AMERICAN BANKRUPTCY INSTITUTE

2020 Consumer Bankruptcy Forum

Consumer Case Law Update

Presented by ABI's Hon. Eugene R. Wedoff Seventh Circuit Consumer Bankruptcy Conference and Hon. Steven W. Rhodes Consumer Bankruptcy Conference

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2020

CASE LAW UPDATE

Presented by

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Honorable Laura K. Grandy
Honorable Scott W. Dales
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These materials are a highly abridged version of the current Case Law Update, which spans more than 1500 pages and summarizes more than 11,000 cases. If you would like the complete Update, please e-mail me at tom.decarlo@det13.com.

In re Fulton, 140 S.Ct. 680, **Case No. 19-357 (2020)** – Does Creditor "exercise control" over property of estate when creditor refuses to return property that creditor repossessed prepetition. Lower Court held that Creditor must immediately return possession without requiring that Debtor bring turnover motion. Creditor must return property prior to Court determination establishing Debtor's obligation to provide adequate protection. Circuit joined Second, Eighth and Ninth Circuits and rejected Tenth Circuit holding in *In re Cowan,* 849 F.2d 943 (10th Cir. 2019). Although creditor would be required to seek protection on expedited basis, that does not limit or modify creditors duty to immediately turn over property. Are unpaid post-petition fines "administrative claims" if vehicle is used by Debtor to generate income to make plan payments?

In re Pike, **2020 Bankr. Lexis 2124 (Bankr. S.D. Ill. 2020)** - Conversion from Chapter 7 to Chapter 13 after entry of discharge in Chapter 7 does not result in disallowance of claims in Chapter 13. Discharge under Section 524 operates as injunction against commencement or continuation of action to collect debt against Debtor personally. Discharge does not release debt itself but only releases Debtor's personal liability. Obligation still exists and may be collected from any other entity that might be liable. Debt remains enforceable in Chapter 13 as discharge does not extinguish liability of bankruptcy estate itself. Any interpretation of Section 524 that "eliminates" debt in its entirety upon discharge would present abuse of bankruptcy process where Debtor would be permitted to extinguish debt and then convert to Chapter 13 prior to liquidation of Chapter 7 estate, allowing Debtor to receive all benefits of Chapter 7 while simultaneously retaining non-exempt property. Creditors timely filing proofs of claim are entitled to distributions from Chapter 13 estate notwithstanding Chapter 7 discharge.

***In re Trepetin,* 617 BR 841, 2020 WL 3833015 (Bankr. D. Md. 2020)** – Debtor under Chapter 7 can convert to Chapter 11 and elect to proceed under Subchapter V after expiration of deadlines for status conference and confirmation under Sections 1188 and 1189. Section 1188 allows Court to extend time to hold status conference and Section 1189 allows Court to extend deadline to confirm Plan if need for extension is attributable to circumstances for which the debtor should not justly be held accountable. Analysis is fact-intensive and focused on Debtor's conduct and potential prejudice to creditors.

***In re Seven Stars on the Hudson,* 618 B.R. 333 (Bankr. S.D. Fla. 2020)** - Chapter 11 small business Debtor permitted to elect application of Subchapter V to already-pending case but may not do so after expiration of statutory Plan-filing and status conference deadlines. Section 1189(b) requires Plan to be filed not later than 90 days after "order for relief" and Section 1188(a) requires Court to hold status conference not later than 60 days after order for relief. "Order for relief" is date on which Debtor initially sought relief under Chapter 11. Amending petition to elect Subchapter V does not create new "order for relief". Where Chapter 11 initially filed more than one year after petition date, any attempt to convert would put Debtor in immediate default of requirements of Sections 1188 and 1189. Although Court has discretion to extend deadlines, Court must find that need for extension is attributable to circumstances for which Debtor should not justly be held accountable.

***In re AJEM Hospitality, LLC*, 2020 WL 3125276 (Bankr. M.D.N.C. 2020)** - Duties of Subchapter V Trustee are listed in Section 1183 and closely mirror those of Chapter 12 Trustee. Trustee must perform duties outlined in Section 704(a)(2), (5), (6), (7) and (9); and if Court orders, must perform duties under Section 1106(a)(3), (4) and (7). Whether to expand trustee's duties to include Section 1106(a)(3)(, (4) and (7) is vested in broad discretion of Bankruptcy Court. Bankruptcy Administrator's motion to require Trustee to perform duties under Section 1106(a)(3) and (4) granted to limited extent of requiring Trustee to review and analyze intercompany claims and file statement summarizing review with Court.

***In re Ellingsworth Residential Community Association, Inc.,* 2020 WL 6122645 (Bankr. M.D. Fla. 2020)** – Sections 1129 and 1191 provide requirements for confirming Plan under SBRA. Section 1191 abrogates absolute priority rule as to unsecured creditors and allows Debtor to confirm Plan without creditor support while retaining property while unsecured creditors are potentially not paid in full. Plan may be confirmed even if all creditors reject Plan if Plan is "fair and equitable" to each class of claims or interests that is impaired or has not accepted the Plan; Plan does not discriminate unfairly; and otherwise meets requirements of Section 1129(a) excluding requirement for acceptance by impaired classes. Section 1191(c) defines "fair and equitable" if Plan provides that Debtor's projected disposable income received and three-year period (or such longer period, not to exceed five years, if applicable); there is reasonable likelihood that Debtor has ability to make all Plan payments; and Plan provides remedies if payments are not made.

In re McGee, 2020 WL 5778462 (Bankr. W.D. Mich. 2020) - Upon death of Debtor, attorney's actual and apparent authority to represent Debtor terminates. Only person authorized to represent interests of estate is personal representative appointed by Probate Court in formal proceeding or by registering in informal proceedings and issued letters of authority. Attorney's Motion to Substitute as Counsel for Debtor denied where Attorney has been requested by Debtor's daughter to appear, but Daughter was not duly authorized representative of Debtor's estate.

***In re Smith,* 618 B.R. 485, 2020 WL 4365287 (Bankr. E.D. Mich. 2020)** - When Debtor dies during bankruptcy case, representative must be appointed as personal representative either by Probate Court in formal proceeding or by registering in informal proceedings and must be issued letters of authority pursuant to Michigan Compiled Laws Sections 700.3103, 700.3614, 700.3615 and 700.3703. Fact that will named individual as personal representative without more is not sufficient to make person "personal representative" under Michigan law or to afford individual standing to appear on behalf of Debtor in bankruptcy case.

***In re Moore,* 2017 WL 4417582 (Bankr. N.D. Ohio 2017)** – Deceased Debtor in Chapter 13 cannot convert case to Chapter 7 and receive discharge. Rule 1016 allows case to either be dismissed or proceed with case administration. Rule does not mention conversion as option. Further, Section 1307 allows conversion only if Debtor would be eligible for relief under Chapter 7. Decedent's estate, which is the surviving "Debtor" in the Bankruptcy Case, would not be eligible for relief under Chapter 7.

***In re Sanford,* 619 B.R. 380, 2020 WL 5105181 (Bankr. E.D. Mich. 2020)** – Section 1328 allows for hardship discharge where (1) debtor's failure to complete payments is due to circumstances for which debtor should not justly be held accountable; (2) value, as of effective date of plan, of property actually distributed under plan on account of each allowed unsecured claim is not less than amount that would have been paid if the estate had been liquidated under chapter; and (3) modification of the plan under section 1329 of this title is not practicable. Debtor-husband passed away in June 2019, and Debtor-wife passed away in January 2020.Parties agreed that parts 2 & 3 were met (Plan had paid liquidation value to unsecureds and further modification was not practicable). Whether failure to make payments was due to circumstances for which Debtors should not be held accountable, payments coming due after January 2020. Court found that all three requirements of 1328(b) were met. The Court held that further administration of the case was possible and in the best interest of the parties and that the case may be concluded in the same manner as though the Debtors had not passed away during the case. The Court further held that Rule 1016 does not bar the personal representative from requesting a hardship discharge for the Debtors.

***In re Meadows,* Case No. 15-31667 (Bankr. D. Utah 2020)** – Discussing split of authority, Court concluded that Court has authority to waive financial management class described in Section 1328(g) where Debtor passes away during Chapter 13 case and before Debtor completed post-petition financial management course. Purpose of class is for Debtor's personal benefit alone with intent to assist Debtor from needing to file bankruptcy in future and does not affect any rights or obligations of any third parties. Better practice is to file motion to excuse when Debtor passes away rather than waiting until end of case.

***In re Tennial,* ___ *F.3d* ___, 2020 WL 6304352 (6th Cir. 2020)** – Deadline for filing appeal under Bankruptcy Rule 8002 is not jurisdictional. Under Constitution, only Congress can create, expand, or limit jurisdiction of Courts. Congress must clearly state that requirement implicates judiciary's subject matter jurisdiction—its "statutory or constitutional *power* to adjudicate case—before federal courts will treat requirement as a non-waivable and non-forfeitable jurisdictional imperative. Deadline created solely by Rule cannot limit Court's jurisdiction as Rules Committee lacks authority to alter or restrict jurisdiction. General reference in 28 USC Section 158 that appeal may be taken "in the time provided in Rule 8002 of the Bankruptcy Rules" not sufficient to indicate that Court intended Rule 8002 to be statutory limitation on Court Jurisdiction. Compliance, while not jurisdictional, is mandatory and Court must dismiss case unless proper Motion for Extension is filed under Rule 8002(d) unless Order being appealed is of type listed in Rule 8002(d)(2) for which extensions are not available.

***Taggart v. Lorenzen, 139* S.Ct. 1795, 2019 WL 2331303** – Creditor may be held in civil contempt for violating discharge order where there is no fair ground for doubt as to whether order barred creditors conduct using our objectively reasonable basis to conclude that conduct might be lawful. Violation of Discharge Injunction is not strict liability but also does not allow alleged wrongdoer to escape consequences based on unreasonable, yet sincerely held the subjective belief. Civil contempt warranted where there is no fair ground for doubt as to wrongful use of conduct using object of standard. Subjective intent may be taken into consideration in determining whether party acts in bad faith, and parties' good faith, while not defense to civil contempt, may help to fashion remedy.

***In re Kimball Hill, Inc.*, ___ *B.R.* ___, 2020 WL 5834884 (Bankr. N.D. Ill. 2020)** – Under *Taggert,* to escape liability for contempt alleged contemnor must show that there was some objectively reasonable basis to believe that conduct did not contravene court order. Creditor bears burden to show "uncertainty" regarding legality of actions. Creditor did not present objectively reasonable basis for actions where Creditor was aware of injunction that precluded Creditor from attempting to collect from their parties. Creditor consistently pursued claims that it knew were released on legal theories the Creditor knew were settled adverse to Creditor's position. Creditor presented no holdings from case law or statutes to support theories advanced and Creditor's alleged intention to attempt to overturn precedent is not objectively reasonable.

***In re Orlandi, 612 B.R. 372,* 2020 WL 986671 (6th Cir. BAP 2020)** - Creditor may be held liable for violation of discharge injunction only if there is no fair ground of doubt as to whether discharge barred creditor's conduct. Creditor's actions in pursuing recovery on pre-petition personal guarantee was not objectively unreasonable where two distinct lines of cases emerged as to post-petition viability of pre-petition personal guarantee, with some courts holding that pre-petition guarantee is not discharged, and there was no controlling law in the Sixth Circuit. Creditor had an objectively reasonable basis to conclude that filing state Court action to enforce personal guarantee might be lawful, precluding finding of willfulness required to hold creditor in contempt.

***In re Goodrich Quality Theaters, Inc., 616 B.R. 514,* 2020 WL 5552581 (Bankr. W.D. Mich. 2020)** – Section 1112 allows for dismissal or conversion of case whichever was in best interests of creditors. Only asset of Debtor was funds received from sale of assets as going concern and all parties agreed there was no reason for Chapter 11 to continue. While conversion would allow Chapter 7 Trustee to disburse funds, conversion not in best interest of creditors where conversion would add layer of administrative expenses, all creditors including Creditor Committee supported dismissal, Debtor had untainted history as fiduciary and could easily administer remaining funds, and conversion would result in confusion with no promise of any meaningful recovery for unsecured creditors.

***In re Taj Graphics Enterprises, LLC, 600 B.R. 1,* 2019 WL 2251831 (Bankr. E.D. Mich. 2019)** - Whether to convert or dismiss Chapter 11 case is vested in sound discretion of Bankruptcy Court. Debtor, Chapter 11 Trustee, and primary creditor all agreed that bankruptcy case should either be converted or dismissed as Debtor had no possibility of reorganization and Chapter 11 would result in liquidation which can be handled in a more cost-efficient manner under Chapter 7. Conversion was in best interest of creditors where creditors had significant claims and allowing case to be converted to Chapter 7 may provide opportunity for recovery while dismissal would leave creditors with no recovery on claims beyond payment of Chapter 11 Trustee fees and trustees counsel's fees. Estate had potentially valuable assets which could possibly produce return to creditors. Although there was no certainty that assets would realize substantial value, potential of assets was sufficiently strong to warrant conversion to allow Chapter 7 Trustee to investigate potential recoveries.

***In re Meehean,* 611 B.R. 574 (Bankr. E.D. Mich. 2020), *aff'd, 619 B.R. 371,* 2020 WL 4783299 (E.D. Mich. 2020)** - Social Security income is not considered in calculating "projected disposable income" under Section 1325(b)(1)(B). However, Debtor's exclusion of Social Security income must also meet good faith requirement under Section 1325(a)(3). Good faith turns on totality of circumstances including ability to pay creditors.. Debtors could not confirm Plan which provided for zero-dollar payments per month and paid creditors nothing where Debtor's income including Social Security was sufficient to pay all of Debtor's living expenses and pay creditors in full in 42 months. Section 407 does not give Debtor immunity from demonstrating good faith as precondition to confirmation of Plan even if demonstrating good faith requires including some or all Social Security benefits.

***Davis v. Helbling,* 960 F.3d 346, 2020 WL 2831172 (6th Cir. 2020)** – Debtor who is making 401k contributions pre-petition allowed to continue contributions and deduct amount from disposable income. Debtor cannot deduct contributions that were not being made pre-petition and cannot deduct amount by which contribution is increased post-petition. Good faith is not issue unless Debtor commences or sharply increases contribution on eve of filing. Court did not determine how to calculate amount of contribution, whether determined by average of 6 calendar months pre-petition or by amount being contributed as of petition date.

***In re Penfound,* Case No. 18-48940 (Bankr. E.D. Mich. 2020)** – *Davis* interpretation of Section 541(a)(7) allows Debtor to exclude from disposable income amounts withheld or contributed to ERISA qualified pension plan (401, 403, 457) if Debtor has demonstrated sufficient pre-filing history of contributions. Debtor in " like circumstances" may deduct contributions from disposable income under Section 1325(b)(2). Debtor was not "like" Debtor in Davis where Debtor did not make consistent contributions prior to commencement of case. Record indicated that Debtor had made no contributions for more than 2 years preceding commencement. While Debtor produced evidence indicating that Debtor had been contributing for 20 years, lack of any contributions in more than 2 years pre-petition fatal to Debtor's assertion that Debtor was "like" Davis.

***In re Williams,* 2020 WL 5753318 (Bankr. W.D. Mich. 2020)** – Disposable income test of 1325(b) does not apply to Plan modifications. Court has discretion to approve or disapprove plan modification. Court must evaluate proposed modification by balancing binding effect of confirmed plan against need to address changed financial circumstances. Debtor bears burden to persuade Court to depart from binding effect of plan and modification is not permitted to address issues that were or could have been decided at confirmation. Debtors' plan did not exclude voluntary retirement contributions from disposable income, based on Counsel's understanding of prior 6th Circuit precedent in *Seafort.* Later decision in *Davis* that voluntary retirement contributions may be excluded in calculating disposable income was not basis to modify plan as Debtors did not challenge *Seafort* or attempt to exclude contributions.

***Brown v. Viegelahn,* 960 F.3d 711, 2020 WL 3039046 (5th Cir. 2020)** – In confirming plan that proposes to pay 100% to unsecured creditors without contributing all disposable income, Court cannot require Debtor to waive discharge if plan is later modified to reduce dividend. Section 1325(b)(1) required either that Debtor contribute all disposable income or pay claims in full. While Section 1325(a)(1) requires Plan to comply with all provisions of Code sweeping in Section 704(a)(2) duty of Trustee to preserve estate for creditors, general duty did not override specific provisions of Section 1325 regarding commitment of disposable income. Proposal to pay 100% while withholding excess disposable income was not lack of good faith as Debtor cannot be in bad faith by doing what Code specifically allows. Plan was feasible on face even with Debtor's retention of excess income and otherwise met requirements of Section 1325(a) requiring Court to confirm plan as proposed.

***Roman Catholic Archdiocese of San Juan, Puerto Rico v. Feliciano, 140*, S.Ct. 696, 2020 WL 871715 (2020)** - Federal Courts may issue *nunc pro tunc* orders to reflect reality of what has already occurred and presupposes decree allowed or ordered but not entered through inadvertence of court. Nunc pro tunc orders are not for revisionist history by creating facts that never occurred in fact or for Court to make the record what it is not.

CASE LAW UPDATE

HONORABLE STEVEN W. RHODES VETERAN'S DAY CONFERENCE

November 11, 2020

HON. JAMES BOYD
HON. SCOTT DALES
HON. LAURA GRANDY
LAURA GENOVICH
THOMAS DECARLO

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In re Fulton, 2019 WL 2521455 (7th Cir. 2019), *cert granted,* Case No. 19-357 (S.Ct. 2019) – Whether Creditor "exercises control over property of estate when creditor refuses to return property that creditor repossessed prepetition. Second, Seventh, Eighth and Ninth Circuits conclude that refusal to return property violates stay, conflicting with Tenth Circuit holding in *In re Cowan,* 849 F.2d 943 (10th Cir. 2019) that mere passive retention is not stay violation.

NUNC PRO TUNC RELIEF

Roman Catholic Archdiocese of San Juan, Puerto Rico v. Feliciano, _____ S.Ct. ____, 2020 WL 871715 (2020) - Federal Courts may issue *nunc pro tunc* orders to reflect reality of what has already occurred and presupposes decree allowed or ordered but not entered through inadvertence of court. Nunc pro tunc orders are not for revisionist history by creating facts that never occurred in fact or for Court to make the record what it is not.

In re Bridges, Case No. 19-31012 (Bankr. S.D. Ill. 2020) – CARES Act applies only where Plan confirmed on or before March 27, 2020. Court cannot "retroactively" confirm plan to date before March 27 even where initial confirmation hearing was scheduled before that date but adjourned to later date. Section 105 does to empower court to ignore explicit mandates of CARES Act by creating "fictional" effective confirmation date. Court cannot use "nunc pro tunc" order to backdate confirmation of Plan. Nunc pro tunc relief allows Court to correct erroneous records but not revise substance of what happened or to back-date events to rewrite history.

APPEALS

Ritzen Group, Inc. v. Jackson Masonry, LLC, 140 S.Ct. 582, 2020 WL 201023 (2020) – Denial of Motion for Relief From Stay is final, appealable order. Adjudication of creditor's motion for relief from stay is discrete "proceeding." Order on stay-relief motion disposes of procedural unit anterior to, and separate from, claim-resolution proceedings, before and apart from proceedings on merits of creditors' claims. Resolution forms no part of the adversary claims-adjudication process. Relief from stay is discrete dispute qualifying as an independent "proceeding" within meaning of 28 USC § 158(a).

CHAPTER 7 - SECTION 707(B)(3)

In re Meehean, 611 BR 574 (Bankr. E.D. Mi. 2020), *aff'd,* 2020 WL 4783299 (E.D. Mi. 2020) - Social Security income is not considered in calculating "projected disposable income" under Section 1325(b)(1)(B). However, Debtor's exclusion of Social Security income must also meet good faith requirement under Section 1325(a)(3). Good faith turns on totality of circumstances including ability to pay creditors and whether Plan amounts to sincerely intended repayment of prepetition debt consistent with Debtor's available resources, taking into account amount of income of Debtor and Debtor's spouse from all sources; regular and recurring living expenses for Debtor and dependents; attorney's fees to be awarded in case and paid by Debtor; probable or expected duration of Plan; motivation of Debtor and sincerity in seeking relief; ability of Debtor to earn and likelihood of future increase or diminution in earnings; special circumstances such as inordinate medical expenses; frequency with which Debtor has sought bankruptcy relief; circumstances under which Debtor contracted debt and good faith in dealing with creditors; whether amount or percentage of payment offered would operate or be mockery of honest, hard-working, well intended Debtors who pay higher percentage of claims consistent with purpose and spirit of Chapter 13; burden of case administration on Trustee; and rehabilitative provisions of Bankruptcy Reform Act. Debtors could not confirm Plan which provided for zero dollar payments per month and paid creditors nothing where Debtor's income including Social Security was sufficient to pay all of Debtor's living expenses and pay creditors in full in 42 months. 42 USC Section 407 exclusion of Social Security from operation of any bankruptcy law excludes third parties compelled acquisition of someone else's Social Security benefits. Good faith test of Section 1325 requires Debtor to demonstrate good faith if Debtor wishes to receive benefits of Chapter 13, no different in principle than Social Security beneficiaries decision to use benefits to purchase anything of value. Social Security is not immune from paying restaurant bills or other living expenses merely because cash to pay bill came from Social Security. Section 407 does not give Debtor immunity from demonstrating good faith as

precondition to confirmation of Plan even if demonstrating good faith requires including some or all Social Security benefits

CHAPTER 7 - ABANDONMENT

Coslow v. Reisz, 2020 WL 2317493 (6th Cir. 2020) – Post-petition appreciation in property is property of estate pursuant to Section 541(a)(6) except appreciation attributable to earnings form services performed by individual debtor after commencement of case. Post-petition increases in equity resulting from causes other than payment for prost-petition services are property of estate. Debtor did not demonstrate that post-petition equity was due to post-petition services, where Debtor did not present evidence that he actually performed any services. Although Debtor agreed to assist Creditor in collecting debts from third party obligor, and third party obligor did make payments reducing the secured debt on property resulting in increased equity, Debtor did not actually do anything to cause or encourage third party to make payments.

CHAPTER 11 – DISMISSAL OR CONVERSION

In re Goodrich Quality Theaters, Inc., 2020 WL 5552581 (Bankr. W.D. Mi. 2020) – Section 1112 allows for dismissal or conversion of case whichever was in best interests of creditors. Only asset of Debtor was funds received from sale of assets as going concern and all parties agreed there was no reason for Chapter 11 to continue. While conversion would allow Chapter 7 Trustee to disburse funds, conversion not in best interest of creditors where conversion would add layer of administrative expenses, all creditors including Creditor Committee supported dismissal, Debtor had untainted history as fiduciary and could easily administer remaining funds, and conversion would result in confusion with no promise of any meaningful recovery for unsecured creditors.

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CHAPTER 11 -SBRA – ELECTION

In re Trepetin, 617 BR 841 (Bankr. D. Md. 2020) – Debtor under Chapter 7 can convert to Chapter 11 and elect to proceed under Subchapter V after expiration of deadlines for status conference and confirmation under Sections 1188 and 1189. Section 1188 allows Court to extend time to hold status conference and Section 1189 allows Court to extend deadline to confirm Plan if need for extension is attributable to circumstances for which the debtor should not justly be held accountable. Debtor requested extension of deadlines simultaneously with failing SBRA election. Debtor did all he could to act timely in Subchapter V case by filing request for extensions and Subchapter V election timely following conversion of case. Chapter 7 debtor is not required or permitted to file a plan and Debtor has not been dilatory in plan process itself and complied with all obligations under chapter 7 of the Code. There was no evidence that Debtor acted in bad faith or engaged in wrongful or dilatory conduct in either chapter 7 case or in process of conversion Debtor's need for an extension appears fairly attributable to factors outside of his control - conversion process and requirements of chapter 7 versus chapter 11. Circumstances surrounding conversion could weigh against extension of deadlines under if Debtor is manipulating timing of original bankruptcy filing and requested conversion in manner that unfairly prejudiced creditors; or if the Debtor did not comply with obligations in original bankruptcy case; or commenced case after effective date of SBRA and had missed plan deadline prior to requesting conversion or making a Subchapter V election. Analysis is fact-intensive and focused on Debtor's conduct and potential prejudice to creditors.

In re Seven Stars on the Hudson, 618 BR 333 (Bankr. S.D. Fl. 2020) - Chapter 11 small business Debtor permitted to elect application of Subchapter V to already-pending case, but may not do so after expiration of statutory Plan-filing and status conference deadlines. Section 1189(b) requires Plan to be filed not later than 90 days after "order for relief" and Section 1188(a) requires Court to hold status conference not later than 60 days after order for relief. "Order for relief" is date on which Debtor initially sought relief under Chapter 11. Amending petition to elect Subchapter V does not create new "order for relief". Where Chapter 11 initially filed more than one year after petition date, any attempt to convert would put Debtor in immediate default of requirements of Sections 1188 and 1189. Although Court has discretion to extend deadlines, Court must find that need for extension is attributable to circumstances for which Debtor should not justly be held accountable.

In re Twin Pines, LLC, Case No. 19-10295 (Bankr. D.N. Mex. 2020) - Debtor who filed for relief under Chapter 11 prior to effective date of SBRA entitled to convert case to proceeding and elect SBRA where Debtor is otherwise eligible under SBRA. Debtor had filed small business Chapter 11 and case had been pending for one year with no ability to promulgate confirmable plan. Sections 1188 and 1189 allow for Court to extend deadlines for circumstances for which debtor should not justly be held accountable. Debtor cannot be justly held accountable for deadlines that lapsed before the SBRA became effective. SBRA was geared to increase possibility of success for debtors struggling to confirm plan under chapter 11 and allowing Debtor to Amended Petition to take advantage of SBRA after it has struggled to confirm plan in Chapter 11 was within Congressional intent. Debtor not required to file a motion for permission to proceed under the SBRA and can amend Petition to make election.

In re Ventura, 2020 WL 1867898 (Bankr. E.D.N.Y. 2020) - Debtor who filed for relief under Chapter 11 prior to effective date of SBRA entitled to convert case to proceeding and elect SBRA where Debtor is otherwise eligible under SBRA. Although deadlines under SABRA to hold status conference within 60 days of Order for Relief and Debtor required to file Plan within 90 days of Order for Relief, both of which expired while Debtor was in Chapter 11 (15 months had passed since Order for Relief), Sections 1188 and 1189 allow for Court to extend deadlines. Although Secured Creditor held sufficient votes to prevent confirmation in Chapter 11, Debtor allowed to amend petition to elect Small Business treatment including ability to strip down Creditor's mortgage. SBRA addressed needs of debtors that engage in small business while allowing lender to retain many rights it originally had.

In re Bello, 2020 WL 1503460 (Bankr. E.D. Mi. 2020) – Debtor who filed for relief under Chapter 11 prior to effective date of SBRA entitled to convert case to proceeding and elect SBRA where Debtor is otherwise eligible under SBRA and case is otherwise in early, pre-confirmation state in Chapter 11.

CHAPTER 11 -SBRA – DUTIES OF TRUSTEE

In re AJEM Hospitality, LLC, 2020 WL 3125276 (Bankr. M.D.N.C. 2020) - Duties of Subchapter V Trustee are listed in Section 1183 and closely mirror those of Chapter 12 Trustee. Trustee must perform duties outlined in Section 704(a)(2), (5), (6), (7) and (9); and if Court orders, must perform duties under Section 1106(a)(3), (4) and (7). Trustee must also investigate acts, conduct, assets, liabilities, and financial condition of Debtor McGlone operation of Debtor's business and desirability of continuing business; and any other matter relevant to case or formulation of Plan; and must file statement of any investigation as soon practicable. Whether to expand trustees duties to include Section 1106(a)(3)(, (4) and (7) is vested in broad discretion of Bankruptcy Court. Bankruptcy Administrators motion to require Trustee to perform duties under Section 1106(a)(3) and (4) granted to limited extent of requiring Trustee to review and analyze intercompany claims and file statement summarizing review with Court.

In re Penland Heating and Air Conditioning, Inc., Case No. 20-1795-5-DMW (Bankr. E.D.N.C. 2020) – SBRA Trustee does not ordinarily need to retain counsel. Trustee acts as fiduciary for creditors in place of creditor committee, and is charged with facilitation of reorganization and monitoring consummation of Plan. Role is similar to that of Trustee in Chapters 12 and 13, with Debtor remaining in possession of assets and operation of business.

CHAPTER 11 - SBRA - REQUIREMENTS FOR CONFIRMATION

In re Ellingsworth Residential Community Association, Inc., 2020 WL 6122645 (Bankr. M.D. Fl. 2020) – Sections 1129 and 1191 provide requirements for confirming Plan under SBRA. Section 1191 abrogates absolute priority rule as to unsecured creditors and allows Debtor to confirm Plan without creditor support while retaining property while unsecured creditors are potentially not paid in full. Plan may be confirmed even if all creditors reject Plan if Plan is "fair and equitable" to each class of claims or interests that is impaired or has not accepted the Plan; Plan does not discriminate unfairly; and otherwise meets requirements of Section 1129(a) excluding requirement for acceptance by impaired classes. Section 1191(c) defines "fair and equitable" if Plan provides that Debtor's projected disposable income received and three year period (or such longer period, not to exceed five years, if applicable); there is reasonable likelihood that Debtor has ability to make all Plan payments; and Plan provides remedies if payments are not made. "Disposable income" means income received by Debtor not reasonably necessary to be expended for payment of expenditures necessary for continuation, preservation or operation of business. Plan provided for payment of allowed administrative, priority and unsecured claims over three years. Debtor had no secured debt. Unsecured creditors would be paid from Creditor Trust in an amount equal to 25% of accounts that become older than 90 days past due; net proceeds received from any Causes of Action; and net disposable income including special assessment to fund payments. Debtor provided projection of Projected Disposable Income which anticipated sufficient funds available to Creditor Trust and Plan provided for ten-day cure should Debtor default, and providing that claim holder may seek relief from Court to enforce Plan or seek other relief available under federal or state law. Debtor was devoting more than all projected disposable income by agreeing to special assessment on members and proposed method to maximize payments to creditors while still paying ongoing expenses. Evidence indicated high likelihood that Debtor will make payments and Plan provided adequate remedies in the event of default. Subchapter V Trustee would remain in place to monitor Debtor's operations, receive net disposable income, and distribute payments pursuant to the confirmed Plan. SBRA does not require formal disclosure statement. Section 1190 requires brief history of business operations of Debtor, liquidation analysis, projections with respect to ability of Debtor to make payments; and provide for submission of future earnings or future income as necessary for execution of Plan. Debtor not required to file lengthy, detailed financial projections as may be required in non-SBRA Chapter 11 reorganization. Although feasibility was dependent on members approval of special assessment, evidence indicated that Plan was feasible where members had previously approved special assessments, Debtor's president asserted that he can get sufficient support for special assessment; and evidence indicated that Debtor would be able to procure sufficient funds to pay allowed unsecured claims. However, Court would require approval of special assessment within reasonable time after confirmation and set post-confirmation status conference 120 days after confirmation.

CHAPTER 11 – SECTION 1111(B)

In re VP Williams Trans, LLC, 2020 WL 5806507 (Bankr. S.D.N.Y. 2020) – Section 1111(b) allows creditor to avoid "default rule" in bankruptcy case that undersecured claim is divided into "secured" and "unsecured" components. If class of secured claims make selection under Section 1111(b)(2), then full amount of claim is treated as "secured" and must receive deferred cash payments totaling at least allowed amount of claim. Section 1111(b)(2) is not available if interest of creditor in collateral is "inconsequential" defined as irrelevant, of no significance or unimportant. Collateral having value of at least $90,000 and potentially as high as $200,000 is not "inconsequential" where collateral is single most important asset to operation of Debtor's business. Rule 3014 governs election of application of Section 1111(b)(2). Election may be made at any time prior to conclusion of hearing on disclosure statement or within such later time as Court may fix. SBRA does not contemplate filing of disclosure statement. Where Court has not set deadline for filing election, election made after filing of Plan but before Debtor took action to solicit votes was timely. Election is not barred by terms of proof of claim that listed "secured" and "unsecured" portions of undersecured claim. Claim was filed consistent with the requirements of Section 506 while Section 1111(b)(2) controls rate of secured creditor to disregard effect of Section 506 and treat entirety of claim as secured.

DEATH OF DEBTOR

In re McGee, 2020 WL 5778462 (Bankr. W.D. Mi. 2020) - Upon death of Debtor, attorney's actual and apparent authority to represent Debtor terminates. Only person authorized to represent interests of estate is personal representative appointed by Probate Court in formal proceeding or by registering in informal proceedings and issued letters of authority. Attorney's Motion to Substitute as Counsel for Debtor denied where Attorney has been requested by Debtor's daughter to appear but Daughter was not duly authorized representative of Debtor's estate.

In re Smith, 2020 WL 4365287 (Bankr. E.D. Mi. 2020) - When Debtor dies during bankruptcy case, representative must be appointed as personal representative either by Probate Court in formal proceeding or by registering in informal proceedings and must be issued letters of authority pursuant to Michigan Compiled Laws Sections 700.3103, 700.3614, 700.3615 and 700.3703. Fact that will named individual as personal representative without more is not sufficient to make person "personal representative" under Michigan law or to afford individual standing to appear on behalf of Debtor in bankruptcy case.

In re Marks, 2019 WL 343815 (Bankr. E.D. Mi. 2019) - When Debtor dies, only person who can appear on Debtor's behalf is official representative of probate estate. Death of Debtor post-confirmation does not require dismissal if personal representative duly appointed by probate Court substitutes in place of Debtor. Case dismissed where personal representative filed, and later withdrew, motion for substitution.

CHAPTER 13 – TAX REFUNDS

Diaz v. Viegelahn, 2020 WL 5035800 (5th Cir. 2020) - Below-Median income Debtor cannot be required to commit post-petition income tax refunds. Provision in District Form Plan requiring Debtor to remit tax refunds in excess of $2000 of bridges Debtor's substantive rights in conflicts with Supreme Court guidance in *Lanning* which defined disposable income as current monthly income less amounts reasonably necessary to be expended for maintenance and support. For Debtor who is Below-Median income, amounts for maintenance and support are determined by actual amount of expenses while Above-Median income Debtors are limited as to expenses which can be deducted. Debtor is required to remit 100% of projected disposable income calculated by first determining disposable income which may then be adjusted based on known or virtually certain information about future income and expenses. Debtor is permitted to retain any income that is recently necessary for maintenance and support. Categorical rule requiring Debtor to remit tax refunds in excess of $2000 abridges Below-Median income Debtor's substantive right to use refund to finance reasonably necessary expenses. Debtor permitted to keep refund in excess of $2000 where Debtor had small budget with expenses well below IRS national standards such that Debtor would need to use "excess" refund for reasonably necessary expenses. Debtor not necessarily permitted to retain refunds but onus is on Trustee, upon receipt of tax return, to pursue Plan modification if Trustee believes that all or some portion of refund is not necessary for maintenance and support.

CHAPTER 13 – 100% -PLANS

Brown v. Viegelahn, 2020 WL 3039046 (5th Cir. 2020) – Court cannot in confirmation of Plan that proposes to pay 100% to unsecured creditors where Debtor does not contribute all disposable income require Debtor to waive discharge if Plan later modified to reduce dividend. Section 1325(b)(1) required either that Debtor contribute all disposable income or pay claims in full. While Section 1325(a)(1) requires Plan to comply with all provisions of Code sweeping in Section 704(a)(2) duty of Trustee to preserve estate for creditors, general duty did not override specific provisions of Section 1325 regarding commitment of disposable income. Trustee in Chapter 13 is accountable only for property received by Trustee. Debtor's excess disposable income is not received by Trustee so Trustee has not duty as to those funds; and Section 1322 requires only that Debtor contribute all or such portion of future income and needed for execution of Plan. Excess disposable income is not funds needed for execution of Plan. Proposal to pay 100% while withholding excess disposable income was not lack of good faith as Debtor cannot be in bad faith by doing what Code specifically allows. Plan was feasible on face even with Debtor's retention of excess income and otherwise met requirements of Section 1325(a) requiring Court to confirm plan as proposed. Section 105 does not empower court to add conditions or requirements beyond Section 1325(a) for confirmation. Provision would also be inconsistent with Section 1329

which specifically allows Debtor to modify confirmed plan to adjust payments to class of creditors.

In re Harrington, Case No. 19-47539 (Bankr. E.D. Mi. 2019) – Debtor who proposes to pay less than entire disposable income while paying unsecured creditor in full must pay interest on unsecured claims. Section 1325(b) requires the value as of effective date of Plan to be at least equal to amount of claim. Debtor cannot both pay less than all disposable income and pay creditors in full without interest.

CHAPTER 13 – CONVERSION

In re Evans, Case No. 19-53445 (Bankr. E.D. Mi. 2020) – Adopting reasoning in *Arnold*, when Chapter 13 case is converted to Chapter 7 before confirmation, *Harris* does not control. Section 1326 requires Trustee to distribute funds on hand to pay attorney's fees in advance of returning funds to Debtor. Court had authority to enter order directing Chapter 13 Trustee to pay attorney's fees from funds on hand as of conversion.

In re Arnold, 2020 WL 2462525 (Bankr. E.D. Mi. 2020) – When Chapter 13 case is converted to Chapter 7 before confirmation, *Harris* does not control. Section 1326 requires Trustee to distribute funds on hand to pay attorney's fees in advance of returning funds to Debtor. Court had authority to enter order directing Chapter 13 Trustee to pay attorney's fees from funds on hand as of conversion.

CHAPTER 13 - DISTRIBUTION OF FUNDS IN DISMISSED AND CONVERTED CASES

In re Johnson, 2020 WL 1943205 (Bankr. E.D. Mi. 2020) – Funds on hand with Trustee when Chapter 13 is Dismissed must first be used to pay administrative claims. Funds held by that must first be used to satisfy administrative expense claim are not Debtor's property." Chapter 13 debtor's attorney fee is a permissible section 503(b) administrative expense. Funds remaining in possession of Trustee if Debtor re-files become property of refiled Chapter 13 Estate. Creditor's writ of garnishment served on Trustee after dismissal of first case and before filing of second case of no effect as garnishment would seek to exercise control over funds which are property of estate in refiled case in violation of Section 362.

CHAPTER 13 – EFFECTIVE DATE OF PLAN

In re Kinne, 2020 WL 5505912 (Bankr. E.D. Mi. 2020) – Bankruptcy Code requires applicable commitment period to run from first payment due date. Debtor cannot be compelled to define effective date of Plan (and to calculate duration of Plan) using confirmation date.

CHAPTER 13 – HARDSHIP DISCHARGE

In re Sanford, 619 BR 380 (Bankr. E.D. Mi.2020) – Section 1328 allows for hardship discharge where (1) debtor's failure to complete payments is due to circumstances for which debtor should not justly be held accountable; (2) value, as of effective date of plan, of property actually distributed under plan on account of each allowed unsecured claim is not less than amount that would have been paid if the estate had been liquidated under chapter; and (3) modification of the plan under section 1329 of this title is not practicable. Debtor-husband passed away in June, 2019, and Debtor-wife passed away in January, 2020.Parties agreed that parts 2 & 3 were met (Plan had paid liquidation value to unsecureds and further modification was not practicable). Whether failure to make payments was due to circumstances for which Debtors should not be held accountable, payments coming due after January, 2020, were due to circumstances beyond Debtors' control. Parties initially disagreed whether payments coming due before Husband passed away were due to circumstances for which Debtors should be held accountable as Debtors did not provide any explanation for failure to make payments while both Debtors were alive and receiving their full income, but after Debtor's PR provided additional documentation for medical bills and expenses that pre-dated Husband's passing and were far in excess of budgeted medical expenses, parties agreed that all missed payments were attributable to circumstances beyond Debtors' control. Court then turned to Rule 1016 which provides that on death of Debtors case may be dismissed or, "if further administration is possible" and in best interest of parties, case may proceed as if Debtors had not passed away. At time Debtors' PR filed Motion for Hardship Discharge, Trustee had no funds on hand and no ability to administer anything. Bankruptcy Code and the Bankruptcy Rules do not define further administration but Rule does not appear limited to Trustee holding funds to distribute. Other tasks may constitute further administration including filing,

consideration, and adjudication of Motion for Hardship. Further administration also in best interests of parties where only asset of Debtors' estate was house which, if Chapter 13 was dismissed, would be hopelessly underwater as Plan provision bifurcating second mortgage would cease to be effective. "Parties" to be considered do not include Debtors who have no need for fresh start or any cognizable interest affected other than possible hardship discharge or heirs of estate. Interests to be considered include post-petition creditors whose debts will not be extinguished by hardship discharge. Granting hardship discharge preserves benefit of lien strip reducing amount of money needed to pay secured claims and potentially generating funds for payment of post-petition claims against Probate estate.

CHAPTER 13 – PLAN MODIFICATIONS

In re Ellison, Case No. 19-50407 (Bankr. E.D. Mi. 2020) – Modification under Section 1329 does not require any change in circumstances but must honor res judicata nature of Confirmation order under Section 1327. Plan Modification cannot relitigate issue that was or could have been litigated at confirmation. Below Median Debtor confirmed plan at 60 months, later sought to reduce term to 36 months alleging that 60 month term was result of attorney error. Plan length could have been litigated at confirmation and whether "cause" existed for Court to approve term longer than 60 months under Section 1322(d) was determined when Court confirmed Plan.

In re Guillen, 2020 WL 5015287 (11th Cir. 2020) - Section 1329 does not require change in circumstances before permitting Debtors to modify confirmed Plan. Court rejected analysis of Fourth Circuit and aligned itself with decisions from First, Fifth and seventh circuits holding that nowhere on face of Section 1329 is there requirement for showing of change of circumstances. Section 1329 permits Debtor's to modify Plan to increase or reduce amount of payments on claims of particular classes; extent or reduce time for making payments; alter distribution to creditor to account for payments made other than under Plan; or reduce amount of payments due to purchase of health insurance. Modification sought to reduce total funds available to unsecured creditors to allow payment of attorney fees incurred in adversary proceeding regarding validity, priority and extent of second mortgage. While Section 1327 provides that confirmed Plan is binding, Section 1329 curves out limited exception subject to certain statutory requirements. However, Debtors cannot "simply modify their plans willy-nilly" given the safeguards in Section 1329 that stand in way of "frivolous" modifications including limitation of powers to modify to Debtor's, trustees and unsecured creditors while excluding secured creditors; modification may be done only for limited purposes; modified Plan must meet requirements of Sections 1325(a), 1322(a) and (b), and 1323(c), which ensure that modified Plan will commit sufficient resources for payment of creditor claims and to be proposed in good faith. Further, Court has discretion whether to modify a Plan even where Plan meets express requirements of code. Unlike Section 1325 which provides that Court "shall confirm" Plan that meets requirements of Section 1325, Section 1329 provides that Plan "may be modified". While unforeseen change in circumstances may be good reason to modify Plan and Court can properly consider whether there has been some change in circumstances in deciding whether to modify Plan,, that is not only reason on which modification may be based. Court properly approved modification where modification was not designed to enrich Debtor at expense of creditors, but to allow Debtor to pay attorney fees incurred in successful adversary proceeding against alleged second mortgage holder and modification to allow Debtor's counsel's fees to be paid was preferable to attempting to force Debtor, who had fixed income, to pay additional $8300 over life of Plan or to deprive counsel of fees counsel earned in prosecution of vital adversary proceeding.

In re Williams, Case No. 18-00179 (Bankr. W.D. Mi. 2020) – Disposable income test of 1325(b) does not apply to Plan modifications. Court has discretion to approve or disapprove plan modification. Court must evaluate proposed modification by balancing binding effect of confirmed plan against need to address changed financial circumstances. Debtor bears burden to persuade Court to depart from binding effect of plan and modification is not permitted to address issues that were or could have been decided at confirmation. Debtors' plan did not exclude voluntary retirement contributions from disposable income, based on Counsel's understanding of prior 6th Circuit precedent in *Seafort.* Later decision in *Davis* that voluntary retirement contributions may be excluded in calculating disposable income was not basis to modify plan as Debtors did not challenge *Seafort* or attempt to exclude contributions. Further, modification still requires good faith and consideration of equities. Notion that

Debtors in bankruptcy should not pay themselves before paying creditors is persuasive. Debtors did not present any reason to avoid binding effect of Plan and demonstrate no reason to require creditors to bear costs of retirement plans.

In re Heikkila, Case No. 17-00637 (Bankr. W.D. Mi. 2020) – Motion for Moratorium on Payments proposing to stop payments For 3 months button excusing payments is Plan Modification under Section 1329 and Rule 3015. Although not properly captioned as Plan Modification, Motion served on entire matrix and requisite 21-days' notice provided and no party objected. Denying Motion based on formal defect would elevate form over substance. Court would treat Motion ss Plan Modification. Modification approved where relief sought was to postpone, but not forgive, payments and Debtors would have to make up payments before end of Plan term.

In re Glover, Case No. 19-46483 (Bankr. E.D. Mi. 2020) – Plan modifications that seek to reduce payments or excuse payments require a plan modification under Section 1329 on notice to all parties in interest. Prior order that excused plan payments done on stipulation without notice to creditors set aside as improvidently entered.

CHAPTER 13 – RETIREMENT CONTRIBUTIONS

Davis v. Helbling, 2020 WL 2831172 (6th Cir. 2020) – Debtor who is making 401k contributions pre-petition allowed to continue contributions and deduct amount from disposable income. Debtor cannot deduct contributions that were not being made pre-petition and cannot deduct amount by which contribution is increased post-petition. Good faith is not issue unless Debtor commences or sharply increases contribution on eve of filing. Court did not determine how to calculate amount of contribution, whether determined by average of 6 calendar months pre-petition or by amount being contributed as of petition date.

CHAPTER 13 – CARES ACT

In re Gilbert, 2020 WL 5939097 (Bankr. E.D. La. 2020) – Cares Act allows plan to be modified to extend term up to 84 months. Cares Act imposes only two requirements: (1) that debtor confirmed plan before March 27, 2020; and (2) debtor experienced or are experiencing financial hardship directly or indirectly cause by pandemic. There is no requirement that Debtor have been current in plan payments or otherwise in compliance with the Plan requirements on March 27 to exercise ability to modify plan.

COLLATERAL ESTOPPEL – CLAIM SPLITTING

Church Joint Venture, LP v. Blasingame, 2019 WL 2112260 (W.D. Tn. 2019), *aff'd,* 2020 WL 3068462 (6th Cir. 2020) – "Claim Splitting" is variation of res judicata and does not require finality of judgment but only presence of prior suit that, assuming it were final, would preclude 2nd suit. Both claim splitting and res judicata predicated on principle that courts have discretion to control dockets by dismissing duplicative cases, and requires plaintiff to join all claims arising from same set of facts in single proceeding. Plaintiff's action contesting spendthrift nature of trust barred where plaintiff had filed similar actions in District Court and in Bankruptcy Court in which plaintiff had suffered adverse judgments and had proceeded through appeals at the BAP and Circuit levels. Any new claim raised in current action predicated on legal theories which could have been used in prior action resulting in current complaint violating prohibition against claim splitting and res judicata.

CONTEMPT

Taggart v. Lorenzen, ___ US ___, 2019 WL 2331303 (2019) – Creditor may be held in civil contempt for violating discharge order where there is no fair ground for doubt as to whether order barred creditors conduct using our objectively reasonable basis to conclude that conduct might be lawful. Violation of Discharge Injunction is not strict liability but also does not allow alleged wrongdoer to escape consequences based on unreasonable, yet sincerely held the subjective belief. Civil contempt warranted where there is no fair ground for doubt as to wrongful use of conduct using object of standard. Subjective intent may be taken into consideration in determining whether party acts in bad faith, and parties good faith, while not defense to civil contempt, may help to fashion remedy.

ELIGIBILITY – BAR TO REFILING

In re Dewaard,, Case No. 20-49323 (Bankr. E.D. Mi. 2019) – Section 109(g)(2) requires dismissal of case if debtor voluntarily dismissed prior case following request for relief from stay and new case is filed within 180 days of prior dismissal. Section 109 is clear statutory mandate without condition. Identity of party seeking stay relief in prior case is irrelevant and fact that creditor seeking dismissal in current case was not creditor who sought stay relief in prior case did not avoid mandatory dismissal.

PROPERTY OF ESTATE

Rodriguez v. FDIC, ____ S.Ct. ____, 2020 WL 889191 (2020) – Where multiple related entitles file single, consolidated tax return, allocation of refund between entities is determined by applicable State law taking int account tax allocation agreements and other corporate documents. Courts that have referred to "federal common law" overstep Constitutional provisions that vest lawmaking in Congress. There is no "federal common law" but only limited areas where Federal Courts may craft rule of decision such as admiralty and certain disputes between states where there is no controlling legislation and Court's need to fashion rule of law is necessary to protect uniquely federal interest. State law is well equipped to handle disputes involving corporate property rights in context of bankruptcy and Congress has generally left determination of property rights in assets of bankrupt's estate to state law. Internal Revenue Code generally creates no property rights.

DISCHARGE INJUNCTION

In re Bentley, 2019 WL 4879330 (Bankr. E.D. Ky. 2019), *aff'd,* 2020 WL 3833069 (6th Cir BAP 2020) – Creditor does not violate discharge injunction by refusing to repossess surrendered automobile. Creditor's statements in response to Debtor's inquiry that Creditor retained its right to enforce lien survived discharge and if either Debtor or third party wanted to make offer creditor would consider release of lien. Creditor's actions do not violate injunction where actions are not "objectively coercive". Creditor's statements in response to Debtor's inquiry that Creditor would consider offer to release lien did not demand full payment and offered to accept minimal payment if Debtor could document poor condition of vehicle. Creditor did not adopt "take it or leave it" attitude or demand terms that either exceeded value of vehicle or were unfeasible. Creditor never demanded any payment and when Debtor advised that salvage yard would pay nominal amount, creditor suggested that Debtor have salvage yard contact Creditor. Creditor offered options but did not demand payment or take any other action that could be objectively coercive and conversations were initiated by Debtor contacting Creditor.

In re Deemer, 602 BR 770 (Bankr. M.D. Al. 2019) – Creditor violates discharge injunction where Creditor refuses to repossess surrendered vehicle or release lien, forcing Debtor to indefinitely store and retain worthless vehicle. Creditor agreed to release lien only if Debtor paid $750.00. Creditor's actions in refusing to release lien or repossess car was objectively coercive and creditor ha not reasonable basis for concluding that conduct was lawful based on language of discharge order. Creditor sanctioned attorney's fees and costs but no compensatory or punitive damages based on specific facts of case.

In re Jones, 2297475 (Bankr. E.D. Ky. 2019) – Secured creditor whose lien was avoided pursuant to Section 522(f) violated discharge injunction where creditor post-discharge refused to file satisfaction or discharge of lien. Continued presence of apparently valid lien in public records impaired fresh start by impairing Debtor's ability to sell property and by representing to public that creditor holds final judgment with right to execute on judgment and has valid lien in Debtor's real estate. Debtor seeking relief for contempt must establish by clear and convincing evidence that creditor violated discharge injunction with knowledge of injunction. Although creditor may not have received copy of Order Avoiding Lien, creditor was properly served with contempt motion yet creditor continue to fail to discharge lien. Sanctions included reduction in sale price of property that resulted from lien plus $2500 actual damages for delay, stress and embarrassment; plus $5995 in attorney's fees; plus "mild non-compensatory damages" of $7,500. Creditor could have easily complied by releasing judgment lien instead. Creditor elected not to participate in case or release lien and to ignore 3 Separate Court orders without explanation. Court would consider imposition of additional sanctions of $100 per day if creditor does not release lien within 14 days after service of contempt order

DISCHARGEABILITY – BAR DISCIPLINARY PROCEEDINGS

Albert-Sheridan v. State Bar of California, 2020 WL 3069784 (9th Cir. 2020) – Costs of disciplinary proceed against attorney are non-dischargeable where State Law defined costs as "penalty" imposed to protect public and promote rehabilitation. Discover sanctions are not excepted from discharge where Section 523(a)(7) excepts only fines, penalties, or forfeitures payable *to and for the benefit of* governmental unit, and is not compensation for actual pecuniary loss. Discovery sanctions awarded against Debtor in favor of private party in state court litigation were compensation to private party for costs of litigation for party's own benefit". Disciplinary Committee did not discriminate against Debtor by conditioning reinstatement on payment of non-dischargeable costs of disciplinary proceedings as Section 525 prohibits discrimination based solely on either Debtor's status as Debtor or non-payment of dischargeable debt. Costs of disciplinary proceeding were not dischargeable leaving State Bar within rights to condition reinstatement on payment.

DISCHARGEABILITY – STANDING AND "INJURY IN FACT"

Roe v. Boland, 2020 WL 39022 (6th Cir 2020) – "Willful and malicious" requires either that Debtor acted with subjective intent to cause injury or that Debtor's actions were substantially likely to produce injury. Debtor's creation of child pornography by "morphing" children's faces into video substantially certain to produce harm to children used in videos. 18 USC Section 2255 creates presumption that Debtor's actions would harm children's reputation, emotional well-being and privacy and presumes that victims will have sustained damages of no less than $150,000. Children suffered injury at moment videos were created. Debtor's response that videos were created solely for use as expert testimony in criminal trial did not alter fact that videos used real, identifiable children creating substantial risk of harm.

DISMISSAL WITH BAR TO REFILING

Riddle v. Greenberger, 2020 WL 3498438 (6th Cir. BAP 2020) – Sections 105 and 349 provide basis for Court to dismiss case with bar to refiling in excess of 180 days. Bar particularly appropriate where debtor is serial filer or filing is part of pattern to forestall state court litigation or where debtor engages in egregious behavior. Bar appropriate where case was Debtor's fifth case; debtors actions mirrored conduct in 2011 case that resulted in denial of discharge including failure to cooperate with Trustee, failure to produce documents and records, and undervaluing of assets. Debtor had prior case dismissed with 3-year bar and waited until after expiration of bar to file two additional cases, and conduct in two post-bar cases indicate that Debtor was not deterred by earlier bar. Case dismissed with another 3-year bar to refiling.

FRAUDULENT TRANSFER – INITIAL TRANSFEREE

Jalbert v. Gryanznova, 2020 WL 5612566 (Bankr. S.D.N.Y. 2020) – Section 550 imposes liability on initial transferee of fraudulent transfer but does not amount to "strict liability" standard. Initial transferee must exercise "dominion and control" as a minimum requirement before party could be treated as transferee, but dominion and control standing alone are not always sufficient. Bare legal ownership of bank account through which funds pass is not sufficient to make party "transferee". Defendant and her "friend" had joint bank account. The friend deposited $1 million generated as the proceeds of a Ponzi scheme into the account and immediately transferred funds to third party. Defendant was completely unaware that transaction had occurred, had no knowledge of the deposit, and money was long gone before defendant knew about it. Defendant had no actual "control" over use of funds. Funds deposited into account were not intended for defendant's benefit and were not used to pay defendant's personal bills were obligations. Imposing liability on defendant under the circumstances would amount to victimizing innocent party, something not required by Section 550.

FRAUDULENT TRANSFER – CONVERSION TO CHAPTER 7

Brown v. Barclay, 913 F.3d 617 (9th Cir. 2020) – Property which Debtor acquired during Chapter 13 Case and then transferred to third party is recoverable by Chapter 7 Trustee following conversion. Although property was not property of estate when Chapter 13 first filed. Property became property of estate when acquired by Debtor. Debtor's father passed away pre-petition and Debtor and 4 brothers were beneficiaries of estate. State Probate

court concluded that brothers had abandoned claims to estate leaving Debtor a sole heir. A few months later Debtor filed for relief under Chapter 13 and listed anticipated inheritance with value of $2,500.00. A few moth later, State Court distributed estate to Debtor consisting of more than $55,000. Debtor, without approval of Chapter 13 Trustee and without Court authorization voluntarily transferred more than $12,000 to each of this three brothers. Chapter 13 Trustee filed Motion to Convert arguing that Debtor abused Bankruptcy system by failing to disclose full amount of anticipate inheritance; transferring funds to brothers who held no legal claim to funds; and non-disclosure of transfers. Section 348 defines property of converted estate to exclude assets acquired after initial filing and includes assets acquired before initial filing only to extent funds remain in possession or control of Debtor. Although funds were not in Debtor's possession or control as of conversion date, Chapter 13 Trustee could have pursued recovery had case not been converted. Funds remained in Debtor's constructive possession or control sufficient to allow funds and right to pursue recovery as an asset of Chapter 7 estate. There is no basis in the structure, policy, or purpose of the Bankruptcy Code for treating the fraudulent transfers as beyond the reach of the creditors merely because the estate was converted.

PROPERTY OF ESTATE – RETURNED FUNDS

In re Zimpher, 2019 WL 4747657 (Bankr. N.D. Ohio 2019) – Funds returned to Trustee ae property of Bankruptcy Estate subject to Chapter 7 distribution priorities under Section 726. Section 502(e) allows claims for reimbursement only under certain circumstances and generally must be asserted by an entity that is liable with Debtor – that is, a co-Debtor. Section 509 defines co-Debtor which, while broadly construed, does not include Debtor as a co-Debtor. Creditor is subrogated to Creditor's claim only where subrogee pays or discharges debt for which another is liable, and not for payment of one's own debts. Debtor cannot use Section 509 or subrogation to file a claim on behalf of Debtor merely because Debtor paid a claim post-petition. There was no basis for Debtor to assert claim to level higher than Debtor's right to recover excess funds under Section 726(a.

SERVICE – RULE 7004

In re Longwell, 2019 WL 1293999 (Bankr. N.D. Ohio 2019) – Rule 3012 allows a Debtor to value a secured claim as part of the Chapter 13 Plan but requires that Plan be served on holder of claim in manner provided under Rule 7004. Service provides creditor with notice of cramdown including proposed value of security and provides creditor with opportunity to appear and protect its rights including contesting valuation. Creditor not properly served where Debtor served Plan on creditor 3 months after deadline to object to confirmation and confirmation hearing had passed. Service of Plan 3 months after expiration of deadline to object served no purpose and gave creditor no opportunity to object and at best would have given notice only of what had already been done. Confirmation denied pending service by Debtor of Plan on creditor in manner that complies with Rule 7004.

Ingram Barge Company, LLC v. Musgrove, 2019 WL 1226818 (M.D. Tn. 2019) - Rule 4 requires service in manner consistent with applicable state law; or by delivering copy of summons and complaint to defendant personally; leaving copy at each of defendant's dwelling or usual places of abode was someone of suitable age and discretion; or delivering copy to agent authorized by appointment or by law to receive process. Service by certified mail does not constitute proper service under any provision of Rule 4. Applicable State Law required that certified mail return receipt be signed by defendant or person authorized by statute to sign certified mail. Certified mail receipt signed by third party is not sufficient. Service by certified mail signed for by third party did not constitute personal service and does not constitute leaving summons and complaint at dwelling or usual place of abode was someone of suitable age and discretion. Service on defendant's former attorney is not sufficient absent evidence that attorney was authorized to receive service of process and even if attorney was authorized, service by mail does not comply with Rule 4. Absent proper service, Court lacks jurisdiction to proceed to adjudication and motion for default judgment must be denied and default under Rule 55 must also be set aside.

STUDENT LOANS

Patterson v. Navient Solutions, LLC, 2020 WL 5104560 (10th Cir. 2020) - Section 523(a)(8) excepts from discharge any educational benefit overpayment or loan made, insured or guaranteed by governmental unit or

nonprofit institution; any obligation to repay funds received as educational benefit, scholarship or stipend; or any other educational loan that is qualified education loan as defined by Internal Revenue Code. Private "Tuition Answer Loans" student loans not made or insured by governmental unit or nonprofit institution is not excepted from discharge under section 523(a)(8)(A)(i). Tuition Answer Loans did not constitute educational loan as defined by Internal Revenue Code because loans were not made solely to cover "cost of attendance" under 523(a)(8)(B). Tuition Answer Loans are not "obligations to repay funds received as an educational benefit" under Section 523(a)(8)(A)(ii). Loans are expressly covered in Section 523(a)(8)A)(i) and (B), but deliberately omitted from 523(a)(8)(A)(ii) which is limited to funds received as educational benefit. Had Congress intended "educational benefit" to encompass loans, Congress would have expressed that inclusion and additional language would be surplusage. Ordinary understanding of "educational benefit" does not encompass loans particularly where remaining context of statute references educational benefits, scholarships, and stipends, which are conditional grants of money that generally do not need to be repaid.

Conti v. Arrowood Indemnity Co., 2020 WL 289309 (E.D. Mi. 2020) – Section 523(a)(8)(B) excepts from discharge any education loan as defined in 26 USC Section 221(d)(1) and incurred by debtor who is an individual. "Qualified Education Loan" is any indebtedness incurred solely to pay qualified higher education expenses including "cost of attendance" which includes tuition and fees, rental or purchase of equipment, materials and supplies required of students; and allowance for books, supplies, transportation and miscellaneous personal expenses. Whether loan is "qualified education loan" is determined by purpose of loan and lender's primary intention in entering into loan rather than how Debtor actually spent proceeds. Loan documents specified that loan was for educational purpose; stated that Debtor may borrow up to the full cost of education less any financial aid; stated that Debtor understood that proceeds of loan "must be used for educational purposes"; Debtor separately acknowledged that proceeds would be used for specific educational purposes; all of which indicate that Lender made loans specifically to finance education. Fact that Debtor could and did use portion of loan proceeds for personal expenses does not control whether loan is qualified educational loan.

STUDENT LOANS – UNDUE HARDSHIP

Hutsell v. Navient, 2020 WL 1213600 (Bankr. N.D. Ohio 2020) – To show undue hardship, Debtor must prove (1) Debtor cannot maintain, based on current income and expenses, 'minimal' standard of living for herself and her dependents if forced to repay loans; (2) additional circumstances exist indicating that state of affairs is likely to persist for significant portion of repayment period; and (3) Debtor has made good faith efforts to repay loans. Debtor need not live in abject poverty to satisfy test. Debtor lacked resources to pay student loans where Debtor worked full time and netted $8.48 per hour, for total monthly net income of $1,366.33; and Debtor's parents paid Debtor's rent of $1196.50 per month. Debtor's expenses totaled $2,311.08 if Debtor's parents' contribution is included in income which theoretically could allow Debtor to pay something toward student loans each month; but Debtor's expenses exceeded income if Debtors' parents' contribution is excluded. Although non-debtor spouse's income must be included, the concept of a "minimal standard of living" requires a certain degree of financial independence and control. Debtor's receipt of charity from third party who is under no legal obligation to provide such support should generally not be considered income for purposes of Brunner, when without such support Debtor cannot maintain minimal standard of living and repay her loans. Whether Debtor made good faith effort to repay loans was subject to factual dispute, where Debtor contended that she never had ability to repay loans. Material issues of fact precluded summary judgment in favor of creditor.