AMERICAN BANKRUPTCY INSTITUTE

2021 Virtual Annual Spring Meeting

Do You Speak Consumer?

Hon. Kevin R. Anderson
U.S. Bankruptcy Court (D. Utah); Salt Lake City

Beverly M. Burden
Chapter 13 Trustee (E.D. Ky.); Lexington

Heather M. Giannino
Heavner, Beyers & Mihlar, LLC; Decatur, Ill.

Cristina Perez Hesano
Perez Law Group, PLLC; Glendale, Ariz.

CONCURRENT SESSION

2021

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AMERICAN BANKRUPTCY INSTITUTE VIRTUAL ANNUAL SPRING MEETING APRIL 12-22, 2021

Reasons for Filing Chapter 13 Instead of Chapter 7

By Beverly M. Burden
Chapter 13 Trustee
Eastern District of Kentucky

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Benefits of Chapter 13

- ✓ Debtor maintains possession of property.
- ✓ Debtor retains exclusive rights to use, sell, or lease property of the estate.
- ✓ Regain possession of repossessed collateral
- ✓ Cure defaults and maintain payments on collateral (e.g., save home from foreclosure).

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Benefits of Chapter 13

- ✓ Modify Secured Claims
  - Pay as secured to the collateral's value (cram-down)
  - Change interest rate and repayment terms
  - Strip off junior liens
- ✓ Retain right to voluntarily dismiss or convert.

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Benefits of Chapter 13

- ✓ Retain property that would be lost in Chapter 7
  - Non-exempt equity
  - Benefit of avoidable lien
- ✓ Protect a co-debtor
  - From collection action on consumer debts
  - Pay the co-signed debt in full

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Benefits of Chapter 13

- ✓ Confirmation is binding on creditors
  - Provide for sale or property
  - Pay student loans per IBR plan
  - Provide for lien retention
  - Benefit of avoidable lien
- ✓ Pay bankruptcy attorney's fees through plan

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Benefits of Chapter 13

- ✓ Obtain discharge in Chapter 13 even if there is a prior Chapter 7 discharge within 8 years.
- ✓ Manage secured and priority debts even if you do not get a discharge.

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Benefits of Chapter 13

- ✓ Discharge debts that are not dischargeable in Ch. 7
  - § 1328(a) lists nondischargeable debts in Chapter 13
  - Chapter 13 can discharge –
    - § 523(a)(15) property settlement debtors that are not domestic support obligations
    - § 523(a)(6) willful and malicious injury to property.

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Benefits of Chapter 13

- ✓ Manage nondischargeable tax debts
  - Value secured tax claim
  - Pay priority taxes over time
  - Discharge tax penalties
  - Discharge § 507(a)(8) taxes

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APRIL 12-22, 2021

Understanding the Automatic Stay in Consumer Cases, Exceptions and Enforcements

Cristina Perez Hesano

By Cristina Perez Hesano
Perez Law Group
Glendale, AZ

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What is the Automatic Stay?

- ✓ One of the fundamental debtor protections provided by the bankruptcy laws.
- ✓ Rises by operation of law and only requires the filing of a bankruptcy to commence.
- ✓ Creditors are immediately enjoined from continued collection efforts or direct contact with the debtor, unless otherwise granted relief under §362(d).

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What is the Automatic Stay?

- ✓ Section §362(a) provides a list to what the stay applies.
- ✓ Section §362(b) provides exceptions to the stay.

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Duration of the Stay under § 362(c)

- ✓ The automatic stay continues against property of the estate until that such property is removed or no longer part of the bankruptcy estate.
- ✓ Generally, the automatic stay will continue until the earlier of when a case is closed, dismissed, or a discharge is granted or denied.
- ✓ §362(h)

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Sections 362(c)(3) and 362(c)(4)

- ✓ Enacted to address and curtail serial bankruptcy filers.
- ✓ Section 362(c)(3) and 362(c)(4).
- ✓ Presumption of bad faith.
- ✓ What is bad faith?
- ✓ Clear and convincing standard.

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Relief from Stay under §362(d)

- ✓ How?
- ✓ Contested matter
- ✓ Proper notice and hearing
  - "for cause, including lack of adequate protection"
  - Cause provides discretion to the judge.
- ✓ §362(e)

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Emergency Relief from Stay

- ✓ Section 362(f) provides a mechanism for movants to obtain emergency relief in limited circumstances.
- ✓ Requires proof of "irreparable damage" that will occur to property before debtor can give notice of a hearing.

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Burden of Proof for Relief from Stay

- ✓ Moving party has the burden on the issue of adequate protection in any §362(d) or §362(e) hearing.
- ✓ The party opposing the relief requested has the burden on all other issues.

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Sanctions for Violation of Stay - § 362(k)

- ✓ Mechanism implemented to deter willful violations of the automatic stay.
- ✓ An individual injured by any willful violation of a stay shall be entitled to recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may be entitled to recover punitive damages.
- ✓ Only actual damages are available to the injured party if the creditor, in good faith, committed a stay violation to recover property under a personal property lease as described in 11 U.S.C. § 362(h).

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Sanctions for Violation of Stay - § 362(k)

- ✓ When does a violation occur that is subject to damages?
  - Willful
  - Intentional
  - No subjective intent needed.
  - Good faith of the creditor is irrelevant.

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Sanctions for Violation of Stay - § 362(k)

- ✓ To recover monetary damages:

  1) a bankruptcy petition was filed

  2) the debtor is an individual

  3) the creditor received notice of the petition

  4) that a violation occurred, and the creditor's actions were willful

  5) the debtor suffered damages.

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Sanctions for Violation of Stay - § 362(k)

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APRIL 12-22, 2021

Mortgage Forbearance and Plan Modifications

By Heather M. Giannino
Heavner, Beyers & Mihlar, LLC
Decatur, Illinois

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Recent Legislation Impacting Consumer Bankruptcy

- ✓ 3/27/20 – Coronavirus Aid, Relief and Economic Security Act (the "CARES Act").
- ✓ 12/27/20 – Consolidated Appropriations Act ("CAA").
- ✓ 3/27/21 – COVID-19 Bankruptcy Relief Extension Act of 2021.
    - CARES Act relief provisions extended to March 27, 2022.

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Forbearance Agreements

- ✓ CARES forbearance option – for borrowers who, either directly or indirectly, suffer a financial hardship due to COVID.
- ✓ No documentation required to prove hardship.
- ✓ Initial forbearance up to 180 days, which may be extended up to an additional 180 days. This was recently extended to up to 18 months.

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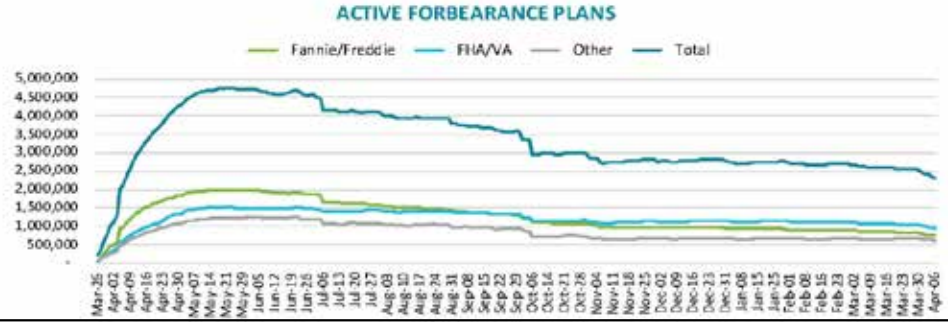
	Fannie & Freddie	FHA & VA	Other**	Total
Loans in Forbearance*	753,000	954,000	605,000	2,312,000
UPB of Loans in Forbearance ($Bil)*	$156	$162	$135	$453
Share of Loans in Forbearance*	2.7%	7.9%	4.7%	4.4%
Active Loan Count (Mil)*	27.9	12.1	13.0	53.0

*Figures in this report are based on observations from Black Knight's McDash Flash data set and are extrapolated to estimate the full mortgage market.
**Other category includes held in portfolios, private labeled securities, or by other entities



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CARES Forbearance Claims

- ✓ CAA added § 501(f), which permits mortgage servicers to file supplemental proofs of claim for forbearance amounts.
- ✓ Supplemental POC must include terms of modification or deferral, copy of agreement, and description of deferred payments.
- ✓ Supplemental POC must be filed 120 days after end of forbearance (sunsets 12/27/21).

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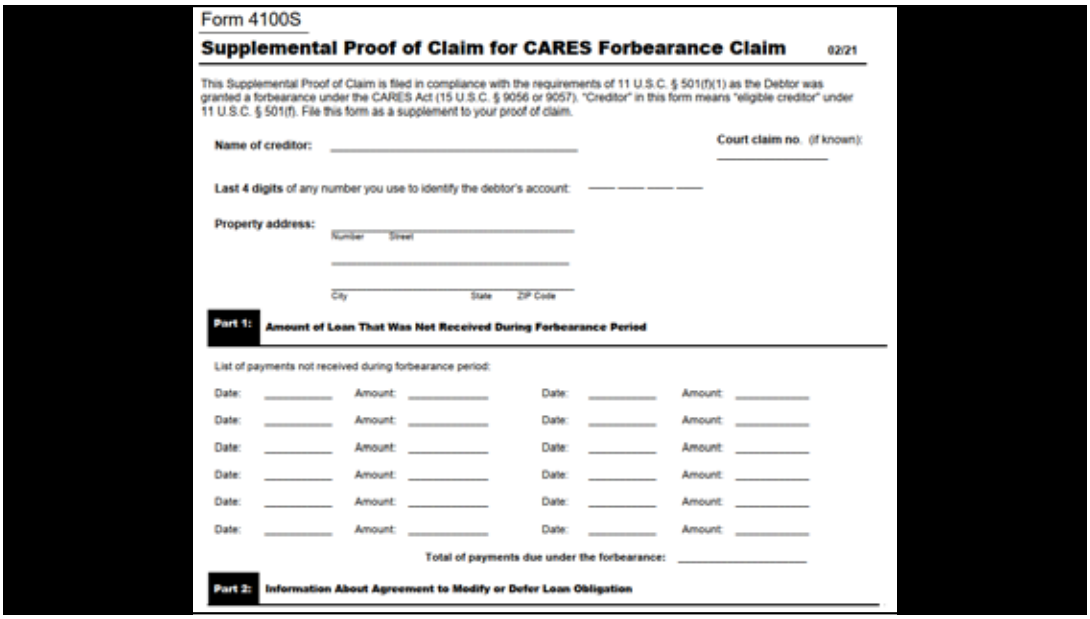

Form 4100S

Supplemental Proof of Claim for CARES Forbearance Claim 02/21

This Supplemental Proof of Claim is filed in compliance with the requirements of 11 U.S.C. § 501(f)(1) as the Debtor was granted a forbearance under the CARES Act (15 U.S.C. § 9056 or 9057). "Creditor" in this form means "eligible creditor" under 11 U.S.C. § 501(f). File this form as a supplement to your proof of claim.

Name of creditor: _____ **Court claim no.** (if known): _____

Last 4 digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Property address: _____
Number Street
_____
_____
City State ZIP Code

Part 1: Amount of Loan That Was Not Received During Forbearance Period

List of payments not received during forbearance period:

Date: _____	Amount: _____	Date: _____	Amount: _____
Date: _____	Amount: _____	Date: _____	Amount: _____
Date: _____	Amount: _____	Date: _____	Amount: _____
Date: _____	Amount: _____	Date: _____	Amount: _____
Date: _____	Amount: _____	Date: _____	Amount: _____
Date: _____	Amount: _____	Date: _____	Amount: _____

Total of payments due under the forbearance: _____

Part 2: Information About Agreement to Modify or Defer Loan Obligation

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Ch 13 Plan Modification

- ✓ CAA amended § 1329 to allow plan modification to provide for post-petition forbearance claims.
- ✓ Motion to modify should be filed within 30 days of the supplemental, forbearance claim.
- ✓ Otherwise, trustee or other party may seek plan modification to pay forbearance claim (sunsets 12/27/21).

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Practice Pointers

Creditors:

- ✓ Be cognizant of Proof of Claim, Notice of Forbearance, and Response to Notice of Final Cure issues.
- ✓ For servicers, determine whether your organization wants to file forbearance claims.
- ✓ Monitor dockets for amended plans and motions to modify plans.
- ✓ Stay informed as to any new developments

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Practice Pointers

Debtor's Counsel:

- ✓ Determine if your bankruptcy borrower is or has been in a forbearance.
- ✓ Educate borrowers on what a forbearance is and what it is not.
- ✓ Monitor dockets for notices of forbearance and supplemental proofs of claim for forbearances.
- ✓ Communication is key to reaching a resolution regarding forborne payments.

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New § § 1328(i): Discharge with Missed Payments

By Hon. Kevin R. Anderson
District of Utah

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New § 1328(i) – 3 Missed Payments

The court **may** grant a discharge where –

- ✓ Debtor missed not more than 3 payments . . .
- ✓ To 13 trustee or creditor with mortgage on debtor's principal residence . . .
- ✓ That occurred on or after March 13, 2020, and
- ✓ Material financial hardship caused directly or indirectly by COVID

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New § 1328(i) – Forbearance or Loan Modification

The court **may** grant a discharge where –

- ✓ Plan provided for cure and maintenance on a residential mortgage . . . and
- ✓ Debtor has entered into a forbearance agreement or a loan modification.

Intent was to allow discharge for missed post-petition payments that will be cured post-plan through a forbearance or loan agreement.

But the statute is not clear.

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Property of the Estate in Chapter 13

By Cristina Perez Hesano
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Glendale, AZ

Cristina Perez Hesano

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Property of Estate Defined in § 541

The filing of a bankruptcy petition creates an estate for the bankruptcy debtor.

- ✓ "all legal or equitable interest of the debtor in property as of the commencement of the case."
- ✓ Broadly construed – anything and everything in which the debtor has an interest, no matter where it is located.

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Determining Property of Estate

- ✓ The nature and extent of debtor's interest in property is determined by state law.
- ✓ Property will remain in the bankruptcy estate until removed from the estate.
- ✓ Section 541(a) defines property of the estate.
- ✓ Section 541(b) defines what is not property of the estate.

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Chapter 13 Expands Property of Estate

- ✓ Section 1306(a) expands definition to include property acquired after bankruptcy filing.
- ✓ Makes all income received during 3 to 5 years of Chapter 13 case possibly available to pay creditors.
- ✓ Tension between §1306(a) and §1327(b).

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Property of Estate Upon Conversion

- ✓ Property of estate as of petition date that is still under debtor's control becomes property of Chapter 7 estate.
- ✓ If conversion in bad faith, then property of Chapter 7 estate includes Chapter 13 property on date of conversion.

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Harris v. Viegelahn

- ✓ Supreme Court found that post-petition wages, not yet distributed by the chapter 13 trustee at the time of conversion to chapter 7, must be returned to the debtor.
- ✓ Bankruptcy courts split on whether *Harris* is limited to post-confirmation conversions and/or dismissals (*e.g., can trustee pay debtor's counsel when case is converted or dismissed*).

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Treatment of Secured Claims in Chapter 13 Cases

By Beverly M. Burden
Chapter 13 Trustee
Eastern District of Kentucky

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Modification of Secured Claims

Valuation – "Cram-Down"

- Section 506(a)(1)
- Bifurcate/split the claim
  - Claim is secured to extent of collateral's value
  - Balance is unsecured
- "910 car claims"
  - Cannot be crammed down
  - Can be otherwise modified (alter interest rate or length of loan)

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Modification of Secured Claims

Interest Rate:

- Interest on secured portion of claim
- Present value analysis
- Compensate creditor for:
  - time value of money
  - risk of default
- "*Till*" rate: 1% to 3% over prime

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Modification of Secured Claims

Other modification issues:

- § 1325(b)(5)
  - Lien retention
  - Equal monthly payments
  - Adequate protection
- Max 5-year plan duration

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Special Rules for Mortgage Claims

- Cannot Modify Mortgage Claims that are –
  - Secured "only" by a "security interest" . . . .
  - In "real property" . . . .
  - That is the debtor's principal residence.
- Can modify a mortgage that comes due before end of plan.

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Lien Stripping

- Underwater junior lien or mortgage can be "stripped off"
- Valuation issue
- Collateral value minus senior liens
- Underwater claim is secured to $0 (unsecured)
- No lien-stripping in chapter 7

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Lien Avoidance Under § 522(f)

- Avoid a lien under § 522(f)-
  - to the extent the lien impairs an exemption;
  - and only if the lien is -
    - ✓ a judicial lien; or
    - ✓ non-PMSI in household goods and other described property

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Lien Avoidance Under § 522(f)

Cannot use § 522(f) to avoid:

- consensual mortgage or deed of trust
- PMSI in jewelry, furniture, etc. purchased with loan proceeds
- Lien in a car
- Any lien in property not claimed as exempt

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City of Chicago v. Fulton

By Cristina Perez Hesano
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Glendale, AZ

Cristina Perez Hesano

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ISSUE

Whether an entity violates § 362(a)(3) by continuing to retain property of the estate that is lawfully obtained prior to the debtor's bankruptcy filing.

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BACKGROUND

City of Chicago impounded vehicles for failure to pay fines related to motor vehicle infractions.

Respondents filed Chapter 13 and requested that City return the vehicles.

City refused and retained possession.

The bankruptcy courts held that City's refusal to return vehicles was a violation of the automatic stay.

Illinois Court of Appeals affirmed and rejected the City's "passive holding" argument. It concluded that § 362(a)(3) becomes effective immediately upon filing for bankruptcy and is not dependent on the debtor first bringing a turnover action.

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SUPREME COURT HOLDING

Mere retention of estate property after the filing of a bankruptcy petition does not violate §362(a)(3) of the Bankruptcy Code.

Under that provision, the filing of a bankruptcy petition operates as a "stay" of "any act" to "exercise control" over the property of a bankruptcy estate.

Reversed and Remanded.

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SUPREME COURT ANALYSIS

The court analyzed the language of §362(a)(3)

Discussed the ambiguity in the text of §362(a)(3)

The court also looked to the history of the Bankruptcy Code.

Justice Sotomayor concurred stating "exercise control over" as used in §362(a)(3) did not extend to "passive retention of property" lawfully seized prebankruptcy,

But she addressed policy issues of a debtor's need to recover a car to get to work.

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POTENTIAL IMPLICATIONS AND RECOMMENDATIONS

Narrow opinion on §362(a)(3) and whether it extended to mere retention of estate property.

Know the rules of your court.

Do not wait to file the required paperwork and obtain a hearing.

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APRIL 12-22, 2021

A Trustee's Strong-Arm Powers

By Beverly M. Burden
Chapter 13 Trustee
Eastern District of Kentucky

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Trustee Lien Avoidance Under § 544

- 11 U.S.C. § 544(a)(1) –
  - Trustee can avoid a lien that is not timely or properly perfected
  - Creditor's claim becomes unsecured
  - Chapter 7: trustee will avoid lien and sell property for benefit of unsecured creditors
  - Chapter 13: debtor may be able to retain property and pay value to unsecured creditors

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Lien Avoidance Under § 547

- Trustee can avoid a lien
  - Granted within 90 days prepetition
  - On account of an antecedent debt
  - Giving creditor more than if it were an unsecured creditor in a liquidation case
- Lien is not avoidable if:
  - Perfected within 30 days
  - PMSI in property
  - Loan was used to purchase the property
  - Lien was perfected within 30 days after debtor has possession of collateral

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Lien Avoidance Under § 547

- When lien is avoided under 547:
  - Creditor's claim becomes unsecured
  - Chapter 7: trustee will avoid lien and sell property for benefit of unsecured creditors
  - Chapter 13: debtor may be able to retain property and pay value to unsecured creditors

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Getting Paid as a Consumer Attorney

By Hon. Kevin R. Anderson
District of Utah

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Access to Justice

- Chapter 7 debtors are entitled to affordable legal services (otherwise, they proceed *pro se* or via a petition preparer).
- Debtor's counsel are entitled to fair and reasonable compensation for their consumer bankruptcy services.
- The current system precludes both these goals.

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Unbundling v. Bifurcation

- Unbundling means you limit your services to discrete tasks in the bankruptcy case – e.g., you only agree to file the petition.
- Bifurcation means you agree to represent the debtor for all basic bankruptcy services, but you do it with a pre-petition and post-petition agreement.

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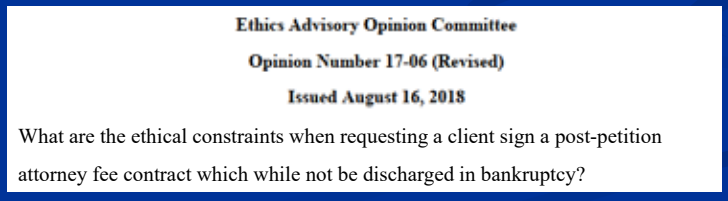
Get an Ethics Opinion From Your Bar

- Make it easier for your bankruptcy judge to find that bifurcated fee agreements do not violate ethical rules.
- See example from Utah State Bar in your materials.



Ethics Advisory Opinion Committee

Opinion Number 17-06 (Revised)

Issued August 16, 2018

What are the ethical constraints when requesting a client sign a post-petition attorney fee contract which while not be discharged in bankruptcy?

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Practice Pointers

(1) The use of bifurcated contracts must be in the best interests of the client (e.g., the client could not otherwise afford to hire bankruptcy counsel);

(2) The attorney must provide appropriate disclosures, options, and explanations;

(3) The client must give his or her informed consent in writing; and

(4) The attorney's fee and costs must be reasonable and necessary.

(5) Don't finance your fees through a third party.

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2021 Annual Spring Meeting
April 20, 2021

DO YOU SPEAK CONSUMER?

A discussion of the top 10 consumer issues any bankruptcy or other attorney trying to practice consumer law needs to know.

Hon. Kevin Anderson
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NEW § 1328(i): MOTION FOR CHAPTER 13 DISCHARGE IN SPITE OF MISSED PAYMENTS TO TRUSTEE OR MORTGAGE CREDITOR

HON. KEVIN R. ANDERSON

Stimulus Act: December 27, 2020

(1) IN GENERAL.—*Section 1328 of title 11, United States Code*, is amended by adding at the end the following:

(i) Subject to subsection (d),[1] after notice and a hearing, the court **may** grant a discharge of debts dischargeable under subsection (a) to a debtor who has not completed payments to the trustee or a creditor holding a security interest in the principal residence of the debtor if—

[First Basis for Discharge – Not More Than 3 Missed Payments to Trustee or Mortgage Creditor.]

(1) the debtor defaults on not more than 3 monthly payments due on a residential mortgage under section 1322(b)(5)[2] on or after March 13, 2020, to the trustee or creditor caused by a material financial hardship due, directly or indirectly, by the coronavirus disease 2019 (COVID–19) pandemic; **or**

[Second Basis for Discharge – Forbearance or Loan Modification Agreement.]

(2)(A) the plan provides for the curing of a default and maintenance of payments on a residential mortgage under section 1322(b)(5); **and**

(B) the debtor has entered into a forbearance agreement or loan modification agreement with the holder or servicer . . . of the mortgage described in subparagraph (A).

Sunset - 1 year from enactment date of 12/27/2021

[1] Section 1328(d): "[A] discharge granted under this section does not discharge the debtor from any debt based on an allowed claim filed under section 1305(a)(2) [*i.e. a post-petition consumer debt "for property or services necessary for the debtor's performance under the plan"*] if prior approval by the trustee of the debtor's incurring such debt was practicable and was not obtained."

[2] Section 1322(b)(5): "[T]he plan may . . . provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any . . . secured claim . . . .";

Initial Observations:

In general, the amendment appears intended to address the *Heinzel*[3] decision, which held that a failure to make all direct payments on a mortgage during the Chapter 13 plan disqualified the debtor from a discharge. As enacted, the amendment addresses two circumstances where the debtor has missed trustee or mortgage payments during the Chapter 13 plan:

> (1) Since March 13, 2020, and due to the COVID pandemic, a debtor has missed no more than 3 payments to the trustee or to a creditor secured by the principal residence of the debtor; and
>
> (2) The debtor has missed at any time more than three post-petition mortgage payments, but the debtor will cure those payments after completion of the Chapter 13 plan through a forbearance or loan modification agreement.

However, while the amendment provides express authority to grant a discharge under such circumstances, the bankruptcy judge still has discretion to determine if a discharge is merited under the debtor's particular circumstances.

The Devil is in the Details:

a. Not More Than 3 Missed Payments

While § 1328(i) provides an opportunity for a debtor who missed 3 or fewer payments to request a discharge, the following prerequisites must be satisfied:

1. The plan must provide for the both the curing **and** maintenance of payments on a "residential mortgage" under § 1325(b)(5).

2. The missed payments must be to the Chapter 13 trustee or to a creditor holding a security interest in the debtor's principal residence. Note that § 1328(i) references a creditor with a lien on the "principal residence of the debtor" while § 1328(i)(1) refers only to payments due on a "residential mortgage." Whether this textual inconsistency will result in confusion or litigation remains to be seen.

3. The default must have occurred on payments due on or after March 13, 2020. This may result in some litigation over whether a payment was due but not technically in default.

4. The missed payments must be "caused by a material financial hardship due, directly or indirectly, by the" COVID-19 pandemic. This may result in litigation over what constitutes a "material" financial hardship along with

[3] *In re Heinzle*, 511 B.R. 69 (Bankr. W.D. Tex. 2014).

possible evidentiary issues necessary to establish the requisite causation between the material hardship and the missed payments.

b. Forbearance or Loan Modification Agreement

1. Again, the plan must provide for the both the curing **and** maintenance of payments on a "residential mortgage" under § 1325(b)(5).

2. The debtor must have entered into a forbearance or loan modification agreement. The statute does not define what exactly constitutes a forbearance or loan modification, but at least one case has held that a stipulation resolving a motion for relief from stay constituted a loan modification and qualified the debtor for a discharge under § 1328(i).[4]

3. Note, there is no date or COVID causation requirements, so the missed payments arguable could have arisen at any time and for any reason.

Plain Language Issues:

The language of § 1328(i) is less than a paragon of statutory clarity, which opens the door for creative lawyering and possibly unintended consequences.

a. Motion for Discharge Before Completion of Applicable Commitment Period:

A glaring issue is that the plain language of § 1328(i)(2) provides that as soon as a debtor enters into a forbearance or loan modification agreement with the holder or servicer of a residential mortgage that the debtor was curing and maintaining through the plan under § 1322(b)(5), then the debtor can request a discharge under this section. This could possibly occur in the first month of the confirmed plan!

Indeed, a creative lawyer has already made an attempt for an early discharge in In re Ritter, No. 1:19-bk-11838-MT, 2021 Bankr. LEXIS 526 (Bankr. C.D. Cal. Mar. 5, 2021). In this case, the debtors had an applicable commitment period of 60 months, and the plan provided for the cure and maintenance of their mortgage. In the summer of 2020, the mortgage creditor granted the debtors a 3-month forbearance followed by a loan modification. With 45 months still left on their plan, the debtors filed a motion for an immediate discharge under § 1328(i). The court agreed that the debtors had satisfied the requirements of § 1328(i)(2), but the court noted it still had discretion to rule on whether granting a discharge under these facts was appropriate:

[4] *See In re Campbell*, 2021 Bankr. LEXIS 332 (Bankr. D.S.C. Feb. 9, 2021) (holding that a § 362 settlement to cure post-petition mortgage insurance payments over a period that would extend beyond the plan term constituted a "forbearance agreement" under § 1328(i)(2) that qualified the debtor for a discharge even with the missed payments). *See also In re McCollum*, 2021 Bankr. LEXIS 343 (Bankr. D.S.C. Feb. 4, 2021) (court granted discharge under § 1328(i) because debtor missed less than 3 direct payments to mortgage creditor under a forbearance agreement).

> It does not make sense that Congress would pass a limited and tailored plan modification provision for COVID-19 related problems, incorporating standard Chapter 13 modification provisions, only to provide a much easier and streamlined immediate discharge provision ignoring decades of well-established Chapter 13 principles only nine months later with no explanation or comment.[5]

b. Principal Residence of the Debtor vs. Residential Mortgage

Another example is that the first paragraph uses the phrase "a creditor holding a security interest in the principal residence of the debtor" while all subsequent references are to the less specific "residential mortgage." This may open some opportunities for creative lawyering for debtors with multiple residential properties.

Judicial Discretion:

As noted in the *Ritter* decision, the grant of a discharge under § 1328(i) is subject to the discretion of the bankruptcy court. Thus, even if a debtor otherwise satisfies the requirements of § 1328(i)(1) or (2), the bankruptcy court could still deny a discharge. I anticipate most judges will focus on the debtor's good faith, including the reasons for the missed payments and the possibility of amending the plan to otherwise cure the missed payments.

[5] *Id*. at *12.

Forbearance and Plan Modifications

By Heather M. Giannino
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I. Introduction to Forbearance under the CARES Act

On March 27, 2020, the *Coronavirus Aid, Relief and Economic Security Act* (CARES Act), which provided two trillion dollars in economic stimulus for U.S. citizens and industries faced with the challenges of the COVID-19 coronavirus, was enacted.[1] To aid borrowers during these difficult times, Section 4022 of the CARES Act mandates that a servicer of a federally backed mortgage loan must grant forbearance to any borrower "experiencing a financial hardship due, directly or indirectly, to the COVID-19 emergency".[2] A forbearance is an agreement between the borrower and servicer that allows the borrower to pause making mortgage payments for a period of time. Once that period of time expires, the payments that have been missed come due. Forbearance is different than a deferral or modification. Forbearance is not necessarily something borrowers understand. For anyone practicing consumer law, it is important to understand what a forbearance is, how it works and to determine what types of repayment strategies are available.

II. Requesting and Granting the Forbearance

Forbearance is not automatic, borrowers must request it from their servicer. Under the CARES Act, for federally backed mortgage loans, borrowers can request a forbearance, regardless of the delinquency status, by submitting a request to the servicer and affirming that they are experiencing a financial hardship during the COVID-19 emergency.

Federally backed mortgage loans means loans secured by a first or subordinate lien on residential property designed principally for the occupancy of from 1-4 families that is purchased, securitized, owned, insured or guaranteed by Fannie Mae, Freddie Mac, HUD/FHA, VA or USDA.[3]

To obtain a forbearance under the CARES Act, borrowers need only state they are experiencing a hardship; no documentation or proof of hardship is required. While the section of the CARES Act related to forbearances does not define what would be considered a financial hardship, some guidance can be found in Section 2102 of the CARES Act. This section, which deals with unemployment for individuals that are unable to work because of the pandemic, includes the following list: the individual—

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[1] See 15 U.S.C. §§9001-9080.
[2] 15 U.S.C. §9056(a)(1) COVID-19 Emergency – The term "COVID-19 emergency" means the national emergency concerning the novel coronavirus disease (COVID-19) outbreak declared by the President on March 13, 2020 under the National Emergencies Act (50 U.S.C. 1601 et seq.).
[3] 15 U.S.C. §9056(a)(2).

(I) is otherwise able to work and available for work within the meaning of applicable State law, except the individual is unemployed, partially unemployed, or unable or unavailable to work because—

(aa) the individual has been diagnosed with COVID–19 or is experiencing symptoms of COVID–19 and seeking a medical diagnosis;

(bb) a member of the individual's household has been diagnosed with COVID–19;

(cc) the individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID–19;

(dd) a child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID–19 public health emergency and such school or facility care is required for the individual to work;

(ee) the individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID–19 public health emergency;

(ff) the individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID–19;

(gg) the individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID–19 public health emergency;

(hh) the individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID–19;

(ii) the individual has to quit his or her job as a direct result of COVID–19;

(jj) the individual's place of employment is closed as a direct result of the COVID–19 public health emergency; or

(kk) the individual meets any additional criteria established by the Secretary for unemployment assistance under this section; or[4]

It is important to note that non-federally backed mortgage loans are not covered by the CARES Act. However, many servicers, at their own discretion, extended the same forbearance opportunities to borrowers.

At this time, if the loan is FHA/HUD, USDA or VA, the deadline for requesting an initial forbearance is June 30, 2021. There is not currently a deadline for requesting an initial forbearance for loans backed by Fannie Mae or Freddie Mac.

III. Length of Forbearance

Under the CARES Act, for federally backed mortgage loans, borrowers can request and obtain forbearance from mortgage payments for up to 180 days, and then request and obtain additional forbearance for up to another 180 days.[5] During a period of forbearance, no fees penalties or interest shall accrue on the borrower's account beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage.[6] Thus, borrowers could request and receive forbearance for 12 months of

[4] 15 U.S.C. §9021(a)(3)(1).
[5] 15 U.S.C. §9056(b)(2).
[6] 15 U.S.C. §9056(b)(3).

payments. Also, at any time borrowers choose, the borrowers can shorten the forbearance and resume payment of the loan.[7]

The forbearance protections available under the CARES Act have since been expanded to provide additional assistances to borrowers through the guidance from federal agencies.

If the mortgage is backed by FHA/HUD, USDA or VA, borrowers may request up to two additional three month extensions, for up to a maximum of 18 months of total forbearance. However, in order to qualify for these extensions, borrowers must have started a forbearance plan on or before June 30, 2020.

On February 9, 2021 the Federal Housing Finance Agency (FHFA) announced that borrowers with Fannie Mae or Freddie Mac-backed mortgages may be eligible for an additional three month extension of COVID-19 forbearance. Eligibility for the extension is limited to borrowers who are on a COVID-19 forbearance plan as of February 2021. This allowed borrowers to request and receive forbearance for 15 months of payments.

On February 25, 2021, the FHFA announced another extension to align COVID-19 mortgage relief policies across the federal government. The FHFA announced an additional three month extension of COVID-19 forbearance. Thus, this additional three-month extension allows borrowers to be in forbearance for up to 18 months. In order to be eligible for this extension, borrowers must be in a COVID-19 forbearance plan as of February 28, 2021 and other limits may apply.

Assuming the other criteria have been met, borrowers with federally backed mortgage loans may be eligible for a maximum of 18 months of forbearance. Other mortgages may provide similar forbearance options, but those are determined on a servicer by servicer basis.

IV. Forbearance in Bankruptcy

The CARES Act is silent on the applicability of forbearances to bankruptcy, but the CARES Act generally requires that servicers of federally backed mortgage loans grant forbearances to any borrower experiencing a hardship related to COVID-19. Since there were no provisions of the CARES Act that indicated borrowers in a bankruptcy case were ineligible for forbearance, the general consensus was borrowers were eligible.[8] However, without guidance on how it would work in bankruptcy, there was a significant amount of confusion and district work arounds as to how this would be implemented by the courts and practitioners.

Initially, servicers and practitioners tried to grapple with how to appropriately notify parties of a requested forbearance. Was it a quasi-notice of payment change or a notice of forbearance filed on the docket? Was court approval necessary? Was a plan modification required? Should a Notice of Payment Change be filed? Initially, there was some discussion of using Rule 3002.1(b)

[7] 15 U.S.C. §9056(c)(1).

[8] While there were no provisions in the CARES Act, the Consolidated Appropriations Act (CAA), through a modification to 11 U.S.C. §525, makes it clear that there can be no discrimination under CARES Act solely because the person is or was a debtor in a bankruptcy case. This provision sunsets on December 27, 2021.

to provide notice of the forbearance, since there was not another mechanism available. Soon, two main approaches began to develop – either file a notice of the forbearance or seek court approval of the forbearance. Then, the questions became where should the notice be filed and how should it be filed? Should it be filed on the claim's register or on the docket?

Since borrowers in bankruptcy were able to request a forbearance directly from their servicers, it became very important to determine how to notify the other parties in the bankruptcy proceeding. In an effort to determine how best to be transparent with trustees, debtor's attorneys and the courts, several servicers met together to begin to develop working drafts of notices of forbearance and find workable solutions to help borrowers that were impacted by COVID-19. While waiting for guidance from the courts, many practitioners began to poll their trustees to determine their preference(s) for receiving notice of a borrower's request for forbearance. Many trustees began to indicate they would be satisfied with a notice of forbearance being filed with the court, though they were reluctant to change the plan payment or amount of the mortgage payment without a plan modification or other order from the court. Trustees and servicers began to have conversations with each other so that procedures for providing notice of forbearance could be standardized where possible.[9]

Courts began to scramble to update CM/ECF to allow notices of forbearances to be filed. By April 2020, several courts introduced a temporary ECF event that allowed a servicer to give notice that the debtor had made a request for a mortgage forbearance. Some courts also issued general orders providing templates or forms to be used. With some courts requiring notices to be filed on the docket, others requiring them to be filed on the claims register, and some giving servicers the option of where to file them, it quickly became a jurisdictional analysis as to how and where to file a notice of forbearance.

A year into the pandemic, most courts have guidelines and procedures that detail the procedure and/or content requirements for a Notice of Debtor's Request for Mortgage Forbearance due to the CARES Act.

V. Plan Modification

The CARES Act also included a section on bankruptcy that, among other things, amended provisions of the Bankruptcy Code to allow for plan modifications due to the COVID-19 emergency.[10] Specifically, it indicates the plan may be modified upon the request of the debtor if "the debtor is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic".[11] The plan can be modified up to 84 months, rather than the typical 60 month limitation. [12] While the plan may be modified, it was initially limited to plans confirmed prior to the enactment of the CARES Act, which was

[9] The NACTT Mortgage Committee helped facilitate some of these conversations.
[10] Section 1113(b)(1)(c) of the CARES Act amended Sections 1325(b)(2) and Section 1329 of Title 11 to allow for plan modifications due to the COVID-19 emergency.
[11] Section 1113(b)(1)(c) of the CARES Act; 11 U.S.C. §1329.
[12] Section 1113(b)(1)(c); 11 U.S.C. §1329.

enacted on March 27, 2020.[13] Additionally, the provision allowing this modification was set to sunset on March 27, 2021.

There has been some developing case law regarding plan modifications under the CARES Act. Some Courts have determined that the CARES Act does not permit modification of a plan that has not been confirmed before the enactment.[14] Additionally, another court has found that a debtor was permitted to modify the plan when the debtor had fallen behind in plan payments before the enactment.[15]

On February 25, 2021, the COVID-19 Bankruptcy Relief Extension Act was introduced to temporarily extend COVID-19 bankruptcy relief provisions enacted as part of the CARES Act and CAA.[16] On the day they were set to expire, the sunset provisions of the CARES Act were extended for an additional year by the COVID-19 Bankruptcy Relief Extension Act of 2021, which was enacted on March 27, 2021. One of the provisions permits borrowers in Chapter 13 to seek plan modifications for plans confirmed before March 27, 2021, if they are experiencing a material financial hardship due to the coronavirus pandemic.[17]

VI. How to Cure – Loss Mitigation and Options

The CARES Act was silent on how borrowers could repay the missed payments after the forbearance period ends. However, Fannie Mae, Freddie Mac, FHA/HUD, USDA and VA all released subsequent guidance making it clear that a lump sum payment at the end of the forbearance is not required. Borrowers have options – they can repay all missed payments in a lump sum, defer payments until the end of the loan, repay past due loans with higher monthly payments or enter loan modifications to change the terms of the loan so that the borrower can resume payments.[18]

As forbearance periods end, borrowers can expect to receive communication from servicers regarding the forbearance. Most servicers are sending frequent letters to maintain contact about the status of the forbearance and to discuss the end of it. However, they will need responses from borrowers in order to determine the available options for a more permanent loss mitigation solution.

While many servicers are going through all the options available to borrowers, the options become more complicated for borrowers in bankruptcy based on current guidance from the federal agencies. In some instances, homeowners in bankruptcy may not qualify for loan deferrals or loan modifications.

VII. Other Issues - Was forbearance *actually* requested?

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[13] *Id*.
[14] See *In re Roebuck*, 618 B.R. 730 (Bankr. W.D. Pa. 2020); *In re Drews*, 617 B.R. 579 (Bankr. E.D. Mich. 2020).
[15] See *In re Gilbert*, ___ B.R. , 2020 WL 5939097 (Bankr. E.D. La. October 6, 2020).
[16] Senate Democratic Whip Dick Durbin (D-Ill.) and Sen. Chuck Grassley (R-Iowa) introduced bipartisan legislation as S. 473 , referred to as the COVID-19 Bankruptcy Relief Extension Act.
[17] See Pub. L. No 117-5 (March 27, 2021).
[18] Borrowers should check with their servicers to determine which options are available to them.

A forbearance can help struggling borrowers through the trying times of the COVID-19 emergency, but what if the borrowers didn't request it? Under the CARES Act, servicers were to issue forbearances to borrowers that requested the same, without requiring any documentation from the borrowers. What constitutes a request for forbearance? There are some allegations that at least one servicer has placed borrowers into forbearance with a "the click of a button" that made no mention of the term. Servicers must take precautions to ensure borrowers are not placed in forbearance simply because they viewed a website or contacted their servicer to obtain more information about forbearance.

VIII. Sunsets

All provisions under the CARES Act were scheduled to sunset after one year, but have since been extended. Once the provisions sunset, Bankruptcy Code amendments under the CARES Act will be removed. Initially, the covered period for mortgage forbearance appeared to be during the COVID-19 emergency or until December 31, 2020, whichever was earlier. As we've seen through subsequent guidance, the forbearance periods for government backed loans can now extend up to a maximum of 18 months.

On February 25, 2021, Senators Dick Durbin and Chuck Grassley introduced the COVID-19 Bankruptcy Relief Extension Act, bipartisan legislation to temporarily extend COVID-19 bankruptcy relief provisions enacted as part of the CARES Act and CAA.[19] While the bill initially proposed to extend provisions from both the CARES Act and the CAA, it was amended before it was passed; the sunset provisions in the CARES Act were extended when the COVID-19 Bankruptcy Relief Extension Act of 2021 was signed by President Biden on March 27, 2021. As we go further and further into this pandemic, it remains to be seen what additional legislation and guidance will be introduced or enacted to help borrowers and servicers navigate this difficult time.

IX. Forbearance Proof of Claim under the Consolidated Appropriations Act of 2021 (CAA)

While the CARES Act allowed for forbearances, it did not provide much other guidance regarding them, especially for borrowers in bankruptcy. At the end of the forbearance period, borrowers must repay or make other arrangements to cure the forborne mortgage payments, but the CARES Act made no provision for how the forborne payments would be repaid. Procedural and administrative problems arose in Chapter 13 cases as a result of the forborne mortgage payments.

On December 27, 2020, the Consolidated Appropriations Act of 2021 (CAA) was enacted to resolve some of the complications presented by the CARES Act.

[19] Senate Democratic Whip Dick Durbin (D-Ill.) and Sen. Chuck Grassley (R-Iowa) introduced bipartisan legislation as S. 473 , referred to as the COVID-19 Bankruptcy Relief Extension Act. The COVID-19 Bankruptcy Relief Extension Act of 2021 was enacted on March 27, 2021. See Pub. L. No. 117-5 (Mar. 27, 2021).

Consumer bankruptcy issues are addressed in Title X Bankruptcy Relief of the CAA, section 1001. The CAA modifies Section 501 to allow qualified servicers to file a supplemental proof of claim for the forborne payments, even if the claims bar date has passed.[20] Thus, servicers of federally backed mortgages loans may file a forbearance claim in the borrower's Chapter 13 bankruptcy for payments that are forborne, deferred or otherwise modified under the CARES Act.[21] Of note, this only applies to federally backed mortgages. Servicers of non-federally backed mortgages are not permitted to file the supplemental proof of claim.

The supplemental claim must include (i) a description of the loan modification or a deferral; (ii) for a modification or deferral that is in writing, a copy of the loan modification or deferral must be attached to the supplemental proof of claim; and (iii) a description of the payments to be deferred until the date on which the mortgage matures.[22] The supplemental proof of claim must be filed no later than 120 days after the expiration of the forbearance period of a loan granted forbearance under the CARES Act.[23] The filing of the supplemental claim appears to be optional by the mortgage servicer.

To provide for the easy and efficient filing of such supplemental proofs of claim, the Advisory Committee on Bankruptcy Rules approved a new Director's Form 4100S; Supplemental Proof of Claim for CARES Forbearance Claim.[24] Director's Form 4100S is designed to address temporary amendments to sections 501, 502, and 1329 of the Bankruptcy Code made by the CAA. The CAA amendments sunset on December 27, 2021, one year after the CAA was enacted, and Form 4100S will be retired after that date.[25]

The filing of a supplemental proof of claim by the servicer should provide transparency to all parties in the bankruptcy proceeding. Once the supplemental claim is filed, the Court, trustee and debtor's attorney will know how much is due and owing on the forborne payments and be able to address the same accordingly. As previously mentioned, many debtors may not be aware of what a forbearance is and are unaware that they may need to contact their servicer to discuss options for repayment, modification or deferral. Additionally, if a notice of forbearance was not filed, the filing of a supplemental proof of claim will also alert debtor's counsel to the forbearance and allow the parties to work through the issues before the debtor reaches the end of the bankruptcy case.

There are still several questions left unanswered. If there is an objection, will the supplemental proof of claim be barred? Will the amounts set forth in the supplemental proof of claim be recoverable? If a servicer fails to file a supplemental claim, will the servicer be able to use the new provisions of Section 1329 to modify the debtor's plan to pay the amount due?

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[20] See 11 U.S.C. §501(f)(1).
[21] See Section 1001(d) of the CAA, which added 11 U.S.C. §501(f)(1)(B). A qualified servicer or "eligible creditor" means a servicer (as defined in section 6(i) of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2605(i)) with a claim for a federally backed mortgage loan or federally backed multifamily mortgage loan of the debtor that is provided for by a plan under section 1322(b)(5).
[22] See Section 1001(d) of the CAA, which added 11 U.S.C. §501(f)(2)(B).
[23] See Section 1001(d) of the CAA, which changed 11U.S.C. §502 (b)(9)(C).
[24] Director's Form 4100S was issued on February 5, 2021 and can be found at https://www.uscourts.gov/forms/bankruptcy-forms/supplemental-proof-claim-cares-forbearance-claim.
[25] See Section 1001(d).

While we do not know the answers to these questions at this time, these issues will be something to watch in the coming months.

X. Modification of Plan after Confirmation under Section 1329(e)

What happens after a qualified servicer files a supplemental proof of claim for a CARES Act forbearance claim? The Consolidated Appropriations Act of 2021 also added an amendment to Section 1329 of Title 11 of the Unites States Code. New section 1329(e) provides that a debtor may file a request to modify a confirmed Chapter 13 plan to address the forborne payments listed in the supplemental proof of claim.[26] Further, if the debtor does not file a motion to modify the plan within 30 days after the supplemental proof of claim is filed, the United States Trustee, Chapter 13 Trustee, bankruptcy administrator, the Court, *sua sponte*, or any other party in interest, may request a modification of the plan to provide for the supplemental proof of claim.[27]

There will likely be some challenges in implementing these new provisions. What does it mean "to provide for the proof of claim"? If the length of forbearance or amount of forborne payments is small, can the debtor modify to make a full cure through the plan? Or are the amounts substantial and a cure through the plan unrealistic? Will the debtor file a motion to modify the plan or will someone else need to do it? If a motion to modify is not filed by the debtor or trustee, are servicers really going to file them? If other parties are stepping in to fix a plan that should have been fixed by debtor's counsel, will it get messy? Will there be additional guidance from the Courts and trustees on preferred local procedures? At this time, those questions remain unanswered and we may just have to wait and see how this develops.

These amendments sunset on December 27, 2021, one year after the date of enactment. While legislation was introduced to extend this time period, the provisions allowing for extension were removed before the COVID-19 Bankruptcy Relief Extension Act of 2021 was enacted.[28]

We are likely to see additional changes and guidance in the coming months. One thing is for sure, forbearances due to COVID-19 and their impact on bankruptcy is a topic that every attorney trying to practice consumer law needs to know.

[26] See Section 1001(e); 11 U.S.C. §1329(e).
[27] 11 U.S.C. §1329(e)(2).
[28] Senate Democratic Whip Dick Durbin (D-Ill.) and Sen. Chuck Grassley (R-Iowa) introduced bipartisan legislation as S. 473 , referred to as the COVID-19 Bankruptcy Relief Extension Act. The COVID-19 Bankruptcy Relief Extension Act of 2021 was enacted on March 27, 2021. See Pub. L. No. 117-5 (Mar. 27, 2021).

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ABI Annual Spring Meeting
2021

Beverly M. Burden*
Chapter 13 Trustee, E.D. Ky.

REASONS FOR FILING CHAPTER 13 INSTEAD OF CHAPTER 7

Reason for Filing Chapter 13 (Subject to limitations as described in the relevant statutes and applicable case law)	**Relevant Bankruptcy Code Sections (Title 11 U.S.C. §)**
Exercise the exclusive right to use, sell, or lease property of the estate and maintain possession of property of the estate	1303; 1306(b)
Cure defaults and maintain payments (e.g., to retain property such as the debtor's residence that would otherwise be taken by the lienholder)	1322(b)(5); 1322(c)(1); 1322(e)
Regain possession of a vehicle that was repossessed (but not yet sold) pre-petition	1306(b); 542(a); 1322(b)(3), (8), & (9); 362(d)(2)(B)
Retain property that would be lost in a chapter 7 liquidation (due to non-exempt equity, or an avoidable lien)	1325(b)(4)
Modify secured claims ("cramdown") rather than reaffirm in a chapter 7	1322(b)(2); 1325(a)(5)(B)

* **The materials generally reflect my interpretation of the provisions of the Bankruptcy Code (as amended by BAPCPA) and of case decisions relating to chapter 13 practice. As the trustee in the EDKY, I reserve the right to: take a contrary position in any particular case depending on the facts of that case; argue an interpretation of the law that may differ from that set forth in these handouts; or change my mind for any reason, without prior notice.**

"Strip off" junior liens that are wholly unsecured	506; 1325(a)(5)(B)(ii)
Manage mortgage debt on the debtor's residence that matured pre-petition or that matures during the plan duration	1322(c)(2)
Protect an individual co-debtor against collection actions on consumer debts	1301
Protect an individual co-debtor by paying a co-signed consumer debt in full	1322(b)(1)
Create separate classes of unsecured claims (e.g., long-term student loans) and treat them differently if there is no unfair discrimination against any class	1322(b)(1)
Pay debtors' attorney's fee	330(a)(4)(B)
Avoid § 707(b) motions to dismiss if debtor "fails" the "means test"	707(b)
Deduct retirement contributions and payments on retirement loans in calculating disposable income	541(b)(7); 1322(f); 1325(b)(2)
Get a discharge if the debtor received a chapter 7 discharge in a case filed more than 4 but less than 8 years ago	727(a)(8); 1328(f)

Manage secured debts even if the debtor cannot get a discharge	101(5) *Johnson v. Home State Bank, 501 U.S. 78, 111 S.Ct. 2150 (1991)*
Get a discharge upon completion of payments under the plan of debts that are nondischargeable in a chapter 7 1) § 523(a)(15) property settlement debts that are not domestic support obligations 2) § 523(a)(6) willful and malicious injury to property 3) unawarded damages for "willful OR malicious" injury or death 4) § 523(a)(14) debts incurred to pay taxes; and other miscellaneous 523 provisions	 1) 101(14A); 1328(a)(2) (by omission) 2) 1328(a)(2) (by omission) 3) 1328(a)(4) 4) 1328(a)(2) (by omission)
Take advantage of the binding effect of confirmation (e.g., nonstandard or creative plan provisions)	1327 *United Student Aid Funds, Inc. v Espinosa, 559 U.S. 260, 130 S.Ct. 1367 (2010)*
Preserve the right to voluntarily dismiss or convert	1307(a) & (b)
Manage tax debts (e.g., value secured tax claims; discharge tax penalties; discharge 507(a)(8) tax debts)	1322(a)(2); 506(a)(1); 507(a)(8); 1328(a)(2); 523(a)(1)(B); 523(a)(1)(C).
Pay interest on nondischargeable claims (after paying all other claims in full)	1322(b)(10)
Modify a plan to buy health insurance	1329(a)(4)
Pay an assigned claim for a domestic support obligation less than in full during the plan	1322(a)(4)

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2021

Beverly M. Burden*
Chapter 13 Trustee, E.D. Ky.

TREATMENT OF SECURED CLAIMS IN CHAPTER 13 CASES

Most debts secured by a properly perfected security interest in collateral such as cars, mobile homes, furniture, farming or commercial equipment, other personal property, real property that is not used as the debtor's principal residence, etc. can be modified in a chapter 13 case. Section 1322(b)(2). The primary exception is a claim secured only by a security interest in real property that is the debtor's principal residence.

Modification of Secured Claims – In General.

Section 1322 provides that a plan may modify the rights of holders of secured claims (except a claim secured only by a security interest in real property that is the debtor's residence) or of unsecured claims.

The Bankruptcy Code does not refer to cramdown, strip down, strip off, lien-stripping, or any other familiar, descriptive terminology, but these terms generally refer to the process of valuing collateral under 11 U.S.C. § 506 to determine the amount of the creditor's secured claim, then dealing with the claim in accordance with 11 U.S.C. § 1325(a)(5).

Valuation:

To determine the amount of an allowed secured claim, start with section 506(a)(1) ("Determination of Secured Status."). Most modifiable secured debts that are to be paid through

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the plan are bifurcated or split into a secured and an unsecured portion. The debt is treated as secured to the extent of the value of the collateral, and the balance of the debt is treated as unsecured. 11 U.S.C. § 506(a); 11 U.S.C. § 1325(a)(5); *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997). The process of bifurcating the claim, valuing the collateral, and modifying the treatment of the claim is commonly referred to as a "cram-down."

Section 506 is not applicable to certain claims. The unnumbered paragraph following § 1325(a)(9) (the "hanging paragraph") excepts two types of secured claims from the valuation process. Section 506 does not apply to:

"910 car claims":

- the creditor has a purchase money security interest,
- in a motor vehicle (as defined in title 49 U.S.C.),
- purchased for:
  - the personal use
  - of the debtor,
- within 910 days (2-1/2 years) before bankruptcy;

"1-year claims":

- the collateral consists of "any other thing of value", and
- the debt was incurred during the 1-year period preceding bankruptcy.

Section 506 cannot be used to value the collateral and bifurcate these "hanging paragraph" claims into a secured and unsecured portion. However, nothing prohibits a modification of the interest rate or other terms of the note (such as the length of time during which payments can be made).

Interest Rate:

Interest is paid on the secured portion of the claim. 11 U.S.C. § 1325(a)(5)(B)(ii). Ordinarily interest is not paid on the unsecured portion of a "split" or bifurcated claim.

The interest rate at which the secured portion of a debt is to be paid is usually 1% to 3% over prime. *In re Till (Till v. SCS Credit Corp.)*, 124 S. Ct. 1951 (2004). The Supreme Court held that interest is required to be paid on secured claims in order to compensate creditors for: (1) time value of money; and (2) risk of default. If the creditor objects to the debtor's proposed rate of interest, the burden of proof is on the creditor to show evidence justifying a higher rate.

Special Rules for Mortgage Claims

Claim Secured by the Debtor's Residence

Section 1322(b)(2) of the Bankruptcy Code provides:

> (b) . . . [T]he plan may –
> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence . . . .

11 U.S.C. § 1322(b)(2). In the case of *Nobleman v. American Savings Bank*, 508 U.S. 324, 113 S. Ct. 2106 (1993), the Supreme Court made it clear that section 1322(b)(2) prohibits any modification of any of the rights of a claim holder secured by a security interest in real property that is the debtor's principal residence. Generally, the rights of the first mortgage holder on the debtor's residence cannot be modified. However, the antimodification rule of section 1322(b)(2) is not absolute. The language of the statute can be broken down into 4 elements which help determine when a mortgage claim can be modified.

- ***Secured "only" . . . .*** It has generally been held that if the claim is secured by collateral in addition to the debtor's home, the mortgage claim can then be modified. A boilerplate security interest in collateral such as "rents, royalties, profits, and fixtures" may not convert the mortgage claim into one that can be crammed down. *See Allied Credit Corp. v. Davis (In re Davis)*, 989 F.2d 208 (6th Cir. 1993). However, a lender who has made multiple loans to the same debtor, at least one of which is cross-collateralized by a security interest in real property that is the debtor's principal residence, may find its mortgage claim subject to cram-down.

- ***By a "security interest" . . . .*** A statutory lien or judgment lien is not a consensual "security interest." Therefore, a claim secured by a nonconsensual lien on the debtor's residence can be modified or crammed down through the chapter 13 plan. A judgment lien can also be avoided to the extent it impairs the debtor's homestead exemption. See 11 U.S.C. § 522(f).

- ***In "real property" . . . .*** A mobile home may not be real property depending on the jurisdiction. If it is personal property under applicable nonbankruptcy law, a claim secured by a mobile home can be crammed down. A claim secured by a mobile home and the land on which it sits may still subject to cram-down because the claim is not secured "only" by the real property. *In re Cole (National City Home Loan Services v. Cole)*, No. 03-357 (Dist. Ct., E.D. Ky., August 13, 2004).

- ***That is the debtor's principal residence.*** A claim secured by rental property, commercial property, vacation home, or any other real property that is not the debtor's residence is subject to being modified through the plan.

Short-Term and Balloon Mortgages

Section 1322(c)(2) is a statutory exception to the general rule that a claim secured by a home mortgage cannot be modified. Section 1322(c)(2) as amended by the Bankruptcy Reform Act of 1994 provides:

> (c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law –
> . . .
> (2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.

11 U.S.C. § 1322(c)(2).

Short-term mortgage claims (5 years or less) or a claim with a balloon payment that will mature prior to the end of the plan can be modified through the plan. *See First Union Mortgage Corp. v. Eubanks (In re Eubanks)*, 219 B.R. 468 (B.A.P. 6th Cir. 1998).

Lien Stripping.

Lien-stripping is a valuation process. An allowed secured claim is secured only to the extent of the value of the property to which the lien attaches; the remainder of the claim is considered unsecured. Although a claim secured by the debtor's residence may not be modifiable under section 1322(b)(2), a junior lien can be "stripped off" if there is no value to which the junior lien can attach after deducting the amount of all senior liens. The claim of an "underwater" junior lienholder is entirely unsecured. The prevailing view is that if there is even one cent of equity remaining in the property after deducting the amount of all senior mortgages from the value of the debtor's residence, the junior mortgage cannot be modified in a chapter 13 case. *See Lane v. Western Interstate Bancorp.*, 280 F3d 663 (6th Cir. 2002). This ability to lien-strip is not available in a chapter 7 case. *Bank of America, N.A. v. Caulkett*, 135 S.Ct. 1995 (2015).

For example, property worth $100,000 is encumbered by a 1st mortgage in the amount of $120,000 and a 2nd mortgage of $10,000. There is no value in the property to which the 2nd mortgage can attach. The claim is an allowed secured claim in the amount of $0. It is a wholly unsecured claim under § 506(a).

The debtor's exemption in property plays no role in this analysis as it does in avoiding a lien under section 522(f). Liens that can be stripped off could be second or third mortgages; second liens on cars; or judgment liens on property that is already fully encumbered.

Lien Avoidance Under 11 U.S.C. § 522(f).

The debtor may use section 522(f) to avoid a lien -

- to the extent the lien impairs an exemption;
- and only if the lien is -
    - a judicial lien; or
    - a nonpossessory, nonpurchase-money security interest in household goods and other property described in § 522(f)(1)(B).

Section 522(f)(2) sets forth the arithmetic formula for determining whether a lien impairs an exemption and can be avoided. The judgment lien does not necessarily have to be junior to all other non-avoidable liens.

Types of Liens That Can Be Avoided Under § 522(f)

There are two types of liens that can be avoided under 11 U.S.C. § 522(f).

The first is a judicial lien. A judicial lien is a lien obtained by judgment or other legal proceeding. A consensual mortgage or deed of trust is not a judicial lien and cannot be avoided under§ 522(f).

The second type of lien that can be avoided under § 522(f) is a nonpossessory, non-purchase money security interest in household goods and other items described in § 522(f).

Not all liens in household goods are avoidable. If the debtor buys furniture, jewelry, or other household goods on credit, the lien is a purchase money security interest ("PMSI") which cannot be avoided under § 522(f).

If the debtor goes to the finance company for a loan and the finance company gets a list of stuff the debtor already owns (like cameras, DVDs, extra TV's, lawn mowers, guns, jewelry), that is a non-PMSI lien which can be avoided.

However, even if the lien is a non-PMSI lien, it cannot be avoided if the lien is on property other than household goods defined within § 522(f). Many finance companies take a lien on the debtor's car and household goods. But § 522(f) excludes vehicles from the definition of household goods. The debtor can avoid the lien on the household goods, but not on the car.

The Importance of Claiming Exemptions

Even if the lien is of a type that can be avoided under § 522(f), it cannot be avoided unless the lien impairs an exemption (i.e., the exemption claimed on Schedule C of the petition). Otherwise, the lien attaches to the property and is secured to the value of the property.

The problem I have with the mathematical formula in the plan – which perfectly tracks the statute and works – is that it determines the unsecured portion of the claim first (the extent to

which the lien is avoided), and the rest of the claim is secured. My brain wants to determine the amount of the secured claim first (based on the value of the collateral), with the rest of the claim being unsecured.

So forget the mathematical formula for a minute. Think about it logically. The debtors own household goods and stuff worth $2,000. XYZ Finance Company loaned the debtors $3,000 and took a non-PMSI in the stuff.

In a chapter 13, absent § 522(f), XYZ would have a secured claim for $2,000 because that is the value of the stuff. The rest of its claim would be unsecured.

Under § 522(f), by claiming an exemption in the stuff, it's as if the exemption now comes ahead of XYZ's secured claim.

If the debtors claim an exemption of $2,000 in stuff worth $2,000, there is no value left for XYZ's claim to attach to. The claim is entirely unsecured. The lien is completely avoided.

If the debtors claim an exemption of only $500 in stuff worth $2,000, there is still $1,500 of value for XYZ's lien to attach to. XYZ has a secured claim of $1,500, and only $500 of the lien is avoided (i.e., treated as unsecured).

If the debtors under-claimed their exemption, they now have to fund the plan to pay a $1,500 secured claim that they should have been able to treat as unsecured. That is also prejudicial to other unsecured creditors.

For detailed instructions regarding the use of § 522(f) to avoid judicial liens, see the instructive "Lien Avoidance Practice Aid" prepared by the judges of the U.S. Bankruptcy Court for the Eastern District of Kentucky at https://www.kyeb.uscourts.gov/sites/kyeb/files/Lien%20Avoidance%20Practice%20Aid.pdf.

"Do You Speak Consumer"
ABI Annual Spring Meeting
2021

Beverly M. Burden*
Chapter 13 Trustee, E.D. Ky.

UNDERSTANDING THE TRUSTEE'S "STRONG-ARM POWERS" IN CONSUMER BANKRUPTCY CASES

Identifying and addressing potential lien avoidance powers of the trustee or the trustee's ability to avoid preferential transfers is a critical yet often overlooked skill for attorneys representing consumer debtors or creditors in consumer bankruptcy cases. This outline is a very generalized and over-simplified explanation of how the trustee's strong-arm powers might affect debtors and creditors in consumer bankruptcy cases.

11 U.S.C. § 544(a)(1) – The Basics:

The trustee has the rights and powers of a hypothetical judicial lien creditor as of the date of the petition. 11 U.S.C. § 544(a)(1). Using that power, the trustee can avoid a lien that is not timely or properly perfected. The concept of perfection of course relates to the validity of a lien as against competing creditors who may claim an interest in the property. For example, if a creditor's lien must be perfected by the filing of a financing statement under the Uniform Commercial Code, the trustee's interest as a judicial lien holder will take priority over a lien for which a financing statement was not filed or was filed improperly.

Although "perfection" is a term of art that applies to security interests created under Article 9 of the Uniform Commercial Code, the same principles of notice and priority apply with respect to real estate mortgages.

Non-bankruptcy law is implicated when determining perfection issues. In states such as Kentucky, the only way to perfect a security interest in a motor vehicle is by noting the lien on

* **The materials generally reflect my interpretation of the provisions of the Bankruptcy Code (as amended by BAPCPA) and of case decisions relating to chapter 13 practice. As the trustee in the EDKY, I reserve the right to: take a contrary position in any particular case depending on the facts of that case; argue an interpretation of the law that may differ from that set forth in these handouts; or change my mind for any reason, without prior notice.**

the certificate of title. The same is true with respect to mobile homes (unless the mobile home has been converted to real property, which is determined by state law).

A creditor whose lien is avoided by the trustee under § 544 becomes an unsecured creditor, to be paid pro rata with other unsecured creditors.

When a consumer debtor files for chapter 7, the debtor's attorney needs to know whether the chapter 7 trustee will swoop in and take the debtor's property and sell it for the benefit of the debtor's unsecured creditors. If the debtor wants to retain the property, a chapter 13 case may be preferable.

In a chapter 13 case, the debtor's attorney needs to know how to deal with the "secured" claim in the plan. In many jurisdictions, the chapter 13 trustee will object to a plan that treats a creditor as secured if the lien is avoidable. If the lien is avoidable, the creditor is treated as unsecured in a chapter 7 case. Treating the claim as secured in a chapter 13 case likely gives that creditor more than what the creditor would have received as an unsecured creditor, which may constitute an unfair discrimination against the other unsecured creditors under 11 U.S.C. § 1322(b)(1).

In addition, a chapter 13 debtor must propose a plan that gives to unsecured creditors at least as much as those creditors would have received in a chapter 7 liquidation. 11 U.S.C. § 1325(a)(4) (often referred to as the "best interests of creditors" test or the "liquidation" test). If the debtor is diverting funds to pay an unsecured creditor as a secured creditor, the debtor may not be able to fund a plan adequately to meet the liquidation test.

The creditor's attorney needs to be able to explain to the creditor why it has become an unsecured creditor despite having a security agreement. In a chapter 13 case, creditors believe it is unfair that the debtor gets to keep the car without paying the secured creditor. The creditor's attorney needs to be able to explain that the debtor is paying for the car through the plan and that the creditor is getting as much as it would get if the case had been filed as a chapter 7.

11 U.S.C. § 547 – The Basics:

Similar issues arise when a creditor's lien can be avoided because it was perfected within 90 days prior to the filing of the petition and none of the exceptions of § 547(c) applies.

If the debtor gives a lien to a creditor to secure repayment of a debt, that lien is an avoidable transfer if it was on account of an antecedent debt, made within 90 days prepetition while the debtor was insolvent, and the lien enables the creditor to get more than what it would have received if it had remained an unsecured creditor.

If the lien is given contemporaneously with the debt, the lien is not on account of an antecedent debt and is not avoidable. But –

The perfection of that lien may also constitutes a transfer. 11 U.S.C. § 54(D); 11 U.S.C. § 547(e). If the lien is perfected within 30 days after the debtor granted a lien to the creditor, the creditor's lien is not avoidable as a preference. Perfection essentially relates back to the granting of the lien, and therefore the transfer was not on account of an antecedent debt and cannot be avoided. However, if the lien is perfected outside of the 30-day safe-harbor period of § 547(e), a transfer takes effect on the date of perfection. The act of perfecting the lien constitutes a transfer on account of an antecedent debt; it changes the creditor's status from unsecured to secured which enables it to receive more than it would have received in a chapter 7 case; and it occurred within 90 days prepetition, making it an avoidable preferential transfer.

Another exception protecting the creditor from having its lien avoided as a preference is the so-called "enabling loan" exception of § 547(c)(3). If the creditor loans the debtor the money for the purchase of a car, for example, takes a security interest in the car, and the debtor actually uses the money to purchase the car, the transfer is not avoided as long as the lien is perfected within 30 days after the debtor takes possession of the car. 11 U.S.C. § 547(c)(3).

Assume state law requires a lien to be perfected in a car by noting the lien on the certificate of title. Assume the debtor files a bankruptcy petition on January 1, 2021. The certificate of title shows that the lien was perfected (noted on the title) in June of 2020. The lien is not avoidable under § 547(b) because the transfer – the perfection of the lien – occurred more than 90 days prior to the filing of the petition.

However, if the lien is noted on the title on December 1, 2020 (within 90 days prepetition), then further inquiry must be made to determine whether the lien can be avoided. When was the security agreement executed? If the loan was a purchase-money loan, when did the debtor take possession of the car? If the lien was perfected outside of the 30-day safe harbor provision of § 547(e) or the enabling loan provision of § 547(c)(3), the creditor's lien is avoidable.

A creditor whose lien is avoided as a preference under § 547(b) becomes an unsecured creditor, to be paid pro rata with other unsecured creditors.

Just as with an unperfected lien, the debtor's attorney needs to know whether the chapter 7 trustee will take the debtor's car at the section 341 meeting because the lien is avoidable. In a chapter 13 case, the debtor's attorney needs to know how to deal with the "secured" claim subject to an avoidable lien in the plan. The creditor's attorney needs to be able to explain to the creditor why it has become an unsecured creditor despite having a perfected lien and how the debtor in a chapter 13 case is not getting a free car but is instead paying to unsecured creditors what they would have received in a chapter 7 case.

The procedures for dealing with avoidable liens in chapter 13 cases vary from district to district. As with all issues in chapter 13 cases in particular, knowledge of local custom and practice is crucial.

A Review of City of Chicago, Illinois v. Robin L. Fulton et al., 592 U.S. _____ (2021)

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ISSUE: Whether an entity violates 11 U.S.C §362(a)(3) by continuing to retain property of the estate that is lawfully obtained prior to the commencement of the debtor's bankruptcy case.

BACKGROUND: Prior to filing bankruptcy, the City of Chicago ("City") impounded each respondent's vehicle for failure to pay fines related to motor vehicle infractions and subject to Municipal Code of Chicago § 9-92-080(f).[1] Respondents filed their respective Chapter 13 bankruptcy petition requesting return of their vehicle. The City refused and retained possession.[2] In each of the four cases, a bankruptcy court held the City's refusal to return the vehicle was a violation of the automatic stay.

The Illinois Court of Appeals, in a consolidated opinion, affirmed all four judgments.[3] The court rejected the City's "passive holding" argument finding that the City did violate the automatic stay and did "exercise control" over estate assets when it retained possession of the vehicles.[4] Relying on the plain reading of §§363(e) and 542(a) and the Supreme Court case *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983)) the court of appeals also concluded that §362(a)(3) becomes effective immediately upon filing bankruptcy and not dependent on first bringing a turnover action.[5]

The Supreme Court granted certiorari to resolve a split in the Courts of Appeals.

CASE ANALYSIS: The court analyzed the language of §362(a)(3) to reach the conclusion that merely retaining possession of the estate property does not violate the automatic stay.[6] The

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[1] Municipal Code of Chicago § 9-92-080(f) provides that "Any vehicle impounded by the City or its designee shall be subject to a possessory lien in favor of the City in the amount required to obtain release of the vehicle."

[2] The City's basis for retaining the vehicles was that it needed to maintain possession of the vehicles to continue the perfections of its possessory liens, and that it would only return the vehicles when the debtors paid their outstanding fines in full. *In re Fulton*, 926 F. 3d 916 (CA7 2019).

[3] Id.

[4] The court of appeals had previously addressed this issue in *Thompson v. General Motors Acceptance Corp.,* 566 F.3d 699 (7th Cir. 2009), holding that a creditor must comply with the automatic stay and return a debtor's vehicle upon the filing of a bankruptcy petition.

[5] Id at 203.

[6] 11 U.S.C. §362(a)(3) states "a petition filed . . . operates as a stay, applicable to all entities, 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."

language in the provision provides that the filing of a bankruptcy petition operates as a "stay" of "any act" to "exercise control" over property of the estate. The court reasoned that the natural reading of these words together "prohibits affirmative acts that would disturb the status quo of estate property" as of the time when the petition was filed. The court continued by stating that a person engages in an "act" to "exercise" their power communicates more than merely "having" the power. Thus, more is required than merely retaining power to violate the provision.

The opinion discussed the ambiguity in the text of §362(a)(3) and resolved this ambiguity in favor of the City due to §542, which was found to expressly govern turnover of estate property. The Supreme Court believed that including "mere retention" within §362(a)(3) would create two issues.

a. It would render the central purpose of §542 superfluous and would make §362(a)(3) the chief turnover provision. The court opted that a better account of the provisions "is that §362(a)(3) prohibits collection efforts outside the bankruptcy proceeding that would change the status quo, while §542(a) works within the bankruptcy process to draw far-flung estate property back into the hands of the debtor or trustee."
b. It would cause contradictory commands of the sections. The court hinged on the exception to §542 where turnover of property is not required if it is "of inconsequential value or benefit of the estate." The court rejected respondents' reading of §362(a)(3) claiming it would create an odd construction requiring a creditor to immediately turnover property of the estate under §362(a)(3) where it was excepted under §542.

The court also looked to the history of the Bankruptcy Code. It noted that both §362(a)(3) and §542 were included in the original 1978 version of the Code[7] however, the phrase "or to exercise control over property of the estate" was not added until 1984.[8] The court stated that if Congress had intended to establish §362(a)(3) as an enforcement arm to §542, they would have noted as such to note the transformation.[9]

CONCURRING OPINION: Justice Sotomayor joined the Court's opinion agreeing that the phrase "exercise control over" as used in §362(a)(3) did not extend to "passive retention of property" lawfully seized prebankruptcy. However, her separate opinion was to emphasize that the Court did not decided whether and when the other provisions of §362(a) would require a creditor to return a debtor's property.[10] She went on to state that the Court did not address how the bankruptcy court should handle enforcement of creditor obligations to "deliver" estate property to

[7] Bankruptcy Reform Act of 1978, 92 Stat. 2570, 2595.
[8] Bankruptcy Amendments and Federal Judgeship Act of 1984, 98 Stat. 371.
[9] Instead, the court decided that a better interpretation of the revision was that the added phrase extended the stay to acts that would change the status quo with respect to intangible property and acts that would change the status quo with respect to tangible property without "obtain[ing]" such property.
[10] Justice Sotomayor specifically referenced, "any act to create, perfect, or enforce any lien against property of the estate" and "any act to collect, assess, or recover a claim against [a] debtor" that arose prior to bankruptcy proceedings. §§362(a)(4), (6); see, e.g., *In re Kuehn*, 563 F. 3d 289, 294 (CA7 2009) (holding that a university's refusal to provide a transcript to a student-debtor "was an act to collect a debt" that violated the automatic stay).

the estate or the debtor under §542. She noted that the City's conduct could violate one or both provisions.

Justice Sotomayor addressed policy issues surrounding withholding estate property and noted that turnover proceedings and the timeframes involved could pose hardships due to their slow nature. She noted that the gap remaining in the Court's ruling would be best addressed by rule drafters, policy makers, and Congress, not bankruptcy judges, to ensure prompt resolution of debtors' request for turnover under §542.

COURT HOLDING: The Supreme Court decided that mere retention of estate property after the filing of a bankruptcy petition does not violate §362(a)(3) of the Bankruptcy Code. Under that provision, the filing of a bankruptcy petition operates as a "stay" of "any act" to "exercise control" over the property of a bankruptcy estate.

POTENTIAL IMPLICATIONS: This decision was a narrow opinion on §362(a)(3) and whether it extended to mere retention of estate property. The court was clear to note that they were not deciding on turnover obligations under §542 or any other subsection in §362(a).[11]

PRACTITIONER RECOMMENDATION: Familiarize yourself with your district's local rules and the bankruptcy judges' individual courtroom rules concerning turnover actions. Districts and courtroom procedures vary. Knowing your district's rules will create efficiency in those circumstances. Immediately after filing the bankruptcy petition and obtaining the case information, file the required paperwork (whether a motion or adversary) and obtain a hearing.

[11] In footnote 2, the majority opinion states, "In respondent Shannon's case, the Bankruptcy Court determined that by retaining Shannon's vehicle and demanding payment, the City also had violated §§362(a)(4) and (a)(6). Shannon presented those theories to the Court of Appeals, but the court did not reach them. 926 F. 3d, at 926, n. 1. Neither do we."

Understanding the Automatic Stay in Consumer Cases, Exceptions and Enforcements.

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The filing of a bankruptcy case activates the automatic stay, a statutory injunction created by 11 U.S.C. §362(a) that ceases and prohibits continued collection efforts against a debtor and/or property of the bankruptcy estate.[12][13] Under 11 U.S.C. §541, "property of the estate" encompasses all legal and equitable interests of the debtor as of the petition date.[14] The automatic stay was established as "one of the fundamental debtor protections provided by the bankruptcy laws."[15] Its purpose was to have a broad application benefiting those seeking relief with the exceptions as provided in 11 U.S.C. §362(b), to be narrowly construed to benefit the debtor seeking bankruptcy protection.[16] It also serves to protect the debtor's assets from a particular creditor to ensure a more equitable treatment of all creditors collectively.

Applicability of the Automatic Stay under Section §362

The automatic stay is "one of the fundamental debtor protections provided by the bankruptcy laws."[17] The automatic stay arises by operation of law and only requires the filing of a bankruptcy to commence. Section §362(a) provides that a voluntary, involuntary, or joint

[12] 11 U.S.C. § 362(b) provides for exceptions to the automatic stay injunction.
[13] *Bd. of Governors of Fed. Res. Sys. v. McCorp Fin., Inc*., 502 U.S. 32, 39, 112 S. Ct. 459, 116 L.3d.2d 358 (1991).
[14] A debtor's post-petition earnings are considered property of the estate in Chapter 13 and individual Chapter 11 cases under 11 U.S.C. §§ 1306 and 1115.
[15] H.R. REP. NO. 95-595, at 340 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296–97; S. REP. NO. 95-989, at 54–55 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5840–41 ("The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.").
[16] *Reedsburg Util. Comm'n v. Grede Foundries, Inc. (In re Grede Foundries, Inc.),* 651 F.3d 786, 790 (7th Cir. 2011); *see In re Stringer,* 847 F.2d 549, 552 (9th Cir. 1988) ("Congress clearly intended the automatic stay to be quite broad. Exemptions to the stay, on the other hand, should be read narrowly to secure the broad grant of relief to the debtor." (footnotes omitted)).
[17] *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.,* 474 U.S. 494, 503, 106 S.Ct. 755, 88 L.Ed.2d 859 (1986) (quoting S. Rep. No. 95-989, at 54 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5840).

bankruptcy petition filing will operate as a stay to most actions against a debtor. Creditors are immediately enjoined from continued collection efforts or direct contact with the debtor, unless otherwise granted relief under §362(d). The automatic stay will apply to include:

1. The commencement or continuation of judicial and administrative proceeding against the debtor which arose or began prior to the filing of the bankruptcy;[18]
2. The enforcement of any judgment obtained prior to the filing of the bankruptcy case;[19]
3. Any act to obtain possession or exercise control of estate property;[20]
4. Any act to create, perfect or enforce a lien against estate property or of the debtor;[21]
5. Any act to collect, assess, or recover a claim against the debtor which began before the filing of the bankruptcy;[22]
6. Any setoff of debt owed to the debtor;[23] or
7. The commencement or continuation of a tax court proceeding concerning individual tax liability for the taxable period ending before the filing of the bankruptcy.[24]

The automatic stay provides a debtor immediate relief from continued collection efforts including repossessions, foreclosures and levies of the debtor's property and property of the bankruptcy estate.

Exceptions to the Automatic Stay under §362(b)

The automatic stay is an essential function to the bankruptcy process.[25] Yet the Bankruptcy Code also affords various exceptions to the automatic stay for individual debtors under §362(b), which serve as a balancing act between the debtor's needs and the interest of certain creditors. The

[18] 11 U.S.C. §362(a)(1).
[19] 11 U.S.C. §362(a)(2).
[20] 11 U.S.C. §362(a)(3).
[21] 11 U.S.C. §362(a)(4) and 11 U.S.C. §362(a)(5).
[22] 11 U.S.C. §362(a)(6).
[23] 11 U.S.C. §362(a)(7).
[24] 11 U.S.C. §362(a)(8).
[25] See H.R. Rep. No. 95-595, at 340–41 (1977).

following list highlights exceptions where the automatic stay does not apply in an individual debtor bankruptcy:

1. The commencement or continuation of a criminal case against a debtor.[26]
2. Family law cases involving the debtor if to establish paternity, establishing domestic support obligations, concerning child custodial matters, dissolution of marriage but not to determine the division of property, or cases concerning domestic violence.[27]
3. Collection of domestic support obligation against property not of the estate.[28]
4. Ongoing wage garnishments for payment of a domestic support obligation.[29]
5. The restriction or suspension of certain licenses, including a driver's license.[30]
6. The reporting of overdue support to credit bureaus.[31]
7. The interception of a tax refund.[32]
8. The enforcement of certain medical obligations.[33]
9. Withholdings for repayments of funds borrowed from pension, 401k or IRA.[34]
10. Assess tax liability, audit a debtor to determine tax liability or make a demand to review debtor's tax returns.[35]
11. Landlord actions to obtain possession of nonresidential property if the lease has expired prior to the filing of the bankruptcy and for the continuation of eviction proceedings with respect to residential property if the judgment for possession was entered prior to the bankruptcy filing.[36]

[26] 11 U.S.C. §362(b)(1).
[27] 11 U.S.C. §362(b)(2)(A).
[28] 11 U.S.C. §362(b)(2)(B).
[29] 11 U.S.C. §362(b)(2)(C).
[30] 11 U.S.C. §362(b)(2)(D).
[31]11 U.S.C. §362(b)(2)(E).
[32] 11 U.S.C. §362(b)(2)(F).
[33] 11 U.S.C. §362(b)(2)(G).
[34] 11 U.S.C. §362(b)(9).
[35] 11 U.S.C. §362(b)(9).
[36] 11 U.S.C. §362(b)(10).

12. The commencement or continuation of an action by government exercising its police and regulatory powers, including the enforcement of the judgment obtained prior to the bankruptcy filing.[37]

Proceedings to determine whether a governmental unit is exercising its policing and regulatory power when commencing, continuing, or enforcing a previous judgment against a debtor is often a topic of litigation. Courts apply the "Pecuniary Purpose Test" or the "Public Policy Test" in determining whether the exception applies.[38]

Duration of the Automatic Stay under §362(c)

The time frame for the duration of the automatic stay is listed under §362(c) and can vary. The automatic stay continues against specific property within the estate until that such property is removed or no longer part of the bankruptcy estate.[39] Otherwise, the automatic stay will continue until the case is closed, dismissed, when the discharge is granted or when the discharge is denied.[40]

Section 362(c)(3) and 362(c)(4) were enacted to address and curtail serial bankruptcy filers from abusing the protections afforded when filing for bankruptcy.[41] Section 362(c)(3) provides that the automatic stay shall terminate with respect to the debtor[42] on the thirtieth day after the filing of a bankruptcy case if the debtor had a pending bankruptcy case within the preceding one-year period but was dismissed.[43] However, §362(c)(3)(B) provides that a bankruptcy court may continue the automatic stay on the motion of an interested party, after proper notice and a hearing, if the court finds that the subsequent filing was done in good faith.

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[37] 11 U.S.C. §362(b)(4).
[38] https://www.justice.gov/jm/civil-resource-manual-55-bankruptcy-and-government-regulator-part-ii
[39] 11 U.S.C. §362(c).
[40] 11 U.S.C. §362(c)(2).
[41] Laura B. Bartell, *Staying the Serial Filer, Interpreting the New Exploding Stay Provisions of §362(c)(3) of the Bankruptcy Code*, 82 AM. BANKR. L.J. 201, 202 (2008).
[42] There is a split of authority regarding this provision. The majority opinion finds that the automatic stay terminates as to the debtor and the debtor's property but continues to protect the property of the estate. The minority opinion holds that the automatic stay terminates completely as to all property unless continued.
[43] 11 U.S.C. §362(c)(A).

Under §362(c)(4) no automatic stay is created upon filing a bankruptcy case if a debtor has two or more cases which were pending within the preceding year of the subsequent case.[44] But an interested party may still move to impose the automatic stay within the thirty days of filing the subsequent case. The court has discretion, after proper notice and hearing to extend the stay, if the court finds that the case was filed in good faith as to the creditors being stayed.[45] If granted, the automatic stay is only effective as of the date of the entry of the order.[46]

Both §§362(c)(3) and 362(c)(4) presume that a bankruptcy case is filed in bad faith[47] as to all of the creditors being stayed if 1) more than one previous case under §362(c)(3) or more than two previous cases under §362(c)(4), for an individual debtor was pending within the preceding one-year period; 2) a previous case for an individual debtor within the preceding one-year period was dismissed because the debtor failed to file or amend required documents, provide adequate protection as ordered or perform the terms of a plan confirmed by the court; or 3) no substantial change in the debtor's financial or personal situation since the dismissal of the most recent filed case or other reason that would lead to discharge or a fully performed confirmed plan in the present case.[48] A bankruptcy case is presumed to be filed in bad faith against a particular creditor if that creditor started an action for relief of stay in the previously filed case and that action was still pending at the time of dismissal or if the action was resolved and resulted in the stay being terminated, conditioned or limited. [49]

Obtaining Relief from the Automatic Stay under §362(d)

To obtain relief from the automatic stay, a creditor must file a motion under §362(d) in the bankruptcy case as a contested matter.[50] The bankruptcy court may, after proper notice and a

[44] 11 U.S.C. §362(c)(4).
[45] 11 U.S.C. §362(4)(B).
[46] 11 U.S.C. §362(4)(C).
[47] 11 U.S.C. §362(c)(3)(B) and 362(c)(4)(D) require clear and convincing evidence to rebut the presumption.
[48] 11 U.S.C. §362(c)(3)(C) and 11 U.S.C. §362(c)(4)(D).
[49] 11 U.S.C. §362(c)(ii).
[50] 11 U.S.C. §362(d).

hearing, grant relief by either terminating, annulling, modifying or conditioning the stay if the court finds that cause exists.[51] Under §362(d)(1), a movant may obtain relief "for cause, including lack of adequate protection." The undefined term "for cause" provides discretion to the presiding judge and is often a term that allows practitioners to advocate for their client. Section 362(d)(2) provides a secured creditor the ability to request relief against property if the debtor has no equity in such property; and it that property is not necessary for an effective reorganization.

Section 362(d)(4) applies to stay relief of an act occurring against real property. If the court finds that the filing of a bankruptcy petition was part of a scheme to "hinder, delay or defraud" creditors, either through transfers of all or part ownership of the real property in question or due to serial bankruptcy filings which affect that property, the court may enter an order against the property which would be binding in subsequent cases for two years.[52] A debtor may seek relief from this order under the grounds of changed circumstances or good cause.[53]

Timeframe of Motions for Relief from Stay under §362(e)

To obtain stay relief under §362(d)(1), the movant must obtain a hearing as outlined in §362(e). Section 362(e) outlines the timing process the courts must follow when addressing motions for relief from the automatic stay. By design, these matters are provided a very short timeframe of no more than sixty days to resolve. Pursuant to 11 U.S.C. §362(e), the automatic stay is automatically lifted on the thirty-first day unless the court concludes a final hearing on the matter and makes a final determination or maintains the stay pending the final determination, or the court holds a preliminary hearing within thirty days after the motion for relief is filed unless otherwise agreed by the moving party and concludes at the hearing that there is a reasonable likelihood the non-moving party will prevail at the final hearing, and the court may extend the automatic stay pending the conclusion of the final hearing and determination.[54] A final hearing must occur not

[51] Id.
[52] 11 U.S.C. §362(d)(4).
[53] Id.
[54] 11 U.S.C. §362(e)(1).

later than thirty days from the conclusion of the preliminary hearing, unless an extension of a specific time is required by "compelling circumstances."[55]

It is crucial to object timely to the motion requesting relief from automatic stay due to the self-executing nature of §362(e).[56] The 5th Circuit expressly stated that, "The debtor must, through 'aggressive litigation management,' obtain a timely hearing if it wants to ensure the continued protection of the automatic stay. …[I]t is the debtor's burden to call the issue to the court's attention if it desires that the stay be continued."[57] An opposing party may use the implied waiver argument if they can demonstrate that the movant's actions have not adhered to the time constraints of §362(e).[58]

The court may also use its equitable powers to continue the automatic stay under §105 with or without notice.[59] However, the circuits vary on whether the court has the power to reimpose the automatic stay once it has been lifted.[60]

Emergency Relief from the Automatic Stay under §362(f)

Section 362(f) provides a mechanism for movants to obtain emergency relief in limited circumstances. To seek emergency relief, an interested party must move the court, with or without a hearing, and demonstrate that emergency relief is necessary to prevent irreparable damage to an

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[55] Id.
[56] https://www.abi.org/abi-journal/the-pitfalls-of-362e
[57] *River Hills Associates Ltd. v. River Hills Apartments Fund (In re River Hills Apartments Fund)*, 813 F.2d 702, 707 (5th Cir. 1987).
[58] *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1308 (11th Cir. 1982) (petitioning creditor appeared without objection at hearing beyond 30-day time period); *Iseberg v. Exchange National Bank and Trust Co. of Chicago (In re Wilmette Partners)*, 34 B.R. 958, 961 (Bankr. N.D. Ill. 1983) (creditor agreed to continuance of preliminary hearing beyond 30-day time period); *In re Small*, 38 B.R. 143, 147 (Bankr. D. Md. 1984) (creditor filed discovery requests to which responses were due more than 30 days after its request for relief was filed).
[59] *See Matter of Kozak Farms, Inc*., 47 B.R. 399 (W.D. Mo. 1985) (court extended the stay without notice or hearing finding that an ancillary matter could not be heard within the required timeframe and reasoned the likelihood that the opposing party would prevail at final hearing).
[60] https://www.abi.org/abi-journal/the-pitfalls-of-362e.

interest of an entity in property, if that interest will suffer damage before there is time for notice and a hearing.[61]

Burden of Proof Required for the Motion for Relief from the Automatic Stay under §362(g)

The burden of proof under §362(g) on the issue of adequate protection in any hearing relating to §362(d) or §362(e) is placed on the moving party requesting the relief from automatic stay.[62] The party opposing the relief requested has the burden on all other issues related to §362(d) or §362(e).[63]

Individual Debtor Required to Timely File Statement of Intention under §362(h)

The automatic stay will terminate after the thirtieth day as to "personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease" and such property will no longer be part of the estate, unless an individual debtor timely files a statement of intention declaring the individual's intention as required under §521(a)(2)[64] and timely takes the action as specified in the statement of intentions. This section does not apply if the trustee files their motion within the time provided by §521(a)(2).

Sanctions Provided under §362(k)

Section 362(k) has statutory and inherent powers to impose sanctions in cases where an automatic stay violation has occurred.[65] An individual injured by any willful violation of a stay shall be entitled to recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may be entitled to recover punitive damages.[66] However, only actual damages are

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[61] 11 U.S.C. §362(f).
[62] 11 U.S.C. §362(g)(1).
[63] 11 U.S.C. §362(g)(2).
[64] The debtor under §521 has the option to surrender the personal property or retain the property by either opting to redeem such personal property pursuant to §722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p).
[65] *United States v. Ruff* (*In re Rush-Hampton Indus.)*, 98 F.3d 614 (11th Cir. 1996).
[66] 11 U.S.C. § 362(k)(1); *Knupfer v. Lindblade (In re Dyer),* 322 F.3d 1178, 1191 (9th Cir.2003).

available to the injured party if the court finds that the creditor, in good faith, committed a stay violation to recover property under a personal property lease as described in 11 U.S.C. §§ 362(h). This Bankruptcy Code section provides a mechanism to deter willful violations of the automatic stay and protect individuals who seek refuge in the bankruptcy laws.[67]

A violation of the automatic stay is willful and subject to damages under §362(k), if the individual knew of the bankruptcy case and if the individual's actions which violated the stay, were intentional.[68] Under §362(k), the court does not need to find a subjective intent to determine the stay was violated.[69] It is also irrelevant that the party committing the violation believed in good faith that it had a right to the property at issue.[70] The Ninth Circuit has identified five prerequisites required to recover damages for a willful violation of the automatic stay. A person who seeks monetary damages for a willful violation of the automatic stay bears the burden of establishing the following elements by a preponderance of evidence: 1) a bankruptcy petition was filed, 2) the debtor is an individual, 3) the creditor received notice of the petition, 4) that a violation occurred, and the creditor's actions were willful, and 5) the debtor suffered damages.[71]

[67] The Ninth Circuit has repeatedly held that this section applies to individual debtors only and "corporate debtors may not recover sanctions under section 362(h) [now k] because the statute refers only to 'individual[s] injured by any willful violation of a stay.' *Johnson Envtl. Corp. v. Knight (In re Goodman*), 991 F.2d 613, 618–20 (9th Cir.1993).

[68] *Eskanos & Adler, P.C. v. Roman* (*In re Roman)*, 283 B.R. 1, 8 (B.A.P. 9th Cir. 2002); *Eskanos Adler, P.C. v. Leetien*, 309 F.3d 1210, 1215 (9th Cir. 2002).

[69] *Pinkstaff v. United States (In re Pinkstaff*), 974 F.2d 113, 115 (9th Cir. 1992).

[70] *In re Bloom*, 875 F.2d 224 (9th Cir. 1989).

[71] *Bauman v. Harbor View Home Owners Ass'n*, 2017 WL 1378215 *2 (S.D. Cal. April 11, 2017), *quoting In re Bertuccio*, 414 B.R. 604, 611 (Bankr. N.D. Cal. 2008).

Property of the Estate in Chapter 13

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The filing of a bankruptcy petition creates an estate for the bankruptcy debtor.[72] The property of the estate is a broadly defined term comprising of all property, with some exceptions, wherever located and by whomever held, "all legal or equitable interest of the debtor in property as of the commencement of the case."[73] This includes tangible and intangible property, causes of action, real and personal property, certain property held by the debtor in trust for others, and certain property of the debtor held by others.[74] The term "property" has been generously construed to include a debtor's assets regardless if the interest is novel, contingent, speculative or enjoyment by debtor of that asset is postponed.[75] The estate includes all conceivable interest in which Debtor possessed at the commencement of the case, regardless of its geographical location.[76]

A debtor's interest in property becomes part of the bankruptcy estate regardless of provisions entered into by the debtor pre-petition, which attempt to restrict transfers of the debtor's interest, or are conditioned on the debtor's financial condition or the commencement of a bankruptcy filing.[77] The nature and extent of a debtor's interest in property is determined by state law.[78] If it is determined that the interest in the property is part of the bankruptcy estate, that property will remain in the bankruptcy until removed from the estate.[79]

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[72] 11 U.S.C. §541(a).
[73] 11 U.S.C. § 541(a)(1).
[74] *United States v. Whiting Pools*, 462 U.S. 198, 204-05, 103 S. Ct. 239, 76 L. Ed 2d 515 (1983).
[75] *Segal v. Rochelle*, 382 U.S. 375, 379, 86 S. Ct. 511, 15 L.Ed. 2d 428 (1966).
[76] *H.K. & Shanghai Banking Corp. v. Simon* (*In re Simon),* 153 F.3d 991, 996 (9th Cir. 1998).
[77] 11 U.S.C. §541(c)(1).
[78] *Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L.Ed 2d 136 (1979).
[79] §554 allows for property to be abandoned from the estate and §363 permits sales of estate property which, if granted, remove such property from the bankruptcy estate.

Section 541 codifies property of the estate to include:

1. All legal or equitable interests of the debtor in property as of the commencement of the case unless listed in §§541(b) or 541(c).[80]
2. All debtor's interest and debtor's spouse interest in community property which is under the control of debtor or allowable for a liable claim.[81]
3. Property recovered by the trustee of the bankruptcy case.[8283]
4. Interests avoided or subordinated for the benefit of the estate.[84]
5. Interest in property as of the petition date or within 180 days of the petition date relating to inheritance, property settlement agreements or life insurance policy or death benefit plan.[85]
6. Proceeds, product, offspring, rents, or profits of or from property of the estate, except earnings for services post-petition (in chapter 7).[86]
7. Any interest that the estate acquires after the petition date.[87]

Property Excluded from the Bankruptcy Estate under §541(b)

Section 541(b) excludes certain property and interests held by the debtor as of the commencement of the case.[88] The following sections are applicable in consumer bankruptcy cases and define property that is not part of the bankruptcy estate:

1. Any power that the debtor may exercise solely for the benefit of another entity other than the debtor.[89]

[80] 11 U.S.C. § 541(a)(1).
[81] 11 U.S.C. § 541(a)(2).
[82] 11 U.S.C. § 541(a)(3).
[83] Applies to property recovered under §§329(b), 363(n), 543, 550, 553, or 723.
[84] 11 U.S.C. § 541(a)(4).
[85] 11 U.S.C. § 541(a)(5).
[86] 11 U.S.C. § 541(a)(6).
[87] 11 U.S.C. § 541(a)(7).
[88] 11 U.S.C. § 541(b).
[89] 11 U.S.C. § 541(b)(1).

2. Any interest the debtor held as a lessee in a nonresidential real property that terminated by its own contractual terms prior to the commencement of the bankruptcy case.[90]
3. Certain interests of the debtor in liquid or gaseous hydrocarbons.[91]
4. Certain funds placed in an education retirement account.[92]
5. Certain funds used to purchase a tuition credit or certificate or contribution to a 529(b) account under a qualified State tuition program.[93]
6. Wages withheld by an employer or contributed by an employee as contributions in a qualified employee benefit plan, 457 deferred compensation plans, 403(b) annuities and health insurance plan.[94]
7. Certain interest in property pledged or sold by debtor as collateral for a loan or advance of money given by a person licensed to make such loans.[95]
8. Proceeds from certain sales of money orders.[96]
9. Certain funds placed in an account of a qualified ABLE program. [97]

Property of the Estate in Chapter 13 Cases

A chapter 13 case expands the definition of what constitutes property of the estate. The debtor is subject to the property brought into the estate through §541, but also has the additional requisites as imposed through §1306. Defining property of the estate in chapter 13 cases can become complicated due to the conflicting language found in §1306 which defines property of the estate in a chapter 13 context and §1327 which discusses the effect of confirmation of a plan.

[90] 11 U.S.C. § 541(b)(2).
[91] 11 U.S.C. § 541(b)(4).
[92] 11 U.S.C. § 541(b)(5).
[93] 11 U.S.C. § 541(b)(6).
[94] 11 U.S.C. § 541(b)(7).
[95] 11 U.S.C. § 541(b)(8).
[96] 11 U.S.C. § 541(b)(9).
[97] 11 U.S.C. § 541(b)(10).

Section 1306 includes all legal or equitable interests of the debtor in property, including wages earned for services performed by the debtor and property that is acquired by the debtor after the commencement of the case, but before the case is closed, dismissed, or converted, whichever occurs first.[98] Section 1327(b) provides that except as otherwise stated in the plan, all property of the estate vests in the debtor upon confirmation of the debtor's plan.[99] The language of these sections have raised discussions of whether these two sections are irreconcilable due to the vesting of property back to the debtor upon confirmation, which contradicts the bankruptcy estate having post-petition, post-confirmation assets included in the property of the estate until the case is closed, dismissed or converted. While some courts find tension in the language, other court have reasoned that the provisions work in conjunction to one another, returning to debtor upon confirmation, only as much as is not necessary to the fulfillment of the plan.[100]

Property of the Estate upon Conversion

As mentioned above, §1306 expands the reach of the estate to include post-petition acquired property.[101] However, when either a chapter 11 or chapter 13 bankruptcy case is converted to a chapter 7 case, the court will look to the property interests possessed by debtor as of the filing date of the original bankruptcy to make its determination of what property is considered property of converted chapter 7 estate.[102]

Section 348(f)(1) provides that property of the estate in a case converted from a chapter 13 to chapter 7, shall comprise of all property which was part of the bankruptcy estate as of the date of the filing, which remain in possession of or is under control of the debtor, on the date of conversion. However, § 348(f)(2) provides that when a debtor converts from a chapter 13 case in

[98] 11 U.S.C. § 1306(a).
[99] 11 U.S.C. § 1306 and 11 U.S.C. § 1327.
[100] *Telfair v. First Union Mortg. Corp*., 216 F.3d 1333, 1340 (11th Cir. 2000), quoting *Black v. United States Postal Serv. (In re Heath*), 115 F.3d 521, 524 (7th Cir. 1997).
[101] 11 U.S.C §§1115 and 1306.
[102] 11 U.S.C. § 348(a).

bad faith, then the property of the estate in the converted case shall consist of the property of the estate as of the date of conversion, not the date of the original filing.[103] Conversion of a chapter 13 case to a chapter 7 case also triggers termination of the chapter 13 trustee's service to the bankruptcy.[104] Therefore, once a case is converted to chapter 7, the chapter 13 trustee no longer has authority to serve as trustee in the converted case.[105]

The Supreme Court of the United States provided needed clarification of §348 when they decided *Harris v. Viegelahn*[106] and found that post-petition wages not yet distributed by a chapter 13 trustee in a case converted to chapter 7, must be returned to the debtor upon conversion.[107] The court noted that upon filing a chapter 7, a debtor's assets, with specified exemptions, are immediately transferred to the debtor's bankruptcy estate under §541.[108] A crucial aspect of a chapter 7, is that this transfer affects only the debtor's assets prior to the commencement of the case, not any assets acquired after the filing.[109] Assets acquired after the commencement of a chapter 7 case remain property of the debtor.[110] However, in a chapter 13, a debtor's post-petition wages are part of the estate, and will typically be used to fund the plan.[111]

The Supreme Court reasoned that the intention of Congress and the Bankruptcy Code's foundational principle provides a debtor with a "fresh start," then a debtor should not be penalized by requiring distribution of funds acquired after the filing date[112] They noted that once the debtor exercised their nonwaivable right to convert, then the trustee lacked the authority to distribute

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[103] *Harris v. Viegelahn*, 135 S. Ct. 1829, 1837-38 (2015) (explaining that post-petition wages not yet distributed revert back to debtor, absent bad faith, in a case converted to chapter 7 from 13)
[104] 11 U.S.C. § 348(e).
[105] Id. also see, *Harris v. Viegelahn*, 135 S. Ct. 1829, 1836 (2015) (citing §348(e))
[106] *Harris v. Viegelahn*, 135 S. Ct. 1829, 575 U.S. 510, 83 U.S.L.W. 4293, 191 L. Ed. 2nd 783, (2015)
[107] Id.
[108] Id. at 1835.
[109] Id.
[110] Id. (citing §541(a).
[111] Id. (citing §§1322(a)(1) and 1306(a)).
[112] Id. at 1837-1838.

payments.[113] Thus, once a chapter 13 case is converted to a chapter 7, absent bad faith, all assets acquired after the filing of the chapter 13 revert to the debtor.

[113] Id. at 1838.

Getting Paid As A Consumer Lawyer

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A. The Compensation Conundrum

One of the most significant challenges facing potential clients seeking debt relief is how to afford to pay for their legal representation when courts have concluded that any obligation owed to debtors' counsel under a prepetition chapter 7 fee agreement is not only stayed upon the filing of the bankruptcy but is also fully dischargeable. *Rittenhouse v. Eisen*, 404 F.3d 395 (6th Cir. 2005); *In re Fickling*, 361 F.3d 172 (2nd Cir. 2004); *Bethea v. Robert J. Adams & Assocs*., 352 F.3d 1125 (7th Cir. 2003); and *Hessinger & Assocs. v. United States Trustee (In re Biggar)*, 110 F.3d 685 (9th Cir. 1997). Without question, the bankruptcy code provides no easy roadmap for consumer attorneys to be compensated by their chapter 7 debtor clients who often do not have ready access to savings or other available funds to pay in advance for the legal work they need.

As one court has observed:

> Chapter 7 attorney fees are not obligations that are compensable from the bankruptcy estate, thus a Chapter 7 lawyer must, in a perfect world, collect his fee in full from the debtor prepetition. Because Chapter 7 debtors often do not have sufficient funds to pay attorney fees up front, lawyers often enter into prepetition agreements allowing debtors to pay part of the fees prepetition and the balance of the fees post-petition. This arrangement, however, runs afoul of the general rule that prepetition debts are dischargeable.
>
> *In re Abdel-Hak*, 2012 Bankr. LEXIS 5393 (Bankr. E.D. Mich. 2012).

B. Will the Political Winds Change Compensation Rules for Debtors' Counsel?

The election of Joe Biden increases the likelihood of more significant changes to the consumer bankruptcy system as a whole. Predicting legislative changes is difficult, but the new administration has made clear its position on bankruptcy reform. In fact, while still campaigning in March of 2020, Biden publicly endorsed the Elizabeth Warren plan for bankruptcy reform.[1]

Warren's bankruptcy plan envisions an overhaul to consumer bankruptcy in general, with the ultimate goal of reducing costs, increasing access, and enlarging relief for consumers with

[1] *Americans' Debts Are Mounting, Putting New Focus On Biden's Role Opposing Bankruptcy Protections*, The Washington Post, (Oct. 27, 2020 at 6:00 a.m. EDT).

student loan debt.[2] One fundamental change called for by Warren would be to permit a consumer debtor's attorney's fees to be paid post-petition over time. Warren's plan would also eliminate the filing fee otherwise paid to the Clerk's Office for any debtor below the federal poverty level. The plan further seeks to reduce the overall expense of consumer bankruptcy with fundamental changes to the chapters to streamline the process, reduce documentation demands, and eliminate credit counseling requirements.

While no action has been taken in Washington to advance this legislation, some debtors' attorneys have developed and implemented unbundling and bifurcation practices that, if successful and approved by the courts, would arguably have similar effects. The remainder of this paper will explore the various forms of unbundling and bifurcation utilized by some consumer practitioners in order to attempt to avoid charging full attorney's fees prior to the filing of a case and will also review issues related to the factoring and financing of attorney's fees charged post-petition.

C. Unbundling and Bifurcation Defined

Because debtors do not generally have the funds sufficient to pay Chapter 7 legal fees before the attorney begins rendering services, some Chapter 7 attorneys have devised a variety of methods to ensure payment. To the extent that these methods involve limiting the services of the attorney to discrete tasks, such practices are generally referred to as "unbundling."

> Unbundling is the practice of limiting the scope of services that an attorney will provide—"dividing comprehensive legal representation into a series of discrete tasks, only some of which the client contracts with the lawyer to perform."
>
> *In re Seare*, 493 B.R. 158 (Bankr. D. Nev. 2013).
>
> Instead of traditional representation, where a lawyer handles a case from start to finish, limited scope representation, also known as "unbundling" or "discrete task representation," involves representation in which a lawyer performs some, but not all, of the work.
>
> *In re Ruiz*, 515 B.R. 362 (Bankr. M.D. Fla. 2014).

In Chapter 7, an attorney might unbundle the work required for the case by offering only to help prepare the petition itself. Or, the attorney might attempt to limit the work to simply representing the client through the meeting of creditors. More commonly, though, a chapter 7 attorney might seek to divide the legal services into two primary bundles. The first concerns services that are rendered prepetition and the second concerns services that are rendered post-petition. Separating the work required for a bankruptcy into two parts like this is often referred

[2] *See* Elizabeth Warren, *Fixing Our Bankruptcy System to Give People a Second Chance*, https://elizabethwarren.com/plans/bankruptcy-reform (last visited November 13, 2020).

to as "bifurcation," particularly if the client is provided the option to be represented for the full case, albeit in two parts. The Court in *In re Hazlett* explained it this way:

> With bifurcated fee agreements, the attorney is contracting to represent the debtor during the entire case, contingent on the debtor signing the post-petition agreement. The primary concern with unbundling is that the attorney provides a limited service and then leaves the client to his or her own devices to complete the legal process.
>
> *In re Hazlett*, 2019 Bankr. LEXIS 1166, *17, 2019 WL 1567751 (Bankr. D. Utah Apr. 10, 2019).

The bifurcation of an attorney's fee agreement into two contracts, one for the prepetition services and one for the post-petition services is the most common type of unbundling utilized in chapter 7 cases.

D. Attempts at Bifurcated Fee Arrangements

1. Early Case Examples

An early and consequential series of cases in the realm of bifurcated fee agreements falls under the case names, *Walton I* and *Walton II*. In the first case, *Walton v. Clark & Washington, P.C.*, 454 B.R. 537 (Bankr. M.D. Fla. 2011) ("*Walton I*"), the Chapter 7 attorney accepted postdated checks from the debtor as a prepetition retainer. The Bankruptcy Court ruled that the Chapter 7 attorney was prohibited from accepting postdated checks as a prepetition retainer for post-petition services that were to be provided to the debtor. The Court ruled that the postdated checks gave rise to prepetition claims as a matter of law and that depositing the checks after the petition date violated the § 362 automatic stay or the § 524 discharge injunction (depending on when the check was deposited). The Court also ruled that the fee arrangement created a conflict of interest.

In response to the Court's opinion, the Chapter 7 attorney instituted a two-contract procedure under which the client executed one agreement for prepetition services and a second agreement for post-petition services. After the debtor signed the prepetition retainer agreement, the attorney prepared the petition and schedules. The attorney then filed the petition. Fourteen days after the attorney filed the petition, the debtor was given three options. The debtor could (1) proceed *pro se*; (2) retain the attorney to prosecute the Chapter 7 case; or (3) retain another attorney to prosecute the Chapter 7 case. If the debtor chose the second option, the parties entered into a post-petition retainer agreement. The client then made arrangements to pay the post-petition fees (generally in the form of automatic debits from the client's bank account) Thereafter, the attorney filed the balance of the schedules, statement of financial affairs, and other necessary documents.

The U.S. Trustee filed a motion to determine whether the attorney's new two-contract procedure violated the Court's prior ruling, resulting in a second opinion found at *Walton v. Clark 7 Washington, P.C.*, 469 B.R. 383 (Bankr. M.D. Fla. 2012) ("*Walton II*"). In *Walton II,* the Court concluded that a debtor may pay an attorney post-petition for post-petition legal services. The Court was persuaded that the attorney had addressed other concerns regarding its prior procedure by: (1) more fully setting out the costs and fees associated with filing the client's case; (2) specifying the client's three options for post-petition legal services; and (3) explicitly disclosing in the Rule 2016 disclosure statement that the prepetition fee was $250 and that the contract between the client and the firm did not include post-petition services; and (4) setting out that the additional fee would be $1,000 in the event the debtor decided to retain the attorney for post-petition services. The attorney also agreed to represent the debtor during the two-week period post-petition and to enhance its notice of two-contract procedure that it provided to the debtor. The Court concluded that there is no prohibition against a debtor making post-petition installment payments for post-petition services.

2. Recent Opinions Addressing Bifurcated Fee Arrangements

a. Denial of Fees Based on Improper Disclosures Example

In more recent years, the court in *In re Wright*, 591 B.R. 68 (N.D. Ok., Sept. 4, 2018) addressed the bifurcation of services into prepetition and post-petition work, with the debtor's counsel also factoring the fees due under the second contract. Under the attorney's arrangement with the factoring company, the attorney would be paid 60% of the post-petition fee upon execution of the contract, with an additional 15% of those fees paid if the accounts were sufficiently paid by the debtors.

The U.S. Trustee filed a Motion for Review of Debtor's Transactions with Attorney, and the Court examined the same issue in seventeen other cases, *sua sponte.* The Court found that the attorney failed to disclose that he shared fees with any third party and that he conflated the total amount a debtor agreed to pay for his services with the amount that the attorney agreed to accept from the factoring company. The Court was troubled by the higher fees in the bifurcated cases, concluding that "BAPCA presents serious impediments to the legality of this kind of bifurcated services scheme…."

The Court further questioned the designation of services post-petition, finding that if the bulk of the work were truly completed post-petition, counsel would not be properly analyzing case. The actual time spent for prepetition services was not consistent with the fee charged to pre versus post-petition services. The effect was to turn an otherwise dischargeable prepetition claim into a nondischarged claim, and "such a scheme works a fraud on both the debtor and the Court." Notwithstanding these stated concerns about the factoring and bifurcation arrangement, the Court limited its ruling to matters under § 329 and ordered the disgorgement of fees based on improper disclosures.

b. Other Bifurcation Examples -- Approved If Certain Criteria Satisfied

In *In re Hazlett*, the debtor's attorney offered the debtor three payment options: (1) pay the attorney $2,400.00 prepetition which included the attorney's fees and court filing fee; (2) pay the attorney $500 prepetition for the preparation and filing of the bankruptcy petition, statement of social security number, and application to pay the court filing fees in installments and then (a) proceed *pro se*, (b) hire another attorney to complete the case, or (c) enter into a post-petition fee agreement with the attorney to complete the bankruptcy case; and (3) Pay nothing prepetition and enter into a prepetition retainer agreement for the preparation and filing of the initial bankruptcy papers for $0 down, with the option to either proceed *pro se*, hire another attorney, or enter into a post-petition fee agreement of $2,400 (which included fees and costs) in 10 equal monthly payments for the prosecution of the case through the entry of a discharge. The debtor selected the third option.

The Court distinguished unbundling from bifurcation of fees. In reviewing the agreements with the debtor, the Court determined that the attorney had simply bifurcated the services and given the debtor the option to be represented for the entire case. The Court noted that the primary concern with unbundling is that an attorney provides a limited service and then leaves the client to his or her own devices to complete the legal process. In the case of bifurcation, however, the attorney commits to provide post-petition services, contingent on the debtor signing the post-petition agreement.

The Court concluded that there are four essential requirements that must be satisfied when using bifurcated fee agreements: (1) the use of two contracts must be in the best interests of the client (*e.g.*, the client could not otherwise afford to hire bankruptcy counsel); (2) the attorney must provide appropriate disclosures, options, and explanations; (3) the client must give his or her informed consent in writing; and (4) the attorney's fee and costs must be reasonable and necessary. The Court found that the attorney had met each of these requirements.

In *In re Carr*, 613 B.R. 427 (Bankr. E.D. Ky. 2020) the Court analyzed the practices of particular debtors' attorneys who received $300 from a chapter 7 debtors prepetition and were to then be paid $1,185 post-petition. After the Court determined that debtor did not schedule any debt owed to the attorneys, the Court required the attorneys to file their written engagement agreement and related documents.

The Court made the following findings of fact. Under a single contract option, a Chapter 7 debtor could pay the attorneys $800.00 plus filing fees. Under a two-contract option, the debtor could pay the attorneys $300 prepetition for prepetition services rendered and $850.00 for post-petition services (plus $335.00 for the filing fee) to paid post-petition in 12 equal monthly payments of $98.75. The debtor had the option of continuing *pro se* or hiring another attorney for post-petition services. The Court found that the payment scheme included an internal interest rate of 7.55%. The attorney collected the payments from the debtor's bank account. The attorney did not enter into a factoring agreement.

The Court concluded that the attorneys' representation of debtors under dual contracts satisfied the requirements in the Code, the Bankruptcy Rules, and applicable ethical rules, with the exception that the attorneys should have been more clear in their fee disclosure regarding the fact that they were proceeding under a dual contract scheme of representation.

c. Bifurcation Example When Not Permitted

In *In re Milner*,[3] 612 B.R. 415 (Bankr. W.D.Ok. 2019) (*currently on appeal*), the attorney offered the debtor two payment options. One such option was a classic one-contract option where the debtor would pay the attorney $1,500.00. If the debtor could not afford to pay that amount prepetition, then the attorney would offer a two-contract (bifurcated contract) option, one contract for prepetition services and one contract for post-petition services. After the debtor paid the attorney $300.00 and the petition was filed, the debtor had the option of continuing *pro se*, hiring another attorney to proceed, or entering into a post-petition contract with the original attorney. Under the post-petition contract, the debtor would agree to pay $200.00 per month for twelve months.

The attorney, in order facilitate the payment and collection of the debtor's post-petition payments, entered into a Line-of-Credit Agreement ("LCA") with Fresh Start Funding ("Fresh Start"). Under the LCA, Fresh Start gave the attorney a line of credit, and the attorney submitted the post-petition contract to Fresh Start. Fresh Start would pay the attorney 60% of the $2,400.00 to the attorney. If the payments were made, the attorney would receive another 15%. In any event, Fresh Start would keep 25%, $600.00, of the $2,400.00. Further, the attorney essentially guaranteed the payments to Fresh Start.

The Court, citing *Hazlett*, held that bifurcated contracts are not prohibited by the Bankruptcy Code. The Court concluded that it was understandable that attorneys are reluctant to represent Chapter 7 debtors who cannot compensate them in full prepetition. The conclusion was based on two facts: (1) a Chapter 7 debtor's attorney fees cannot be treated as an administrative expense (*Lamie v. U.S. Trustee*, 540 U.S. 526 (2004),) and (2) a debtor's prepetition promise to pay attorney fees is dischargeable (citing a number of circuit opinions).

The Court adopted the *Hazlett* test to determine when a debtor's attorney may use bifurcated fee agreements in Chapter 7 and held that bifurcated contracts may be appropriate where: (1) it is in the best interests of the client; (2) the attorney provides appropriate disclosures, options, and explanations; (3) the client gives informed consent in writing; and (4) the attorney's fee and costs are reasonable and necessary.

The Court then held that the attorney did not meet the *Hazlett* requirements because it could not find that it was in the best interest of the debtor to pay the attorney $2,400.00 under the post-petition contract and because the attorney's disclosures were inadequate. Further, the Court found that the attorney's fees were unreasonable.

[3] At the time of the submission of these materials, March 11, 202, no decision on the appeal at the District Court in the Western District of Oklahoma has been issued (*Sisson v. United States Trustee et al*, Case # 5:20-cv-00033-PRW).

The Court also found that the attorney did not provide adequate disclosure of his fees and services as required under 11 U.S.C. §§ 526-528. The Court found that the compensation terms of the disclosure statement were confusing, that the disclosure of matters covered by both contracts was confusing, that the disclaimer of representation was both confusing and inappropriate, and that the fee options were also confusing.

E. The Practice of Factoring and/or Financing Attorney Fees in Bifurcated Cases to Offer No Money Down or Low Money Down Chapter 7 Cases

Related to unbundling is the emerging debtors' attorneys' practice of contracting with factoring companies or finance companies to ensure the payment of attorney's fees in order to offer low or no money down Chapter 7 bankruptcies. Under the practice of factoring, the holder of accounts receivable sells them to the factor for a discounted amount, that is, an amount that is less than the face amount of the receivables. The factor then earns a profit by collecting the receivables. In the context of consumer bankruptcy cases, the debtor's attorney might sell the post-petition accounts receivables for the unbundled or bifurcated services typically contracted under a post-petition attorney fee agreement. Financing agreements work similarly, with the lender extending credit to the debtor's attorney based on the post-petition fee agreement and then in certain cases providing the collections for those post-petition fees.

The use of factoring companies and financing agreements like these, however, have come under scrutiny by certain courts and the Office of the U. S. Trustee, and complaints filed in various enforcement actions highlight some of the potential issues.[4]

1. Potential Issues Raised by Factoring and Financing Arrangements

The practice of factoring and financing attorney fees in the consumer debtor context raises a number of issues including: (1) whether the fees arising from post-petition Chapter 7 services are dischargeable, subject to the automatic stay, and may conceal the improper collection of attorney's fees for prepetition services; (2) whether the arrangement causes the debtor to pay higher attorney's fees than the attorney otherwise would charge or than what may be deemed reasonable; and (3) whether the financial transaction is properly disclosed in the schedules and statements filed with the petition.[5]

2. Dischargeability, Stay Implications and the Bifurcation of Services

The first issue that must be considered when a Chapter 7 attorney factors or finances receivables owed by a debtor is whether the debtor's debt to the attorney (and hence the debtor's

[4] *See*, *e.g.*, Bloomberg Law, *Firm Sued by U.S. Trustee Over Billing Practices in Chapter 7s*, December 19, 2017, https://biglawbusiness.com/firm-sued-by-u-s-trustee-over-billing-practices-in-chapter-7s/, (referencing Adversary Proceeding No. 17-01271, filed in the case of *In re Gilmore*, pending in the U.S. Bankruptcy Court for the Central District of California), and Bloomberg Law, *U.S. Trustee Files Motion Against Lawyer's Fees in Chapter 7 Case*, February 27, 2018, https://biglawbusiness.com/us-trustee-files-motion-against-lawyers-fees-in-chapter-7-case/, (referencing the Motion to Examine Fees filed in the case of *In re Neufville*, Case No. 17-24812, from the U.S. Bankruptcy Court for the District of Maryland).

debt to the factor in the case of factoring) is dischargeable and subject to the stay imposed in 11 U.S.C. § 362. While all courts hold any unpaid debt based on a claim for prepetition services to be dischargeable in Chapter 7, the courts are in in some disagreement, as described previously in this paper, regarding whether an attorney can collect unpaid fees for post-petition services based on a prepetition contract. *Compare*, e.g., *Hines*, 147 F.3d. 1185 (9th Cir. 1998), with *Bethea*, 352 F.3d 1125 (7th Cir.2003). If the unpaid fees are dischargeable, then the factoring or financing of the receivable arising from the debt does not change the analysis. The receivables would be discharged and subject to the automatic stay.

To minimize the risk of the discharge of fees, factoring and finance companies suggest to debtors' counsel a two-contract practice model.[6] The skeletal petition would be filed for low or no money down, and then the debtor would be offered the opportunity to contract, post-petition, for the services of the attorney needed to complete the case. Attorneys endorsing such a practice would note that it is not dissimilar from a *pro se* debtor that seeks out and hires competent counsel for the completion of the case and schedules after the debtor files his or her own basic petition. Critics might argue that the planned division of services with the only substantial fees charged post-petition is a fiction because significant legal work is required before a petition may properly be filed. Competent representation requires review of assets, income, and liabilities prior to filing even a skeletal petition. Thus, is the bifurcation of the work and ultimate factoring or financing of the fees arguably concealing the improper collection of attorney's fees for prepetition services? Of course, if any issue as to the dischargeability of the fees remains an open question in a particular jurisdiction, the attorney would need to properly inform the client. In some actions, the Office of the United States Trustee has, in fact, asserted that the attorney in these scenarios has not properly advised the debtor regarding the automatic stay or the discharge.

3. Increased Attorney's Fees and Review of Reasonableness

Another issue that arises in the factoring and financing scenarios is whether the debtor is forced to pay a higher amount in attorney's fees. If the attorney would accept the reduced amount from the factor, he or she should also accept the same reduced amount from the debtor according to the Utah State Bar Ethics Committee. *See*, Advisory Opinion No. 17-06, at ¶ 2.c., September 27, 2017. In addition to implicating ethical responsibilities, increasing attorney's fees to compensate for the factoring or financing of fees may run afoul of the reasonableness of fees requirements of 11 USC § 329(b). The fact that the attorney is willing to accept an amount that is discounted from what he or she is asking the debtor to pay might support the notion that the fees that the debtor is being charged are high. "If the lawyer is willing to do the work with a thirty percent discount, we question (but do not resolve) whether the total fee is reasonable." *Id.*, at ¶ 17.

4. Disclosure of the Financial Arrangement and Informed Consent

Clear disclosure of the bifurcation of the legal services and the factoring of the attorney's fees must be made both to the debtor and the Court. The American Bar Association's Model

[6] The complaint of the U.S. Trustee in the *In re Gilmore* case includes as an attachment a "welcome memo" from the factoring company which describes the suggested two-contract approach. *See*, p. 29 of 147 of the Complaint at Docket Entry No. 1, December 12, 2017, Adversary Proceeding No. 17-01271.

Rules of Professional Conduct Rule 1.2 (c) allows attorneys to limit the scope of their representations as long as the limitation is reasonable, and the client gives informed consent after full disclosure. Further, Bankruptcy Rule 2016(b) mandates disclosures for payments made "in a case under this title, or in connection with such a case."

The ABA's Model Rules of Professional Conduct 1.2(c) provides that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Rule 1.0(e) then defines "informed consent," explaining that it "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Courts carefully consider the requirement of informed consent in the context of bifurcated fee arrangements, specifically questioning whether the debtor comprehends the risks associated with the withdrawal of the attorney should the post-petition payments not be completed. *In re Grimmett*, 2017 Bankr. LEXIS 1492 (D. Idaho 2017) (*affm'd on appeal*). How should a debtor's attorney adequately advise the debtor of the risks of representing oneself at a meeting of creditors and completing all tasks necessary for a discharge?

In addition, bifurcating legal services under a two-contract system requires particular timing. The post-petition contract must in fact be executed after the date of the Chapter 7 filing and requires the informed consent of the debtor to the arrangement. This would likely need to include the clear disclosure to the debtor of the other options that he or she may have, including proceeding *pro se* or hiring another lawyer to complete his or her case. *See*, *Walton II*, at 386.

5. Professional Independence of the Lawyer

The Trustee's allegations and the debtor's attorney in the *In re Neufville* matter included concerns related to the use of the retainer documents, consent forms, and recurring payment forms of the third party factory company.[7] The Trustee alleged that the use of those forms of a third party by the debtor's attorney that had a financial arrangement with that third party impacted the attorney's independent professional judgment and created a conflict of interest. The Trustee's pleading cites the Maryland Rules of Professional Conduct that correspond to the following ABA Model Rules of Professional Conduct:

> Rule 5.4(c): Professional Independence of a Lawyer. (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

[7] Ultimately the *In re Neufville* matter was resolved by the entry of a consent order entered 4/12/19 cancelling the fee agreements between the debtor and the debtor's attorney and providing for the disgorgement of certain fees. *In re Neufville*, Case No. 17-24812, Docket Entry No. 104, April 12, 2019, U.S. Bankruptcy Court for the District of Maryland.

> Rule 1.8(f): Current Clients: Specific Rules. (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client gives informed consent;
>
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
>
> (3) information relating to representation of a client is protected as required by Rule 1.6.

> Rule 1.7(a): Conflict of Interest: Current Clients. (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

F. Conclusion

As with many thorny issues in the practice of bankruptcy, different approaches are developing that seek to accomplish the same goal: the payment of attorney's fees by debtors in an affordable and appropriate manner so that debtors may have access to the relief they need and also the benefit of competent legal advices during their cases. Case law is rapidly developing in this area that provides some guidance to practitioners, and the topic continues to be an active one in academic and professional publications. Particularly in the absence of statutory, counsel must be mindful of all the relevant issues, pitfalls, and ethical considerations as they establish procedures in their own firms for charging and handling attorney fees consumer debtor cases.

Ethics Advisory Opinion Committee

Opinion Number 17-06 (Revised)

Issued August 16, 2018

ISSUES

1. The opinion request involved several issues in the practice of consumer Chapter 7 (liquidation) bankruptcies.[1] The issues discussed also have relevance in lawyer advertising, client conflicts, and unbundling legal services.[2] The issues presented include:

a. Is a lawyer's advertisement of a "$99" or "Zero Down" for a consumer Chapter 7 liquidation bankruptcy misleading under Rule 7.1 of the Utah Rules of Professional Conduct? Is it misleading to advertise that such a price is good for a limited time or that a promotion with this price has been extended?

b. What are the ethical constraints when requesting the client sign a post-petition attorney fee contract which will not be discharged?

c. What disclosures must be made if the lawyer intends to sell the rights to collect the post-petition attorney fee contract to a litigation financing company? Does a relationship with the buyer of the attorney fee contract create a conflict of interest under Rule 1.7 of the Utah Rules of Professional Conduct?

[1]This response is reflective of information given the Ethics Advisory Opinion Committee (the "**Committee**"). The Committee was not asked to approve a business model nor does it do so. It is up to the individual lawyers concerned to evaluate their business practices with respect to compliance with the Utah Rules of Professional Conduct, and other applicable law, and the guidance given below.

[2] This opinion replaces the prior version of Opinion 2017-06.

d. Are the attorney fees reflected in the post-petition contract reasonable when the attorney sells her rights to those fees at a deep discount under Rule 1.5 of the Utah Rules of Professional Conduct?

OPINION

2. Without providing the consumer further information, advertisement of a "$99" Chapter 7 bankruptcy or a "Zero Down" Chapter 7 bankruptcy is false and misleading under Rule 7.1(a) of the Utah Rules of Professional Conduct because the price refers only to the filing of the initial petition. The price does not include the mandatory filing fee as well as work to be done subsequent to the filing of the petition such as preparation of schedules, meeting of creditors, and reaffirmation agreements. All of these subsequent activities are necessary to obtaining a final discharge of debt which, of course, is the purpose of a consumer bankruptcy. Unless the follow up work is done, the bankruptcy will ultimately be dismissed. The consumer will have wasted both time and money.

3. In connection with the disclosures required under paragraph 2 above to avoid running afoul of Rule 7.1(a) of the Utah Rules of Professional Conduct, an attorney must disclose that her fees for post-petition work will be more substantial and not dischargeable in the consumer bankruptcy. The attorney cannot "unbundle" the filing of the petition unless it is reasonable under the circumstances to do so. Further, no case can be unbundled where prohibited by statute, case law or court rules.

4. While it is not a violation of the Utah Rules of Professional Conduct to sell a lawyer's accounts receivable, the client must be fully informed with respect to the transaction. The client must be offered the same discounted price. The client must consent in writing to the sale and must be informed that the legal fees for post-petition work are not dischargeable. The

lawyer must inform the client that the legal financing company will collect the fee and if there were to be a dispute between the finance company and the client, the lawyer would not represent the client.

5. The fee charged the client (including the finance company discount) must be reasonable. Reasonable fees in consumer bankruptcy are governed by Rule 1.5(a) of the Utah Rules of Professional Conduct.

ANALYSIS

6. The Issues addressed in this Opinion reflect the growing disconnect between individuals of modest means who need legal services and the ability for lawyers to serve those needs without incurring personal financial hardship. The Utah State Bar has long recognized this disconnect. Programs have been established to serve the needs of modest means consumers. Every lawyer has a duty to perform pro bono services. Yet, individuals who need to file Chapter 7 liquidation do so because creditors are garnishing wages or threatening foreclosure. The Utah State Bar cannot reasonably expect that these needs will be met pro bono. Accordingly, it is not sufficient in this Opinion to merely declare practices of the consumer bankruptcy bar to be unethical. Rather, this Opinion is intended as a guide to the consumer bankruptcy bar in order to aid them in serving their clients while avoiding violations of the Utah Rules of Professional Conduct. While this Opinion discusses the consumer bankruptcy bar, the provisions on advertising, unbundling of services where allowed by law, and full disclosure to the clients are applicable to all lawyers.

7. It takes money to do a consumer bankruptcy. There is a substantial filing fee which may be paid in installments. If the filing fee is not paid, the case will be dismissed. In order to get relief from creditors, a petition must be filed with the court. Typically, the low

advertised price refers to the attorney's work in preparation of the petition.[3] Thereafter, there is post-petition work, including filing a schedule of the debtor's affairs, attending a meeting of creditors, and negotiating any affirmation of debt agreements. In the hypothetical given the Committee, the post-petition, attorney fees range from $1,000 to $2,000.[4]

8. Most individuals in Chapter 7 liquidation do not have funds to pay the lawyer for post-petition work that will not be discharged in the bankruptcy.[5] According to the hypothetical, the lawyer informs the client that additional work must be done in order to accomplish the goal of discharged debt. The client has the choice of hiring the filing lawyer, hiring another lawyer, or doing the work themselves as a *pro se* litigant.

9. Pre-petition attorney fees are dischargeable as is any other debt. Post-petition attorney fees are not dischargeable and must be paid even after all other debts are discharged.[6] Care must be taken to include only fees generated post-petition in the post-petition attorney fee contract. Care must also be given to full disclosure of the necessity for further work and the amount to be charged. As individuals in consumer bankruptcy are perhaps hiring a lawyer for

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[3]A representation that speed is needed in filing the initial petition is subject to the duty of diligent representation under Rule 1.3 of the Utah Rules of Professional Conduct. A false representation that speed in filing is needed is precluded as a "false or misleading communication about the lawyer's services" and thus, precluded by Rule 7.1(a) of the Utah Rules of Professional Conduct.

[4]The Committee does not opine on matters of bankruptcy law, as indeed those matters are beyond the scope of the interpretation of the Utah Rules of Professional Conduct. Rule 8.4(d) precludes conduct that is prejudicial to the administration of justice. Utah R. Prof. Cond. 8.4(d). A lawyer must comply with all general and local rules of the bankruptcy court, and this Opinion does not mean to imply or suggest otherwise.

[5]This is a major difference between Chapter 7 liquidation and Chapter 13 reorganization. Legal fees for Chapter 13 may be paid as part of the debtor's plan for reorganization. The lawyer, however, has a duty of competence and diligence under Rule 1.1 and 1.3 to effectively counsel the client as to the risks and benefits of relief under both chapters. It would be a violation of those rules if the lawyer placed the client in Chapter 13 merely to enhance the lawyer's ability to collect his fee. *See* Utah R. Prof. Cond. 1.1 & 1.3.

[6]The Committee expresses no opinion on when a debt might be considered post-petition under applicable bankruptcy law. Such a question goes beyond the interpretation of the Utah Rules of Professional Conduct.

the first time in their lives, the lawyer has a duty of fully informing the client in advance about these matters.

10. The hypothetical given the Committee indicated that a law firm "factoring" company would buy the notes of debtors covering post-petition attorney fee costs at a discount rate on such contracts of thirty percent. In cases of non-payment, the "factoring" company would "gently" pursue payment from the client. The factoring company would have no recourse to the lawyer but would look solely to the client for payment. The hypothetical indicated that a large percentage of Utah Chapter 7 bankruptcies are financed in this manner.

11. A lawyer is allowed to limit the scope of her engagement if the limitation is reasonable under the circumstances and the client gives informed consent.[7] *See* Utah R. Prof. Cond. 1.2(c). Rule 1.5(b) requires that the scope of the representation and the basis or rate of the fee be communicated to the client, "preferably in writing." Utah R. Prof. Cond. 1.5(b). This is particularly applicable when the lawyer agrees to perform only a portion of the services needed to accomplish the goals of a legally unsophisticated client. In *In re Seare,* the Nevada

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[7] "Informed Consent" denotes the agreement by a person to a proposed course of action after the lawyer has communicated adequate information and explanation of the material risks of and reasonably available alternatives to the proposed course of action. *See* Utah R. Prof. Cond. 1.1(f). Further

> when a lawyer and a client or potential client are discussing the scope of a proposed representation, the lawyer usually has superior knowledge about what the scope of the undertaking would be in the absence of a limiting agreement. Accordingly, the lawyer should have the responsibility for identifying and specifying any limitations and should presumptively bear the consequences of any misunderstanding. For this reason, both Rule 1.2(c) and Restatement [of the Law Governing Lawyers] § 19 appropriately require that any limitation on the scope of a representation be reasonable (which is to say not harmful to the client) *and* that the client give informed consent. Thus, the client will have been told about and accepted the risks that are inherent in contracting for limited legal services....

Geoffrey C. Hazard, Jr. , W. William Hodes, Peter R. Jarvis, THE LAW OF LAWYERING § 5.10 (2005-2 Supp.).

bankruptcy court discussed the ethical problems of "unbundling" bankruptcy services at great length and explained, in pertinent part:

> These facts present the legal issue of when consumer bankruptcy attorneys . . . may limit the scope of their representation, a practice colloquially referred to as "unbundling." While unbundling is permissible, it must be done consistent with the rules of ethics and professional responsibility binding on all attorneys. Those rules allow a lawyer to limit his or her representation *only when it is reasonable under the circumstances to do so, and only when the client gives informed consent to the limitation.*

In re Seare, 493 B.R. 158, 176 (Bankr. D. Nev. 2013) (emphasis added). The Committee adopts the discussion in *In re Searle* regarding ethical concerns of unbundling services in bankruptcy that Utah attorneys should consider, as follows:[8]

> Unbundling raises concerns, however. The push to limit representation may come from the attorney, who often benefits from and has superior knowledge of the possible ramifications of excluding certain services.
>
> > There are strong reasons for protecting those who entrust vital concerns and confidential information to lawyers. . . . Clients inexperienced in such limitations may well have difficulty understanding important implications of limiting a lawyer's duty. Not every lawyer who will benefit from the limitation can be trusted to explain its costs and benefits fairly. . . . In the long run, moreover, a restriction could become a standard practice that constricts the rights of clients without compensating benefits. The administration of justice may suffer from distrust of the legal system that may result from such a practice. Those reasons support special scrutiny of noncustomary contracts limiting a lawyer's duties, particularly when the lawyer requests the limitation.
>
> *Restatement (3d) of Law Governing Lawyers* § 19 (2000).
>
> There is a particular concern in consumer bankruptcy practice that attorneys will unbundle services that are essential or fundamental to bankruptcy cases and clients' objectives.

[8]Of course, should the United States Bankruptcy Court for the District of Utah decide that unbundling of Chapter 7 petitions is not allowed, this opinion relates only to situations in which unbundling is allowed by law. The Committee expresses no opinion as to local Utah bankruptcy rules and law.

> A lawyer walks a perilous path in attempting to limit the services provided to bankruptcy debtors. Making an effective disclosure of the risks of such an arrangement, and obtaining informed consent, may be impossible in some cases. As noted, some lawyer services are so fundamental and essential to effective representation, no amount of disclosure and consent will suffice. Instructing a debtor to "go it alone" in any significant aspect of the bankruptcy case exposes counsel to possible criticism, and worse yet, a potential for sanction.

Hon. Jim D. Pappas, *Simple Solution = Big Problem*, 46 ADVOCATE (IDAHO) 31, 33 (2003).

* * *

In spite of the concerns that unbundling raises, the ABA amended Model Rule 1.2(c) in 2002 to expressly allow limited-scope representation and provide a mechanism to regulate it. [Michele N. Struffolino, *Taking Ltd. Representation to the Limits: The Efficacy of Using Unbundled Legal Servs. in Domestic Relations Matters Involving Litig*., 2 ST. MARY'S J. LEGAL MAL. & ETHICS 166, 215 (2012) ("Struffolino");] AM. BAR ASS'N, ANNOT. MODEL RULES OF PROF. COND. 38 (2011) ("ANNOTATED RULES"). The ABA's goal was to "encourage attorneys to provide some assistance to low- and moderate-income litigants who could not otherwise afford full representation." [Struffolino, at 215] (citing AM. BAR ASS'N, STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 8 (2009)); ANNOTATED RULES 38 (citing AM. BAR ASS'N, LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROF. COND., 1982-2005 at 55 (2006)). ABA Model Rule 1.2, which Nevada has adopted verbatim, states that "[a] lawyer may limit the scope of representation if the limitation is *reasonable under the circumstances* and the client gives *informed consent.*" Nev. R. Prof. Cond. 1.2(c) (2011) (emphasis supplied).

Shortly after the ABA amended the rule, the ABA published the *ABA Handbook,* a report on limited scope legal assistance. The *ABA Handbook* emphasizes that the majority of people in our nation are low and moderate income, and that often they cannot afford to pay lawyers in litigation. *Id.*at 3. Limited scope legal representation can make the judicial process fairer by providing greater access to justice. *Id.* at 3-4. The ABA quoted a long time limited-service practitioner for the proposition that unbundling should be client driven—"[i]n this legal relationship, 'the client is in charge of selecting one or several discrete lawyering tasks contained within the full-service package.'" *Id.* at 7 (quoting FORREST S. MOSTEN, UNBUNDLING LEGAL SERVS.: A GUIDE TO DELIVERING LEGAL SERVS. A LA CARTE 1 (2000)).

* * *

> If limited representation is selected, "the lawyer must also alert the client to reasonably related problems and remedies that are beyond the scope of the limited-service agreement." [*ABA Handbook*] at 68. In a related ethics opinion, the Los Angeles County Bar Association put it this way,
>
> > The attorney has a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention, and to inform the client that the limitations on the representation create the possible need to obtain additional advice, including advice on issues collateral to representation.
>
> *Id*. at 69 (quoting Los Angeles County Bar Ass'n, Prof. Responsibility & Ethics Comm., Ethics Op. 449 (March 1988)).

*In re Sear*le, 493 B.R. at 184-86.

12. A lawyer should not automatically assume that "unbundling" the filing of a petition is reasonable under the circumstances of the case. Indeed, propriety of unbundling a petition may be the *exception rather than the usual practice*.[9] Recent bankruptcy ethics cases demonstrate the concerns of the bankruptcy courts. In *In re Seare,* the majority of the client's unsecured debt was a judgment for fraud. 493 B.R. at 171. The lawyer failed to investigate the nature of the judgment and thus failed to learn that this debt was non-dischargeable. *Id.* at 190-91. He then filed an unbundled and worthless Chapter 7 petition. *Id.* at 173. The attorney was

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[9] The Committee recommends careful consideration of Justice O'Connor's warning concerning flat fees in "simple" cases:

> Until one becomes familiar with a client's particular problems, there is simply no way to know that one is dealing with a 'routine' divorce or bankruptcy. Such an advertisement is therefore inherently misleading if it fails to inform potential clients that they are not necessarily qualified to decide whether their own apparently simple problems can be handled by 'routine' legal services. Furthermore, such advertising practices will undermine professional standards if the attorney accepts the economic risks of offering fixed rates for solving apparently simple problems that will sometimes prove not to be so simple after all.

Shapiro v. Kentucky Bar Ass'n, 486 U.S. 466, 485-86 (1988).

required to disgorge all fees and present a copy of the court's opinion to any future client when the attorney proposed to unbundle the filing of a petition. *Id.* at 224-27.

13. *In re Minardi*, 399 B.R. 841 (Bankr. N.D. Okla. 2009), concerned a lawyer's attempt to limit services to exclude negotiation of reaffirmation agreements. *Id.* at 843. The court found that the "decision to reaffirm an otherwise dischargeable debt plays a critical role in the bankruptcy process—so critical, that assistance with the decision must be counted among the necessary services that make up competent representation of a Chapter 7 debtor." *Id.* at 848. Particularly, the court explained that an agreement for limited representation does not exempt a lawyer from the duty to provide competent representation. *Id.* at 849-52.

14. The Idaho bankruptcy court provides that "'an attorney, in accepting an engagement to represent a debtor in a bankruptcy case, will find it exceedingly difficult to show that he properly contracts away any of the fundamental and core obligations such an engagement necessarily imposes. Proving competent, intelligent, informed, and knowing consent of the debtor to waive or limit such services inherent to the engagement will be required.'" *In re Grimmett*, 2017 WL 2437231, 2017 Bankr. LEXIS 1492, at *15 (Bankr. D. Idaho June 5, 2017) (quoting *In re Castorena*, 270 B.R. 504 , 530 (Bankr. D. Idaho 2001)).

15. If a consumer bankruptcy lawyer presents unbundled legal services, she must comply with Rule 7.1's limitations on false or misleading communications. A representation is false or misleading if it "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." Utah R. Prof. Cond. 7.1(a). It would be materially misleading if a bankruptcy lawyer unbundled services and did not explain in detail, preferably in writing, what additional services would be needed to accomplish the client's goal. Just as in *Seare*, it would not be sufficient to remain silent when it

is well known that an adversary proceeding is likely to occur. Further, statements indicating that the one-time fee is "for a limited time" or has "been held over" are misleading[10] if not accurate.

16. It is not unlawful for lawyers to sell or encumber their accounts receivable, whether or not the work has been accomplished. Sale or encumbrance of accounts receivable is not sharing fees with a non-lawyer. Utah R. Prof. Cond. 5.4(a). This is equally true for consumer bankruptcy lawyers. As the Texas Court of Appeals explained in *Counsel Financial Services v. Leibowitz*:

> The main thrust of Leibowitz's argument is that loans such as those at issue in this case fundamentally violate public policy as articulated in the disciplinary rules, which as a general rule prohibit lawyers from sharing legal fees with non-lawyers. However, Texas case law allows an attorney to assign accounts receivable, consisting of consisting of current or future, earned or unearned, attorney fees as property securing a transaction. Moreover . . . there is a significant difference between sharing legal fees with a non-lawyer and paying a debt with legal fees.

2013 WL 3895317, 2013 Tex. App. LEXIS 9252, at *27-28 (Tex. Ct. App. 13th Dist. July 25, 2013)(citations omitted).

17. There are a number of potential pitfalls, however, in litigation funding. All of these pitfalls must be discussed with the client. Because of a regular relationship with the funding company, the possibility of a current conflict of interest between the lawyer's interest, the client's interest and the interest of the funding company in being paid, the lawyer must

[10] Those statements may be unlawful under the Utah Consumer Sales Practices Act, Utah Code Ann. § 13-11-1, *et seq*. The Utah Consumer Sales Practices Act provides that it is a deceptive act to knowingly or intentionally indicating the subject of a consumer transaction is available to the consumer for a reason that does not exist, such as "going out of business" or lost our lease," when those statements are not true. *Id.* § 13-11-4(2)(d). A lawyer who makes false statements about a certain fee being available for only a limited time is guilty of misconduct pursuant to Rule 8.4 of the Utah Rules of Professional Conduct. By making such false statements, the lawyer engages in conduct involving dishonesty, fraud, deceit or misrepresentation.

comply with Rule 1.6(b) of the Utah Rules of Professional Conduct. The client must give informed consent, confirmed in writing, when waiving any such conflicts.

18. The lawyer has but one client and must maintain confidentiality and loyalty towards that client. "Although litigation funding companies are not subject to lawyers' rules of professional conduct, the lawyers whose clients receive funding are." Geoffrey Hazard, W. William Hodes & Peter Jarvis, THE LAW OF LAWYERING § 8.26 (2014 Supp.). Chief among the pitfalls are client confidentiality and protecting the independence of the attorney. Further we call attention to Utah Ethics Advisory Opinion 13-05 which discusses the extent to which a lawyer may involve herself in helping the client apply for financial assistance.

19. Finally, the hypothetical raises questions as to the reasonableness of the consumer bankruptcy lawyer's fees. If the lawyer is willing to do the work with a thirty percent discount, we question, but do not resolve, whether the total fee is reasonable.[11] There are, however, guidelines. The consumer bankruptcy lawyer, like all other lawyers, is subject to the reasonable fee provisions of Rule 1.5 of the Utah Rules of Professional Conduct, which is determined by the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly. Other factors include the likelihood that accepting the matter would preclude taking other employment by the lawyer. A reasonable fee might be the fee customarily charged in the locality for similar services. Finally, the reasonableness of a fee depends upon the experience, reputation and ability of the lawyer performing the service.

[11] Other bankruptcy attorneys claim that in cases of financed Chapter 7 bankruptcies, the financing lawyer increases his fee by as much as 50% to 184%. This Opinion should not be read as indicating approval of such price increases. Indeed, such price increases may implicate Rule 1.7(a)(2) of the Utah Rules of Professional Conduct, in that the representation of a client might be adversely impacted by the personal interest of the lawyer.

Faculty

Hon. Kevin R. Anderson is a U.S. Bankruptcy Judge for the District of Utah in Salt Lake City, appointed on Sept. 4, 2015. Previously, he served for 17 years as the standing chapter 13 trustee for the District of Utah, administering more than 70,000 chapter 13 cases. Judge Anderson served as president of the National Association of Chapter 13 Trustees (NACTT), and he also served on several national committees regarding chapter 13 legislation, rules, forms and policy. He has frequently written and presented on chapter 13 issues, including for the *Norton Bankruptcy Law Advisor*, the *ABI Journal*, the *NACTT Quarterly* and the *NACTT Academy for Consumer Bankruptcy Education*. He is also a Fellow in the American College of Bankruptcy. Prior to his appointment as chapter 13 trustee, Judge Anderson practiced for 13 years as a commercial litigator with an emphasis on civil fraud, real property, and representing chapter 11 and 7 trustees. He also clerked for Hon. David N. Naugle, U.S. Bankruptcy Judge for the Central District of California. Prior to law school, Judge Anderson worked for two years as a data systems specialist testing military and commercial jet engines for General Electric. He received his J.D. *cum laude* from the J. Ruben Clark Law School at Brigham Young University.

Beverly M. Burden has served as the chapter 13 trustee for the Eastern District of Kentucky in Lexington since 1999. She previously clerked for Hon. Joe Lee, and prior to that was an assistant attorney general for the Commonwealth of Kentucky in its Consumer Protection Division. Ms. Burden has presented at numerous national, regional and local bankruptcy seminars. She is a member of the National Association of Chapter Thirteen Trustees (NACTT) and serves on the board of directors of the NACTT Academy for Consumer Bankruptcy Education (www.considerchapter13.org). Ms. Burden chairs the University of Kentucky Biennial Consumer Bankruptcy Law Conference and served on the Chapter 13 Advisory Committee to the ABI Commission on Consumer Bankruptcy. She also is a regular contributor to www.considerchapter13.org and writes a blog for practitioners in the Eastern District of Kentucky at www.ch13edky.wordpress.com. Ms. Burden was the 1997 recipient of the Kentucky Bar Association's Justice Thomas B. Spain Award for Outstanding Service in Continuing Legal Education and in 2017 was inducted as a Fellow in the American College of Bankruptcy. She received her J.D. from the University of Kentucky College of Law and holds a B.B.A. in accounting.

Heather M. Giannino is the managing attorney of the Bankruptcy Department at Heavner, Beyers & Mihlar, LLC in Decatur, Ill., where she oversees secured creditors' rights in bankruptcy, foreclosure and related matters. She is a member of ABI and the Bankruptcy Association of Southern Illinois (BASIL), National Association of Chapter Thirteen Trustees (NACTT), American Legal and Financial Network (ALFN), Illinois State Bar Association (ISBA) and Decatur Bar Association (DBA). Ms. Giannino co-chairs ABI's Hon. Eugene R. Wedoff Seventh Circuit Consumer Bankruptcy Conference, is Education Director of ABI's Consumer Bankruptcy Committee, and is a Coordinating Editor for the *ABI Journal*'s Consumer Point/Counterpoint column. She is licensed to practice in Illinois, Missouri and Indiana. Ms. Giannino received her B.S. in accounting and finance *summa cum laude* from Millikin University and her J.D. *cum laude* from Chicago-Kent College of Law.

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