was a "one-time error" and that PHH Mortgage did not have a "systemic problem;" and (4) it did not violate any court order.

3. Reasoning: PHH Mortgage had prior notice of the need to comply with Rule 3002.1 since these were not the first times it had failed to do so, and it was given an opportunity to correct the underlying processes that caused the violations but failed to do so. Although the trustee compelled PHH Mortgage to remove the incorrect charges and the debtors suffered no economic injury, the court wanted to deter future misconduct. Citing to other similar cases, the court found that it is common for bankruptcy courts to punish misconduct where the opposing party did not suffer financial harm by directing the offending party to pay the sanction to a third party non-profit legal organization or a volunteer lawyer project. In analyzing Rule 3002.1, the court determined that it was added to aid in the implementation of 11 U.S.C.S. § 1322(b)(5), which permits a Chapter 13 debtor to cure a default and maintain payments on a home mortgage over the course of the debtor's plan. To fulfill the obligations of § 1322(b)(5), a debtor and the trustee have to be informed of the exact amount needed to cure any pre-petition arrearage and the amount of the post-petition payment obligations. If the latter amount changes over time, due to the adjustment of the interest rate, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of any change in payment amount needs to be conveyed to the debtor and trustee. Timely notice of these changes will permit the debtor or trustee to challenge the validity of any such charges, if appropriate, and to adjust post-petition mortgage payments to cover any undisputed claimed adjustment.

b. *In re Howard*, 563 B.R. 308 (Bankr. N.D. Cal. 2016)

1. Holding: Filed responses of the lender were stricken for failure to comply with Bankruptcy Rule 3002.1(g), and the Debtor was awarded its attorney's fees and costs. The lender was also precluded from presenting evidence, in any form, of the \$62,623.90 in escrow charges in any contested matter or adversary proceeding in this case. The Debtor's request to deem the mortgage current was denied without prejudice.
2. Facts: Debtor's schedules listed real property encumbered by a senior lien in favor of PNC Mortgage ("PNC") of approximately \$705,000. The confirmed plan provided that \$26,760.70 in mortgage arrears would be paid through the plan and that Debtor would make on-going mortgage payments directly to PNC. The chapter 13 trustee filed a Notice of Final Cure Payment (the "Notice") pursuant to Rule 3002.1(f), stating that the

claim of PNC in the amount of \$26,760.70 has been paid in full by the trustee. The Notice further stated that pursuant to Rule 3002.1(g), the creditor must file and serve within 21 days a Statement as a supplement to the holder's proof of claim to (1) indicate whether it agrees that the Debtor has paid in full the payment required to cure the default; (2) indicate whether the Debtor is otherwise current on all payments consistent with § 1322(b)(5); and (3) itemize the required cure or post-petition amount, if any, that the holder contends remain unpaid. Despite these instructions, PNC's counsel incorrectly filed three different responses on the court's docket rather than as a supplement to PNC's proof of claim. PNC first asserted that Debtor was current with all postpetition payments, but a total prepetition amount of \$20,712 remained unpaid. The very next day, PNC's second response agreed that Debtor had paid in full the prepetition arrears and was current on all postpetition obligations. Two days later, PNC's third response alleged that the prepetition arrears were paid in full, but Debtor was delinquent on postpetition mortgage payments in the amount of \$674,693.60 and outstanding fees and costs in the amount of \$62,623.90. None of the responses included an itemized statement detailing the charges. The Debtor requested the court strike all three responses, award attorney's fees, and deem the mortgage postpetition current, pursuant to Rule 3002.1(i). PNC responded by claiming the third response was correct in that Debtor has paid in full her prepetition arrears, but Debtor has outstanding postpetition obligations in the amount of \$62,623.90. PNC did not mention the outstanding postpetition mortgage payments of \$674,693.60. After not appearing at a hearing, the court ordered PNC to submit additional briefing to clarify the situation. PNC filed a declaration stating the third response was correct, but admitted it erroneously stated that the full mortgage of \$674,693.60 was due and owing. Debtor then requested the court to preclude PNC from presenting any evidence of the escrow charges, in addition to deeming the mortgage current and to award attorney's fees to Debtor.

3. Reasoning: If a mortgage holder disagrees with the trustee's notice of final cure payment, Rule 3002.1(g) requires that the holder file a response as a supplement to its proof of claim and to "itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement." The itemization must be sufficiently detailed for a debtor to contest the holder's response under Rule 3002.1(g). The record was clear that PNC did not comply with Rule 3002.1(g), and PNC admitted as much. Rule 3002.1(i) provides the sanctions available if a secured creditor fails to file a proper response with the necessary information under subsection (g). It states the court may preclude the creditor from presenting "the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless," and/or "award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure." Because PNC's actions defeated the purpose of Rule 3002.1, which is to provide the mortgagor-debtor information necessary to determine the *exact amount* needed to cure any prepetition arrearage and the amount of the postpetition

payments, the court deemed it appropriate to preclude PNC from introducing evidence of the escrow charges in future proceedings. The court also found no legal authority to support the Debtor's request that the mortgage be deemed current.

- c. *In re Payer*, No. 10-33656 HRT, 2016 Bankr. LEXIS 1941 (U.S. Bankr. D. Colo. May 5, 2016)
1. Holding: Because debtors were in default of their plan for failure to make mortgage payments, the court found cause existed under 11 U.S.C. § 1307(c)(6) to dismiss the debtors' case or convert it to one under Chapter 7 of the Bankruptcy Code, and gave the debtors two weeks to convert their case or have it dismissed. Given the extent of their default, the debtors did not have a right under Rule 3002.1(h) to cure their default and receive a discharge.
  2. Facts: The Debtors listed the value of their principal residence as \$244,000.00 and scheduled two mortgage debts encumbering that property. The first mortgage holder filed a proof of claim in the principal amount of \$245,525.02 and a pre-petition payment arrearage of \$14,823.62. The holder of the second priority mortgage filed a proof of claim in the amount of \$77,279.78, which the court determined was entirely unsecured for purposes of the debtor's plan. The court ordered that upon successful completion of the plan, the debtor may request an order that the lien is extinguished. But if the bankruptcy case is dismissed or converted to a Chapter 7, the order making the second mortgage unsecured shall be deemed vacated and the lien shall be reinstated and shall continue in full force and effect as specifically provided by 11 U.S.C. §§ 348(f)(1)(C) and 349(b)(1)(C). Debtors' chapter 13 plan provided that Debtors would make payments totaling \$33,860.00 over their 5 year plan, which would cure the pre-petition payment arrearage on the first mortgage and maintain regular post-petition monthly payments. After the Debtors completed making plan payments to the Chapter 13 Trustee, the Trustee served her Notice of Final Cure Payment (the "Notice") on Ocwen Loan Servicing, LLC ("Ocwen"), the servicer for the first mortgage holder. In response, Ocwen reported the pre-petition arrearage had been fully cured, but the Debtors were eight payments in arrears on post-petition monthly payments of \$1,369.78, for a total post-petition arrearage amount of \$10,949.60. The Trustee filed her Statement Regarding Debtors' Eligibility for Discharge and a Final Report and Account, informing the Court of the mortgage deficiency, along with Debtors' failure to file a proof of their completion of a financial management course and a local bankruptcy form requesting entry of a discharge. The Debtors' Response acknowledges that Ocwen's report of post-petition mortgage arrearage was correct, but claims they received conditional approval for a mortgage loan modification to become current on their mortgage obligation.
  3. Reasoning: The debtors were in material default of their plan and were deemed ineligible to obtain a discharge under § 1328(a). Although the debtors had cured arrears they owed on their first mortgage and were in the process of modifying their first mortgage to cure their default, their failure to make all payments they owed on the first mortgage affected

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a bank that held a second mortgage on the debtors' residence, so the court ruled against them. The court found that the power to extinguish a valid property interest is extraordinary and requires strict compliance with the conditions that the Code and a debtor's confirmed plan set upon the exercise of that power.

d. *In re Tollios*, 491 B.R. 886 (Bankr. N.D. Ill. 2013)

1. Holding: The court determined the bank had violated Rule 3002.1(b), but deemed a motion seeking sanctions inappropriate because the debtors had not been harmed. The court did indicate it would consider whether an award of attorneys' fees was appropriate and granted the debtors 10 days to file a request with an itemization of time for any fees sought and an explanation of why an award was appropriate in light of a flat fee agreement.
2. Facts: The debtors' chapter 13 plan was confirmed in September 2009 making monthly mortgage payments directly to the mortgage servicer, but nothing was owed in arrearage. In December 2011, the debtors' monthly mortgage payment was \$1,937.59 in principal and interest plus \$90.48 for an escrow to cover insurance payments, for a total monthly payment of \$2,028.07. The loan agreement provided that the debtors would pay their property taxes directly to the taxing authority, so there was no escrow for taxes. In January 2012, Chase sent debtors a notice that their monthly payment would increase by approximately \$1,200 per month to \$3,294.46. The debtors had failed to pay their property taxes so Chase paid the taxes and then increased the monthly escrow payment in accordance with its rights under the loan agreement. Although the debtors received notice of the payment increase, Chase did not file a notice of the increase with the court or serve it on the debtors' counsel or the chapter 13 trustee. The debtors did not pay the increased escrow amount to Chase, and acknowledged they could not afford to pay the taxes on the property. In August 2012, the debtors filed a motion seeking sanctions against Chase for violating Rule 3002.1 by failing to file and serve the notice on debtors' counsel and the trustee. They sought a sanction declaring Chase is estopped from asserting any post-petition default under the loan, that they are "current" on their loan payments, and that the escrow payment will be the original amount of \$90.28 for the remainder of the term of the loan. The debtors also requested an award of their attorneys' fees for bringing the motion and punitive damages of at least \$250,000.
3. Reasoning: The court concluded that the text of the rule and the operation of §§ 1322(b)(5) and 1325(a)(5) supported the conclusion that Rule 3002.1 applied to all Chapter 13 cases in which a debtor's plan provided for the maintenance of monthly mortgage payments on the debtor's principal residence regardless of whether the plan also provided for payment of pre-petition arrears owed to the mortgage creditor. Thus, the bank violated Rule 3002.1 by failing to file and properly serve the notice of escrow increase with the court and serve it on the debtors' attorney and the trustee. However, under the circumstances of this case, sanctions under Rule 3002.1(i) were not appropriate. There was a split in authority regarding the applicability of Rule 3002.1 to

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claims of mortgage lenders when the debtors owed no pre-petition arrears. In addition, the sanction was not appropriate because the bank's failure to file the notice and serve it did not harm the debtors. The court rejected as frivolous the debtors' request that their contractual obligation to pay property taxes be considered "other appropriate relief" under Rule 3002.1(i)(2).

- e. *In re Thibeault*, No. 11-10072, 2015 Bankr. LEXIS 3432 (U.S. Bankr. D. Me. Oct. 8, 2015)
1. Holding: When both the debtor and trustee failed to follow the proper procedure under Rule 3002.1, the debtor's motion for an order declaring that their home mortgage loan had been cured by the completion of their chapter 13 plan was denied. After the trustee filed an amended Notice of Final Cure Payment, the lender filed a response stating the debtors had paid the full amount to cure their default and were current on all payments. The court determined the lender's response gave the debtors the assurances they were seeking with their motion, and no further action was necessary.
  2. Facts: Under Rule 3002.1(f), "within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision (g)." Here, Debtors filed a Motion to Determine that Mortgage Default is Cured, Post-Petition Payments Have Been Made and Loan is Current (the "Motion to Determine"). The Motion to Determine cited, inter alia, Rule 3002.1(h), but did not allege the filing or service of the required notice under Rule 3002.1(f) by either the Debtors or the trustee. The Motion to Determine sought a variety of forms of declaratory relief, all centering on the status of the Debtors' loan obligations to the lender, CitiFinancial. More than a month after the Motion to Determine was filed, the chapter 13 trustee filed his Notice of Final Cure Payment and amended that notice. In the amended Rule 3002.1(f) notice, the trustee asserted that he (i) paid \$68,274.90 to CitiFinancial on account of monthly ongoing mortgage payments and (ii) paid \$3,411.13 to CitiFinancial as the "final cure amount." On September 25, 2015, CitiFinancial filed its statement in response to the amended Rule 3002.1 notice. In the statement, CitiFinancial agreed that the Debtors had "paid in full the amount required to cure the default on [CitiFinancial's] claim" and that the Debtors were "current with respect to all payments consistent with § 1322(b)(5) of the Bankruptcy Code."
  3. Reasoning: A motion seeking declaratory relief under Rule 3002.1(h) is supposed to await the service of the Rule 3002.1(f) notice and the service of a response by the holder of the claim under Rule 3002.1(g). There is a logical sequence preceding a request to the Court for the entry of an order granting declaratory relief regarding the mortgage loan obligations. That sequence was not followed here and the ability of the Court to grant declaratory relief under some other statute or rule does not excuse compliance with the specific procedures set forth in Rule 3002.1. The Court recognized that a chapter 13 trustee may not always send the Rule 3002.1(f) notice following a debtor's completion of

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plan payments, but the rule allows the debtor to send the notice if the trustee falters. Additionally, creditors do not always respond when the trustee (or the debtor) sends the Rule 3002.1(f) notice, but the rule also allows the Court to award sanctions where a creditor sits by idly after the service of a Rule 3002.1(f) notice and later takes a position inconsistent with the information contained in the notice.

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RECENT SUPREME COURT RULINGS  
ON  
DEBT BUYERS UNDER THE FAIR DEBT COLLECTION PRACTICES ACT

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In two recent back-to-back opinions, *Midland Funding, LLC v. Johnson*, 137 S.Ct. 1407 (May 15, 2017) and *Henson v. Santander Consumer USA Inc.*, 137 S.Ct. 1718 (June 12, 2017), the Supreme Court struck substantial blows to the rights of consumers, both in and outside of bankruptcy, under the Fair Debt Collection Practices Act (“FDCPA”).

In general the FDCPA prohibits debt collectors, as defined, from engaging in a variety of unfair or abusive practices, in the process of collecting a debt. See 15 U.S.C. § 1592 et seq.

I. *Midland Funding, LLC v. Johnson*

A. Background

*Midland Funding, LLC v. Johnson* construes the FDCPA’s prohibition on debt collectors’ making any “false, deceptive, or misleading representation,” or using any “unfair or unconscionable means” to collect a debt. The specific issue addressed is whether these statutory provisions entitle a bankruptcy debtor to damages or other relief if a debt collector files a proof of claim on debt that, from the face of the proof of claim, is barred by the statute of limitations.

In Aleida Johnson’s Chapter 13 proceeding, Midland – a debt buyer – filed a proof of claim for credit card debt amounting to \$1,879.71. According to the proof of claim itself, the last time any new charges had been posted to the account was over 10 years before the petition. In Alabama, which was the forum state and the source of the applicable law, the statute of limitations for such causes of action is only 6 years.

The debtor objected to the claim; Midland did not respond; and the bankruptcy judge disallowed the claim. Later, Ms. Johnson sued under the FDCPA in federal district court, seeking actual damages, statutory damages, attorneys’ fees, and costs. The District Court ruled that the FDCPA did not prohibit Midland’s conduct, and dismissed Johnson’s claim; the Court of Appeals reversed; and Midland petitioned for certiorari noting a split in the circuits.

The majority, per Justice Breyer, here rules in favor of Midland. Justices Sotomayor, Ginsburg and Kagan dissented. Justice Gorsuch took no part in the case.

B. Filing the proof of claim was not a “false, deceptive or misleading representation”

1. *Definition of “claim” under the Bankruptcy Code.* Johnson apparently argued that the Code uses “claim” to mean “enforceable claim;” hence the proof of claim would be false, deceptive or misleading.

- In 48 states including Alabama, the passing of the statute of limitations does not extinguish a right to payment. Instead it generates an affirmative defense which the debtor can raise in order to block the creditor’s remedy.

- The exceptions are Wisconsin and Mississippi, in which the right to payment is automatically extinguished. No affirmative defense need be raised.

- Code § 101(5): “right to payment . . .”

- Textually:

- § 101 does not mention enforceability

- § 502(a) deems claims allowed unless an objection is raised based on subsection (b), which includes unenforceability under state law.

- FRBP 3001(f) provides that a proof of claim is prima facie evidence of validity of a claim.

- § 558, regarding defenses of the estate, provides for state law defenses, including specifically statutes of limitation.

- The court notes the broad definition of “claim” as including even “disputed” claims. And see FRBP 9011, providing for sanctions. The majority notes that one bankruptcy court has imposed sanctions for the filing of a time-barred claim without a pre-filing investigation of the potential statute of limitations defense, but that other courts have declined to impose them.

One could argue that there is no “dispute” unless the creditor has at least a colorable argument on the merits. By contrast in cases like this one, the creditor is simply hoping the trustee fails to wake up and object.

Unaddressed by the Court is the limited and common-pool nature of the estate’s assets. If the trustee fails to object to a particular time-barred claim, the other creditors suffer. So the Court’s reasoning does not account for the well-known view of the Bankruptcy Code as the “creditors’ bargain” seeking to enhance the well-being of all creditors.

Supporting the creditors’ bargain view of the Code in this regard, see § 558, second sentence (“A waiver of any such defense by the debtor after the commencement of the case does not bind the estate”). @realJusticeBreyer wouldn’t usually overlook Code text so closely related to the rest of his discussion. Sad!

2. *Nature of a “misleading” statement under the FDCPA.* The majority argues that the misleading nature of a statement should be evaluated in the context of its audience’s sophistication. And in Chapter 13, this audience includes the trustee, whose job it is to examine the claims and where appropriate file an objection.

This neglects the operational fact that debt buyers buy vast numbers of claims for pennies on the dollar, and file vast numbers of proofs of claim with the incentive of recovering those greater-than-pennies dollars. As a result, trustees can be, and are, overwhelmed at a game of whack-a-mole. Moreover, when the claims filed are in Chapter 13, it's this government-supervised trustee who does the collecting for the debt-buyer!

On the Court's view, the Code sections discussed above (i.e. §§ 101(5), 502, and 558) are not about validity; rather they are only about the procedure for establishing validity. However, faith in a procedure is all well and good, but no procedure can be soundly evaluated without reference to the circumstances in which it operates. In the nearly 40 years since enactment of the Bankruptcy Code and the FDCPA, the massive stale debt-buying industry has emerged as a serious challenge that should affect justices' evaluation of the system.

Bankruptcy is a practical tool for practical problems. When the economy changes in a substantial way, the interpretation of relevant Code sections can reflect the changes.

One example: it requires a strained reading of 1322(b)(2) to permit the cramdown of a wholly unsecured home mortgage, but even so, bankruptcy courts have permitted this in the face of this country's mortgage crisis. The courts have not waited for Congress to amend a statute enacted at a time when lenders continued to hold onto the mortgages they originated.

C. Filing the proof of claim was not an "unfair or unconscionable means" to collect a debt

1. *The majority acknowledges this is a closer question.* Lower courts have found that in ordinary state collection actions, it is "unfair" within the FDCPA for a debt collector to assert a claim that the debt collector knows to be time-barred. For a post-Midland example, see *Kaiser v. Cascade Capital LLC*, 2017 WL 2332856 (D. Or.) (Acosta, Mag. J.).

• But the majority finds that the Chapter 13 context differs substantially from the ordinary state collection context. In non-bankruptcy cases, there is a concern that a consumer might unwittingly pay the time-barred debt.

- Consumers tend not to be aware or well advised of their rights;
- The passage of time dulls the consumer's memory of the circumstances;
- The consumer might not have records anymore;
- The consumer might pay a stale debt just to avoid the trouble, cost and inconvenience of a lawsuit.

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- The majority finds these concerns to be “significantly reduced” in Chapter 13 for several reasons:

- In Chapter 13 the consumer initiates the proceeding, and hence will not pay just to avoid going to court.
- A knowledgeable trustee is on the job.
- Chapter 13 is “generally a more streamlined and less unnerving prospect for a debtor than facing a collection lawsuit,” quoting the Eighth Circuit Bankruptcy Appellate Panel in *In re Gatewood*, 533 B.R. 905, 909 (2015).
- Thus altogether it is “considerably more likely” that efforts to collect on a time-barred claim will be met with “resistance, objection and disallowance.”

The assertedly consumer-initiated nature of the proceeding risks being rather hollow in light of the severe straits – job loss, illness, divorce, etc. – pushing many Chapter 13 debtors into filing. We cannot blithely call the proceedings free and voluntary actions.

And we have already noted above the shortcomings, in a world of massive debt-buying, of the view that a trustee is a cure-all.

Also note that bankruptcy differs from other civil proceedings in an additional way that cuts against the majority’s holding. Bankruptcy is of course a collective proceeding, so that when a creditor is paid on a claim that should have been found unenforceable, it is the other creditors who lose out, not the debtor. (Nor is this argument weakened by the debtor not bearing the loss. The argument is not just result-oriented but, rather, values the soundness of the system.)

- The filing of these claims is beneficial to debtors, because claims that are “neither listed nor scheduled” are not discharged. § 523(a)(3).

The dissent notes that no discharge occurs in Chapter 13 until the debtor has completed the plan, and that there are many reasons the debtor might not be able to do so (again, job loss, illness, divorce, etc.). In such cases, not only would there be no discharge, but the debtor would be worse off because (a) he or she will have paid a portion of the time-barred debt and (b) crucially, some state law resuscitate an otherwise time-barred debt if the debtor makes any payments on it after the statute has run. The debtor might well wind up being worse off than had s/he never filed bankruptcy at all.

- Because investigating and asserting defenses is usually a debtor’s burden, shifting the burden in the single instance of stale claims would add complexity and change settlement incentives.

Settlements are always made “in the shadow of the law,” that is, the law sets the parameters against which the parties negotiate. So the

primary question is always the law, not the settlement dynamics in isolation from the law.

- Carving out an exception for staleness of claims would also create a boundary-drawing problem. Would the new rule “apply only where (as Johnson alleged in the complaint) a claim’s staleness appears ‘on [the] face’ of the proof of claim? Does it apply to other affirmative defenses or only to the running of a limitations period?”

This is a case of borrowing problems one does not have. The case concerns only the defense of the statute of limitations, not other defenses. Moreover, other defenses are unlikely to be (a) as open-and-shut as the statute of limitations or (b) apparent to an arm’s-length debt buyer.

N.B.: factual complications affecting the statute of limitations, such as equitable tolling, will tend to favor the creditor rather than the debtor. So they, similarly, do not affect this branch of the analysis.

- There is no good reason to believe that Congress wanted non-bankruptcy courts to determine bankruptcy-related questions, or to put the creditor’s state of mind at issue when this is difficult to determine.

The dissent points out that the FDCPA cause of action can be raised in the bankruptcy court; and that state of mind is a factor in any sanctions case.

Moreover, this FDCPA cause of action is “bankruptcy-related” only in a loose sense, in that the facts involve the filing of a proof of claim. Also, a creditor’s state of mind can be directly relevant in cases involving, for example, (a) the UFTA (because § 548(c) gives a transferee who takes for value and in “good faith” a lien on any interest transferred to the extent of the value given), (b) preferential transfers (because § 547(c)(1) protects transfers from avoidance when the transfer if “intended by the debtor and the creditor . . . to be a contemporaneous exchange . . .”), and (c) the good faith of non-bankruptcy acceleration of loan agreements.

Just as the Code itself is a living and breathing legal instrument that can change in response to the economic or practical environment around it, so too can close companion statutes such as the FDCPA.

D. Doors open for future.

*Midland*’s reasoning likely would not apply in states where the passing of the limitations period extinguishes the creditor’s right, rather than merely raising an affirmative defense. Hence, apart from seeking a possible amendment to the FDCPA itself (or any state-law counterparts), consumer advocates may want to lobby state legislatures for an appropriate amendment to the statute of limitations.

II. Henson v. Santander Consumer USA, Inc.

A. Background

Santander Consumer USA, Inc. is a buyer of consumer debt, and among other things bought the debt that Ricky Henson and others owed on their cars. Allegedly, Santander engaged in practices that would violate the FDCPA, if Santander is a “debt collector” as defined in the statute.

The statutory definition is lengthy, but the core of the definition involved in this case is “any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts . . . *owed or due* or asserted to be owed or due *another*.” FDCPA § 806(6) (emphasis added).

At either of two extremes, it is clear who is or is not a debt collector. An auto dealer, attempting to collect on debt for a car that the dealer itself sold, is not a debt collector. But a repo agent, that the auto dealer hires in order to collect for the dealer’s account on that same debt, is a debt collector. The distinction is whether the debt is “owed or due . . . another.”

Santander in this case occupies a middle position. It did not originate the car debt (rather it bought it from the originator). But neither was it hired to collect on anyone else’s account (rather it was collecting on its own account).

In an opinion by Justice Gorsuch – his first since elevation from the 10<sup>th</sup> Circuit – the Supreme Court unanimously held that Santander was not a debt collector.

B. The primary argument raised against Santander was grammatical

*1. Is the word “owed” in the definition a past-tense verb, an adjective, or something else?*

- If “owed” were a past-tense verb, then Santander would be a debt collector under the statute’s plain language, because the debt was originally “owed . . . another” (i.e. owed to the car dealer), and only later came to be owned by Santander.
- But the Court ruled that the word is in fact an adjective (more specifically a past participle functioning like an adjective). As such, it does not have a time-based element.
  - Just as “burnt toast” can remain burned through time, and a “fallen branch” can remain fallen through time, debt is covered by the definition only if “owed . . . another” through time.
  - In short, the debt ceased to be owed to anyone other than Santander once Santander bought the debt.
- If Congress had thought “owed” referred only to the past, then Congress would have written the phrase as something like “owed *or owing* another.”

C. Congress’s purpose was also argued but rejected

1. *Henson and the other petitioners “also contend[ed] that their interpretation best furthers the Act’s perceived purposes.”*

- The argument runs that if Congress had been aware of defaulted debt-buyers like Santander, Congress would have treated them like traditional debt collectors, “because they pose similar risks of abusive collection practices.”

This raises the same important point that we saw above in *Midland*: large-scale debt-buying of the type involved in these cases did not exist at the time the FDCPA was enacted.

Yet today’s debt-buying practices present the same time of practice that Congress was seeking to control. Specifically, the Senate Committee working on the FDCPA explained that the the Act was limited to third-party collectors of past due debts because, unlike originating creditors, “who generally are restrained by the desire to protect their good will when collecting past due accounts,” independent collectors are likely to have “no future contact with the consumer and often are unconcerned with the consumer’s opinion of them.” S. Rep. No. 95-382, at 2, 1997 U.S.C.A.A. at 1698. Cf. *FTC v. Check Investors, Inc.*, 502 F.3d 159, 173 (3d Cir. N.J. 2007).

This reasoning applies directly to debt buyers like Santander who act on their own account, no less than it does to repo agents who act on the account of originating car dealers.

Whether the collected money winds up in the pocket of the company making the phone calls, or the pocket of a third party for whom the company works, has no bearing on the nature of the conduct that Congress sought to prohibit.

2. *The Court was unpersuaded.*

- “[I]t is not this Court’s job to rewrite a constitutionally valid text under the banner of speculation about what Congress might have done had it faced a question that, on everyone’s account, it never faced.”

The term “speculation” is a drastic overstatement in light of the Senate Report quoted above.

More generally, whether Congress “faced a question” or not is a matter of judgment. Questions can be “faced” in general terms or in specific terms. Almost always, Congress and other legislators have to face questions in general terms, because statutes are forward-looking and the particulars (including the economic context) of any given case have not yet arisen. By contrast, courts can face questions in specific terms, by applying the statutes to the particular situations that have now come before them.

For a similar refusal to look to a statute’s purpose in light of particular facts, see then-Judge Gorsuch’s dissent in the “frozen trucker” case that became well-known in his confirmation hearings. *TransAm Trucking v.*

*Administrative Review Board*, 833 F.3d 1206 (10<sup>th</sup> Cir. 2016) (statute prohibits trucking companies from discharging drivers who “refuse to operate” a truck because of serious hazards; following hours stuck in a severe snowstorm, the driver drove the cab without the trailer in order to protect himself against possible frostbite or death; dissent says statute did not keep company from discharging driver because driver “operate[d]” the truck rather than “refus[ing] to operate” it).

D. Doors open for future?

As discussed above under *Midland*, consumer advocates can press for amendment of the FDCPA or of any state counterparts.

Also, the Court’s opinion notes in passing that the FDCPA’s definition of “debt collector” also includes two other possibly relevant provisions:

- “any person . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”
- persons engaged “in any business the principal purpose of which is the collection of any debts.”

FDCPA § 806(6). However, it is doubtful that either of these statutory phrases presents new ground not already addressed in *Santander* itself.

RECENT “INTERESTING” BANKRUPTCY DECISIONS<sup>1</sup>

**United States Supreme Court**

*Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407 (2017)

Creditor filed a proof of claim which was barred by the statute of limitation. The filing of such claim was not a false and deceptive and did not violate the Fair Debt Collection Practice Act. However, the Court also pointed out that bankruptcy courts have held that the filing of time-barred claims “without a pre-filing investigation” warrants sanctions while others indicated that they were not warranted. The Court did not address the 9011 issue.

*Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017)

A bankruptcy court may not approve a structured dismissal, without the consent of the affected parties which deviates from the priority rules of a distribution. This was a chapter 11 business bankruptcy case. However, this case “may” extend to issues in consumer cases for a structured dismissal, a settlement motion as well as a plan or reorganization. In light of the recent concerns about student loans, courts may consider allowing chapter 13 debtors to prioritize payments to student loan companies in lieu of treating them as unsecured creditors. Accordingly, if no one objects to such treatment, would this be considered consensual under Jervic? What if the Chapter 13 Trustee is the only objecting party? (Chapter 11- 9019 would be an abuse to approve a settlement which is a sub rosa plan...which was not in accord with the rules of priority In re Fryar, 16-13559 (Bankr. E.D. Tenn. April 25, 2017).

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<sup>1</sup> This list is not exhaustive but it is being utilized for purposes of discussion in an upcoming CLE and is based upon my own “interest”.

**1<sup>st</sup> Circuit**

*In re Reznikov* 567 B.R. 239 (Dist Ct. Mass 2017)

Read the “fine print” and the law. In this case, the Debtor entered into a mortgage. However, the notary acknowledgement was defective because the certificate of acknowledgement did not contain explicit language that the mortgage was voluntary. Under Massachusetts law, such statement was required. Accordingly, the Chapter 7 Trustee sought to avoid and did avoid the mortgage under 11 U.S.C. 544.

*In re Brown*, 563 B.R. 451 (Dist. Ct. Mass 2017)

A chapter 13 plan cannot force a secured creditor to take title to collateral that it does not want; even though, there was no stay pending appeal. The Court examined vesting with surrender and determined, even though there may be compelling public policy arguments (the collapse of the mortgage industry), a chapter 13 plan is unable to force a property to be vested to a creditor without its consent.

*In re Bradley*, 567 B.R. 231 (Bankr. D. Maine 2017)

Discussion of good faith requirements in a Chapter 13 plan and does not just mean committing all non-exempt assets and meeting projected disposable income. Court determined that the good faith analysis boils down to “fundamental fairness”. The plan was denied. Note, that the facts pertained to a debtor who utilized her workmen compensation settlement not to pay her ex-spouse (who was entitled to 15% of such funds) but to invest in a home, a vehicle and gift her children \$10,000 each (3 children). Important footnote (#6), stated that other courts have identified the non-dischargeable nature of a debt in a chapter 7 that may, with other factors, indicate the lack of good faith.

**2<sup>nd</sup> Circuit**

*Carlin v. Davidson Fink LLP*, 852 F.3d 207 (2<sup>nd</sup> Cir. 2017)

This was a class action case under the Fair Debt Collection Practices Act which may have some potential overlap in a bankruptcy case. The issue was whether a mortgage foreclosure complaint was an initial communication. The Court found that such complaint was not an initial communication under the FDCPA. In this case, the attorney filed a complaint and attached a FDCPA 30 day notice letter. The debtor made a demand for information based upon that letter and received additional information. The Court found that the complaint with the attachment was not an initial communication, but the second letter was the initial communication. Unfortunately for the law firm, the second letter did violate the FDCPA as it contained a payoff statement that did not clarify the actual amount owed and the fees which would allow the least sophisticated consumer to determine the amount owed.

*In re JJE & MM Grp, LLC*, 2017 U.S. App. LEXIS 9870 (2<sup>nd</sup> Cir. 2017)

Bankruptcy Court sua sponte ordered a show cause hearing as to why an attorney should not be held in contempt for filing a second petition after the Bankruptcy Court dismissed the first petition and barred the refiling of the case for one year. The attorney filed the second petition, on an emergency basis to stop a foreclosure sale. The attorney did not file the first petition and was not aware of the first dismissal. The Bankruptcy Court did find him in contempt and the Circuit reversed in this unpublished decision because there was no finding of bad faith. The Court did note that compensatory sanctions could be imposed under Rule 9011(c). The moral of the case is be aware and due an investigation prior to filing as an attorney has requirements under Rule 9011. (This issue can also arise for violations of the discharge injunction....for instance...was notice of the bankruptcy and discharge proper? There can be a violation of the discharge but for sanctions it must be willful. Always accomplish a reasonable investigation).

*In re Tronox, Inc.* 855 F.3d 84 (2<sup>nd</sup> Cir. 2017)

Discussion of derivate claims in the bankruptcy context (claims that arise from harm done to the estate) vs. particularized claims which are exclusive to individual creditors. (Note, this issue also arises on alter ego claims).

### **3<sup>rd</sup> Circuit**

*In re Ross*, 858 F.3d 779 (3<sup>rd</sup> Cir. 2017)

Discusses the issuance of injunction to prohibit refiling of a case under the backdrop of a voluntary dismissal under Section 1307(b). Court held that a bankruptcy court has authority to issue such an injunction even with a voluntary dismissal. Court noted circuit split in authority. However, the Court barred the Debtor from refiling for the indefinite future. The 3<sup>rd</sup> Circuit indicated that that the 180 day bar to refiling is persuasive authority and limited the bar to 180 days.

### **4<sup>th</sup> Circuit**

*In re Tillman* (Bankr.W.D. NC 2017).

The sole issue is may a debtor take the credit counseling class on the same day of the bankruptcy filing, but after it was filed. Judge Beyer utilized the plain meaning of the statute of 109(h), which states in part to complete their credit counseling classes “during the 180-day period ending on the date of filing of the petition.” This plain language would then permit the Debtor to actually filing bankruptcy and then take the credit counseling class. See also, *In re Walker*, 502 B.R. 324 (Bankr. N.D. Ill. 2013) vs. *In re Arkuszewski*, 550 B.R. 374 (N.D. Ill. 2015) [take class in advance].

**5<sup>th</sup> Circuit**

*In re Selenberg* 856 F.3d 393 (5<sup>th</sup> Cir. 2017)

Debtor who was an attorney and prepetition committed malpractice by failing to file suit prior to the expiration of the statute of limitations. The Debtor admitted the mistake and gave his client a promissory note to resolve the matter. Approximately two years later, the Debtor filed bankruptcy and attempted to discharge the debt. At the time of entry into the promissory note, the client was not represented. The attorney indicated he had no funds and was uncollectable. The Court found that he had an intent to deceive even though he was truthful in his financial situation because he did not advise her to seek independent counsel and hence made a false representation under 523(a)(2)(A). The Court also stated that "[a]n extension, within the meaning of § 523(a)(2), is 'an indulgence by a creditor giving his debtor further time to pay an existing debt.'" *In re Gerlach*, 897 F.2d 1048, 1050 (10<sup>th</sup> Cir. 1990).

**7<sup>th</sup> Circuit**

*Netzer v. Office of Lawyer Regulation*, 851 F.3d 647 (7<sup>th</sup> Cir. 2017). Debtor attempted to discharge a debt to the Wisconsin's Office of Lawyer Regulation. Debtor lost but did not appeal until 41 days after the notice of entry. The Debtor argued that he did not become aware of the order until a few days prior to the filing of the appeal. The Court determined that the 14 day period to appeal under Rule 8002(a)(1) is jurisdictional and there are no equitable exceptions. **The US Supreme Court has granted a writ of cert on a similar issue in *Hamer v. Neighborhood Hous. Servs* 2017 US Lexis 1565 (2017).** So keep your eyes open to see how far the court will rule. [In this nonbankruptcy matter, the party who was required to file a notice of appeal within 30 days. The lower court granted a motion to extend the deadline from October 14, 2015 to December 13, 2015. However, this was more than the 30 day extension permitted under the rules. The party did file the notice of appeal on December 11, 2015. A motion to dismiss was filed indicating the appeal was not timely and such motion was granted based upon the restriction that the Court is unable to equitably extend the time to appeal but more than 30 days under Rule 4(a)(5)(C). The Circuit dismissed the case because it was not timely. The issue in front of the Supreme Court is whether Federal Rule of Appellate Procedure 4(a)(5)(C) can deprive a court of appeals of jurisdiction over an appeal that is statutorily timely, as the U.S. Courts of Appeals for the 2nd, 4th, 7th and 10th Circuits have concluded, or whether Federal Rule of Appellate Procedure 4(a)(5)(C)

is instead a nonjurisdictional claim-processing rule because it is not derived from a statute, as the U.S. Courts of Appeals for the 9th and District of Columbia Circuits have concluded, and therefore subject to equitable considerations such as forfeiture, waiver and the unique-circumstances doctrine.

### 8<sup>th</sup> Circuit

*In re Gregory*, 2017 Bankr. Lexis 1631 (Bankr. W. D MO 2017)

What is meant by surrender? This was a convoluted state court action with a bankruptcy twist. The facts are a bit interesting...but the focus here is that the court went through an analysis under 521(a)(2) on what Congress meant when it used the term surrender. Under 521 you have 3 options afforded debtors only three options: reaffirmation, redemption, or surrender of the collateral and lack of a plain statutory remedy offered a fourth option — that of keeping the collateral without reaffirming or redeeming, so long as they remained current on payments. Under this option, the debtor — having extinguished any personal liability on the loan with his discharge — could continue to drive the car or live in the house while he was current. But if the debtor later decided to give up the car, for example, the lender was limited to repossessing the depreciated vehicle; the discharge injunction prevented the lender from suing the debtor to recover any deficiency. In this case, it was argued that the Debtor intended to surrender, but the Bank released its lien on the property. The Debtor filed a declaratory relief action in State Court to clear up the property (along with other claims). The Bank, then went back to bankruptcy court and sought to compel the Debtor to surrender the property to the Bank. The Court determined that as to real property, 521(a)(2) was a notice statute and the Bank's remedy was seek relief from stay. The Court denied the motion to compel and abstained from any further issue because the Chapter 7 Trustee abandoned his interest in the property.

9<sup>th</sup> Circuit

*In re Partida* 2017 U.S. App LEXIS 12166 (9<sup>th</sup> Cir. 2017) - Published

The Court affirmed the BAP that the automatic stay provision does not prohibit the collection of criminal restitution under the Mandatory Victims Restitution Act (even in a Chapter 13).

*Weil v. Elliott* 2017 U.S. App LEXIS 10559 (9<sup>th</sup> Cir. 2017) - Published

Debtor fraudulently omitted an asset, his home. He received his discharge and the case was closed. Approximately 15 months later the case was reopened and the trustee filed suit to revoke the discharge. At issue was whether the time limit was jurisdictional under 727(e)(1). The 9<sup>th</sup> Circuit found that the time limit was not jurisdictional. Important to note that the court found that this a jurisdictional time bar and subject to an affirmative defense...which was not raised. The Court did not rule on equitable tolling.

*In re Mark Dingley* (9<sup>th</sup> Cir. 2017) – Published

Civil contempt proceeds are exempted from the automatic stay under 11 USC 362(b)(4) when they are intended to effectuate the court's public policy interest in deterring litigation conduct.

**10<sup>th</sup> Circuit**

*In re Cowen*, 849 F.3d 943 (10<sup>th</sup> Cir. 2017)

This case involves the repossession of a truck under false pretenses and the brandishing of a can of mace. Suffice it to say, the creditor repossessed the truck pre-petition. Upon the filing of the bankruptcy case, the Debtor made demand for the return of the truck. The Creditor refused to return the truck and an action for violation of the stay was filed. The 10<sup>th</sup> Circuit determined that the holding onto an asset does not constitute exercising control over it and violate section 362. Accordingly, there is now a split in authority. See, *Thompson v. Gen. Motors Acceptance Corp.*, 566 F.3d 699, 703 (7th Cir. 2009); *see also Weber v. SEFCU (In re Weber)*, 719 F.3d 72, 81 (2d Cir. 2013), *California Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1151 (9th Cir. 1996), *Knaus v. Concordia Lumber Co. (In re Knaus)*, 889 F.2d 773, 775 (8th Cir. 1989), *Unified People's Fed. Credit Union v. Yates (In re Yates)*, 332 B.R. 1, 4 (B.A.P. 10th Cir. 2005); *but see United States v. Inslaw*, 932 F.2d 1467, 1474, 289 U.S. App. D.C. 383 (D.C. Cir. 1991). The 10<sup>th</sup> Circuit reviewed 362(a)(3) and stated: here again is § 362(a)(3), in relevant part: a bankruptcy petition "operates as a stay. . . of. . . any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." Breaking down the sentence, "any act" is the prepositive modifier of both infinitive phrases. In other words, § 362(a)(3) prohibits "any act to obtain possession of property" or "any act to exercise control over property." "Act", in turn, commonly means to "take action" or "do something." *New Oxford American Dictionary* 15 (3d ed. 2010) (primary definition of "act"). This section, then, stays entities from *doing* something to obtain possession of or to exercise control over the estate's property. It does not cover "the act of passively holding onto an asset," *Thompson*, 566 F.3d at 703, nor does it impose an affirmative obligation to turnover property to the estate. "The automatic stay, as its name suggests, serves as a restraint only on acts to gain possession or control over property of the estate." *Inslaw*, 932 F.2d at 1474. Stay means stay, not go.

In essence, the 10<sup>th</sup> Circuit determined that the majority of courts are reading that section 362 should be read in conjunction with section 542 – the turnover provision. It does not appear that this case was appealed to the Supreme Court.