AMERICAN BANKRUPTCY INSTITUTE

2021 Alexander L. Paskay Memorial Virtual Bankruptcy Seminar

Unmasking Some Great Consumer Cases from 2020 and 2021

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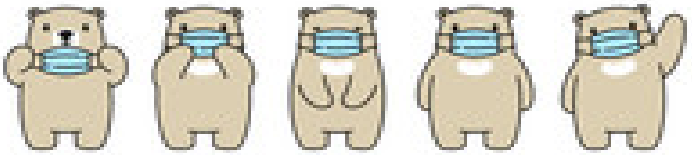
CONCURRENT SESSION

2021

CONSUMER LAW UPDATE

Unmasking Some Great Consumer Cases and Legislation from 2020 and 2021



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March 26, 2021, Tampa, Florida

Discussion Topics

1. **Supreme Court Cases**

2. **Cases from Bankruptcy Courts in Florida and Outside of Florida**

3. **2020 Quarterly Consumer Law Updates by Hon. William Houston Brown (reprinted by permission)**

4. **Excerpts from the Consolidated Appropriations Act of 2021 (reprinted by permission of compiler Elena Ketchum)**

5. **Select Local Rules/Procedures Update (Fed. R. Bankr. P. 3002.1, FLMB admin. order re reimposition of stay, FLSB LBR requiring service of stay relief orders on state clerks, etc., Judge Colton's pilot chapter 13 procedures are history, etc.)**

Supreme Court Cases

Ritzen Group, Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582 (2020) (finality of order re stay relief): https://www.supremecourt.gov/opinions/19pdf/18-938_l6gn.pdf.

Roman Catholic Archdiocese of San Juan v. Feliciano, 140 S. Ct. 696 (2020) (nunc pro tunc): https://www.supremecourt.gov/opinions/19pdf/18-921_2cp3.pdf.

Chicago v. Fulton, 141 S. Ct. 585 (2021) (passive exercise of control doesn't violate § 362(a)(3)): https://www.supremecourt.gov/opinions/20pdf/19-357_6k47.pdf.

Cases from Bankruptcy Courts in Florida[1]

Middle Florida

1. ***In re Burns***, 6:19-BK-08093-KSJ: The debtor is permanently enjoined from filing any future bankruptcy cases in any jurisdiction. The order further states that if the debtor attempts to file another bankruptcy case in violation of the injunction, the Court will issue a bench warrant for the debtor's arrest without further notice or hearing. The debtor filed eight prior cases, two with inconsistent social security numbers. Additionally, the debtor's husband filed a series of coordinated abusive bankruptcy filings. Every case was dismissed to failure to file schedules, pleadings, pay filing fee, and/or attend the § 341 meeting.

2. ***In re Cotter***, 6:17-bk-04372-KSJ, Adv. No. 6:18-ap-00006-KSJ: Denial of discharge under § 727(a)(5) is appropriate where debtor fails to explain a loss of assets. plaintiff has preliminary burden of demonstrating debtor "formerly owned substantial, identifiable assets that are now unavailable to distribute to creditors." Upon showing, debtors must demonstrate satisfactory reason why they no longer have the asset. A vague and indefinite explanation without corroboration is not enough. In denying the debtor's motion for judgment on the pleading, the Court found it is not beyond doubt that Plaintiff can prove no set of facts in support of its claims.

3. ***In re Cruz (Doiron v. Cruz)***, 6:16-bk-07815-KSJ, Adv. No. 6:17-ap-00043-KSJ: In a dischargeability proceeding under § 523(a)(6) for defamation, a prior state court judgment established most of the facts: The plaintiff had worked for the debtor-doctor, who claimed in an employee evaluation that the plaintiff did excellent work as nurse practitioner. Two days later, the plaintiff resigned to work for a competitor, and the debtor, angry, thereafter sent a letter to a licensing board and hospitals criticizing the plaintiff's work. A state court jury found statements constituted defamation and awarded the plaintiff $150,000. The Court held that the defamatory statements were willful and malicious. Therefore, the pre-petition judgment debt is not dischargeable.

4. ***In re Daniel (Avren v. Daniel)***, 613 B.R. 374 (Bankr. M.D. Fla.) (CED): In an adversary proceeding seeking an exception to the discharge under § 523(a)(2)(A),(4) and (6) and objecting to discharge under § 727(a)(4), creditor-

[1] All references to statues are to the Bankruptcy Code, title 11 of the United States Code, unless otherwise noted. All references to rules are to the Federal Rules of Bankruptcy Procedure, unless otherwise noted.

plaintiff failed to prove its case under all counts. Creditor could not justifiably have relied on any misrepresentation by chapter 7 debtor as to whether he had capital in the form of a $100,000 certificate of deposit to "back up" repayment of loan, and thus debtor's alleged misrepresentation could not be excepted from discharge under § 523(a)(2)(A) as having been obtained by false pretenses, a false representation, or actual fraud; loan omitted basic information regarding the alleged CD, such as the name of the bank and possibly the account number, and despite those obvious omissions, creditor never spoke with attorney who prepared the note, and there was no evidence that creditor performed even a minimal investigation to verify the status of the CD before he advanced the funds. And § 523(a)(4)'s exception for debts for fraud or defalcation while acting in a fiduciary capacity could not be a basis for creditor to have loan to chapter 7 debtor excepted from discharge, absent evidence that debtor owed a fiduciary duty to creditor or that debtor served as a fiduciary of an express trust. Further, § 523(a)(6)'s exception for debts due to willful and malicious injury by the debtor to another entity or to the property of another entity could not be a basis for creditor to have loan to chapter 7 debtor excepted from discharge, where creditor failed to identify any specific acts by debtor that he believed were wrongful and intended to cause injury, and creditor failed to present any evidence at trial to establish that debtor intended to injure creditor by borrowing money. Regarding § 727(a)(4), the debtor's alleged false statements on his bankruptcy schedules and statement of financial affairs, which allegedly included listing wrong address for creditor, failing to list creditor's pre-petition lawsuit against debtor, failing to list debtor's payments made on behalf of his daughter, failing to list three judgment debts, failing to include his non-filing spouse's income, and failing to disclose all cash on hand, were neither fraudulently made nor material, and thus the statements could not be a basis to except creditor's loan to debtor from discharge under Bankruptcy Code's "false oath" provision; alleged omissions did not concern the discovery of any significant assets or business dealings by debtor, and creditor had actual notice of debtor's bankruptcy.

5. ***In re De Bauer***, Case No. 6:20-bk-04228-KSJ: The issue presented was "whether the Debtor may claim a Florida homestead exemption when neither she nor any family member residing in the home are legally permitted to permanently reside in the United States." The Court answered "no," sustaining the chapter 7 trustee's objection.

6. ***In re Echeverria (Echevarria v. Nat'l Auto Finance Co., Inc.)***, 6:19-ap-141-KSJ: The Court held that the debtors did not have standing to file adversary proceeding against creditor based on the claims the creditor was

improperly trying to collect on a settled debt. The claim that was the subject of the adversary proceeding was property of the estate and, therefore, only the chapter 7 trustee had standing until/unless the trustee abandons the asset to the debtor pursuant to § 554. The Court thus dismissed adversary proceeding for lack of standing. ***Postscript*** concerning motion for reconsideration: The plaintiffs' contention that they had sent earlier emails to the trustee discussing claims is without merit. Old emails do not constitute new evidence or demonstrate any reason for reconsideration.

7. ***In re Errico*****,** 618 B.R. 41 (Bankr. M.D. Fla. 2020) (CED): The Court denied the debtor's motion to modify his chapter 13 plan to abate payments, granted stay relief, and dismissed the case because the plan and the petition were not filed in good faith. This was the debtor's ninth case (and second within a recent one-year period).

8. ***In re First Florida Living Options, LLC***, 2020 WL 3053135 (Bankr. M.D. Fla.) (JAF): Automatic stay applied to request by creditors of nursing homes to notify AHCA of their outstanding judgment under §400.024, Fla. Stat, which allows AHCA to collect the judgment or to deny license renewal or transfer. Action was an effort to collect a debt, creditors were not a governmental unit, and statute required payment, not investigation only by AHCA, and narrow exception of § 362(b)(4) did not apply to commencement of action by creditors as non-governmental unit.

9. ***In re Fitzgerald***, 8:19-BK-07741-RCT: In this chapter 13 case, Debtor timely filed his creditor matrix and schedules but failed to accurately list a particular unsecured creditor's address, resulting in the creditor having no notice of the bankruptcy until some three months after the claims bar date. Upon learning of the bankruptcy when Debtor amended his schedules and matrix to list a proper address for the creditor, the creditor promptly moved for an extension of time under Fed. R. Bankr. P. 3002(c)(6). The court held that an extension of the claims bar date is permissible as to a creditor when the debtor timely files the list of creditors but either omits or incorrectly lists the creditor seeking the extension. Noting that in such circumstances a debtor fails in his duties under both Fed. R. Bankr. P. 1007(a) and § 521, the court concluded that when that failure results in lack of sufficient notice so as to deny a creditor a reasonable period in which to file its proof of claim, Fed. R. Bankr. P. 3002(c)(6) provides the court with the discretion to extend the bar date as to that creditor. Examining a series of factors, the court found that the circumstances of the case warranted an extension of the claims bar date as to the petitioning creditor.

10. ***In re Givans***, 6:19-bk-01928-KSJ: On motions for summary judgment by creditors and the chapter 7 trustee concerning tenancy by the entirety issues, held: 1) Creditors failed to establish the absence of a fact dispute concerning the existence of a joint creditor that would prevent the debtor from claiming property exempt under a tenancy by entirety. Genuine issues of material fact precluded summary judgment. 2) A revocable living trust cannot own property as tenants by the entireties to exempt it from creditors' claims in bankruptcy cases. Summary judgment granted to the trustee to administer non-homestead real property held by the trust.

11. ***In re Greer (Greer v. Select Portfolio Servicing, Inc.)***, 621 B.R. 514 (Bankr. M.D. Fla. 2020) (CPM): Court confirms application of res judicata, collateral estoppel, and lack of subject matter jurisdiction. Court also explains distinction between jurisdiction and venue. Good discussion on various legal theories. Bonus: Check out the Court's order denying the motion by the same debtor to disqualify the judge.

12. ***In re Hopkins (Roberts v. Hopkins)***, 6:19-bk-07280-LVV, Adv. No. 6:20-ap-00032-LVV: The Plaintiffs failed to state a claim to establish an equitable lien on the Debtor's homestead. Therefore, the Court granted the defendant's motion to dismiss the adversary proceeding. An equitable lien may only be placed on a homestead when funds obtained through fraud of egregious behavior are used to purchase, invest in, or improve the homestead. Even had the plaintiffs brought a claim for fraudulent transfer and traced the funds into the mortgage payments on the homestead, the plaintiffs still cannot state a claim for an equitable lien because three regular mortgage payments do not satisfy the requirement of monies to invest in, purchase, or improve the homestead. This does not mean the use of fraudulently obtained funds to pay a mortgage can never result in an equitable lien. A substantial principal reduction of the mortgage loan or payment of several mortgage payments may qualify as a purchase or investment in the homestead. That was not the case here.

13. ***In re Juravin (FTC v. Juravin)***, 6:18-bk-06821-KSJ, Adv. No. 6:19-ap-00030-KSJ: FTC sued the defendant-debtor in district court alleging deceptive trade practices for sale and advertising of weight loss products. Summary judgment was entered with no trial**,** testimony, or findings of the debtor's credibility. The plaintiff sought an exception from discharge under § 523(a)(2)(A) and moved for summary judgment relying on *res judicata* effect of the district court's final order finding violations of FTC Act. The Court held § 523(a)(2)(A) must establish debtor had intent to deceive. The district court made no such finding on this issue, as to which summary judgment was denied. Summary judgment was partially granted as to the other four elements established in district court's order: false representation, reliance,

reliance was justified, and customers sustained a loss due to misrepresentation. ***Postscript*** after trial: The Court determined the debtor made numerous affirmative misrepresentations about the efficacy of his weight loss products with intent to deceive his customers and enrich himself by over $7 million. The district court judgment against the debtor was not discharged.

14. ***In re Kokin,*** 6:19-bk-02413-KSJ: The Court rejected straight line accounting method in tracing monies to determine exemption, instead adopting "first in, first out" method. Debtors failed to claim exemption for funds in custodial account holding tax refund. Additionally, Debtors' frequently transferred funds, benefitting from use of the account. However, Debtors were permitted to amend schedules to claim exemption to custodial account. Additionally, Debtors had to turnover vehicle or pay value of vehicle less $2000 exemption, $325 depreciation for use of car after petition date. ***Postscript*** concerning cross motions for reconsideration: Eleventh Circuit holds that the only grounds for granting such motions are "newly-discovered evidence or manifest errors of law or fact." Therefore, both requests denied as improperly asking the Court to rethink a ruling, rightly or wrongly. ***Postscript*** regarding subsequent case with same issue: ***In re Dupree***, 6:19-bk-07126-KSJ: The Court receded from the ruling in *In Re Kokin* and concluded child tax credit is not exempt under Florida law.

15. ***Diane Leslie McAnally (Welch v. Mt. Ogden Eye Center, LLC et al.)***, 8:19-BK-00132-RCT, Adv. No. 8:19-BK-00132-RCT: The Court exercised its discretion to permissibly abstain from hearing the proceeding finding that all the relevant factors weighed in favor of abstention. At the heart of the proceeding was the plaintiff-debtor's state law claim that the mortgagee lacked standing to enforce the note and mortgage. The parties' dispute was the subject of long-standing state court litigation, in which a partial judgment in favor of the defendants had been rendered. The adversary proceeding had no bearing on the underlying bankruptcy as the real property involved had been formally abandoned by the chapter 7 trustee, the debtor received her discharge, and the chapter 7 trustee's final report had been approved. But for the pendency of the proceeding, the debtor's case would have been closed.

16. ***In re McGrory (Roberts v. McGrory)***, 6:19-bk-07256-LVV, Adv. No. 6:20-ap-00027-LVV: The plaintiffs failed to state a claim to establish an equitable lien on the debtor's homestead. An equitable lien may only be placed on a homestead when funds obtained through fraud of egregious behavior are used to purchase, invest in, or improve the homestead. Even had the plaintiffs brought a claim for fraudulent transfer and traced the funds into the mortgage payments on the homestead, the plaintiffs still did not state a claim for an equitable lien because three regular mortgage payments do not satisfy

the requirement of monies to invest in, purchase, or improve the homestead. This does not mean the use of fraudulently obtained funds to pay a mortgage can never result in an equitable lien. A substantial principal reduction of the mortgage loan or payment of several mortgage payments may qualify as a purchase or investment in the homestead. That was not the case here. The Court dismissed the adversary proceeding.

17. ***In re Micallef***, 6:18-bk-06259-KSJ: Chapter 7 trustee filed adversary objecting to discharge in six counts under § 727 and sought a summary judgment. Although the debtor filed a brief answer, the debtor did not respond to the trustee summary judgment motion, leaving it unopposed. Held: The trustee met its burden, and the Court denied the discharge. The debtor failed to adequately explain where $450,000 in assets went.

18. ***In re Miller (Miller v. Miller),*** 6:19-bk-02485-KSJ, Adv. No. 6:19-ap-00247-KSJ: The plaintiff-ex-husband's request for summary judgment that $77,106.43 assessed against the debtor-ex-wife in acrimonious divorce was nondischargeable was granted. Section 523(a)(15) excepts from discharge a debt owed to a spouse, former spouse, or child incurred in a divorce and is liberally construed to encourage payment of familial obligations rather than give a debtor a fresh financial start. Vexatious fees awarded by trial court demonstrate willful and malicious harm requiring the spouse to spend $30,000 for unnecessary attorney fees.

19. ***In re Moffitt (Trujillo v. Moffitt)***, 8:19-bk-3392-CPM, Adv. No. 8:19-ap-337: Relation-back doctrine did not apply to a Statement of Corporate Ownership inadvertently filed in lieu of a complaint to determine dischargeability of debt under § 523(a)(6). And under Rules 9006(b) and 4007(c), motion to enlarge time must be filed prior to expiration of the original deadline. The adversary proceeding was dismissed as untimely.

20. ***In re Musto***, 8:19-bk-03452-RCT: Following a trial focused largely on the appropriateness of sanctions, the Court awarded Debtor $450.00 in nominal damages for the violation of the discharge injunction and Debtor's counsel a reduced sum of $10,120.00 for reasonable attorney's fees and costs incurred to remedy the violation, for a total sanction of $10,570.00. The Court concluded that Debtor failed to meet the exacting standard required for the imposition of "emotional distress" sanctions. Nevertheless, the Court found that the facts warranted sanctions in the form of nominal damages to vindicate Debtor's statutory right to be free of collection attempts in violation of the discharge injunction, particularly where the respondent Law Firm continued its improper attempts after acknowledging the Debtor's reminder that she had received her bankruptcy discharge. The Court reduced slightly counsel's sought fees and costs via adjustment to the lodestar and upon

consideration of the factors articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

21. ***In re Ojeda***, 9:19-bk-06611-FMD (CED): The debtors financed the construction of an inground swimming pool at their home and granted the lender a security interest in the swimming pool. The lender filed a claim in Debtors' Chapter 13 case, asserting that its claim is secured by the swimming pool. The Court concluded that under the Florida Uniform Commercial Code, (ch. 679, Fla. Stat.) the swimming pool is neither a "good" nor a "fixture" to which the lender's asserted security interest could attach. Therefore, the lender's claim is unsecured.

22. ***In re Olson***, 8:20-bk-04890-MGW: A debtor making direct mortgage payments under a chapter 13 plan is entitled to the benefit of Rule 3002.1 upon request to the Court.

23. ***In re Ortiz***, 6:18-bk-05222-KSJ: Chapter 7 trustee filed complaints against creditor banks for violation of consumer protection statutes. The trustee hired collection attorneys to pursue the claims and who were to receive between 40-50 percent of recovery. The trustee's statutory compensation was 25 percent of any recovery under $5000. A proposed settlement of $3,900 left $1,015 to pay creditor claims where together professional fees and costs would consume for 74 percent of the estate's recovery. Only three proofs of claim were filed, two of which were defendants in the collection adversary proceedings. The only other creditor had a claim of $125.18. The Court determined that denying the defendants' claims and denying approval of the settlement was in best interest of all creditors, holding that the chapter 7 trustee has a fiduciary obligation to treat all parties fairly, and the primary duty is to the estate's unsecured creditors.

24. ***In re Page (Groundhog Enterprises, Inc. v. Page)***, 2020 WL 5755331 (Bankr. M.D. Fla.) (KSJ): The Court dismissed adversary proceeding in part for the plaintiff's failure to state a claim. The plaintiff pleaded an exception to discharge and an objection to discharge under §§ 523(a)(2)(A) and 727(a)(4), respectively. Two years prior to bankruptcy case, the plaintiff had obtained a final default judgment against the defendant in state court for fraudulent merchant processing charges against the plaintiff's customers for goods and services never supplied. The intercepted charges were never reimbursed to the plaintiff, who then had to issue chargebacks to the customers. The Court found that the plaintiff stated claim for relief under § 523(a)(2)(A) but failed to establish under 727(a)(4) that the debtor knowingly and fraudulently in connection with the case made a false oath or account or received money for acting or forbearing to act.

25. ***In re Rivera***, 8:19-bk-08490-RCT: The Court was required to decide whether the Debtor must account for, on a going forward basis, certain bonus income as "projected disposable income" under § 1325(b)(1)(B) and dedicate future bonuses to his chapter 13 plan. The parties agreed that the analysis

was governed by *Hamilton v. Lanning*, 560 U.S. 505 (2010). Faced with a stipulated record, the Court found that the matter came down to the burden of proof. Examining *Hamilton* and its progeny, the Court concluded that the initial burden of proving unusual circumstances such that the Court might deviate from the calculation provided by a debtor's Official Form 122C (the "means test") logically fell to the party asserting that unusual circumstances in the case required the Court to deviate from the calculation on the official form. Noting it was a close call, the Court found that the Chapter 13 Trustee had met her initial burden to show unusual circumstances that were "virtually certain" to continue throughout the chapter 13 plan, namely that Debtor had a history of receiving a not-so-insignificant annual bonus. Debtor failed to establish otherwise. Accordingly, the Court sustained the Chapter 13 Trustee's objection to confirmation ruling that Debtor was required to account for the annual bonus in proposing his chapter 13 plan.

26. ***In re Rumptz***, 2020 WL 2462528 (Bankr. M.D. Fla.) (JAF): The Court declined to deny the debtor's discharge under § 727(a)(2) by finding that debtor did not transfer property within the year prior to the petition date or after the petition date with the intent to hinder, delay, or defraud creditors, and where the debtor cooperated with the trustee and provided satisfactory explanations to fulfill her duties as a debtor.

27. ***In re Sander***, 8:20-bk-02731-RCT: The Court found that a property owners association willfully violated the automatic stay when it filed a motion for sanctions in the state court after receiving notice of the debtor's bankruptcy. Noting that some courts have questioned whether the governing standard for "willfulness" under § 362(k) was altered by the U.S. Supreme Court's decision in *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019), the Court found it was unnecessary for it to decide that issue because under either standard the actions of the association's attorneys, who plainly had notice of the bankruptcy, were willful. The Association, unsuccessfully, tried to argue that it did not violate the automatic stay because the contempt motion that was filed in State Court was not an attempt to collect a debt but rather an attempt to obtain information to confirm the debtor's compliance with the declaration (the debtor failed to maintain homeowner's insurance on his property in violation of the governing declaration).

28. ***In re Santiago***, 6:10-bk-16771-KSJ and ***In re Coto***, 6:10-bk-10520-KSJ: Arguing excusable neglect under Fed R. Civ. P. 60(b)(1) (adopted by reference in Rule 9024), creditors sought to vacate an order holding them in contempt and assessing sanctions for attempting to collect on an arguably discharged debt. The debtor filed motions for contempt and sanctions, which motions which were properly served. The creditor's registered agent and its team members failed to forward to appropriate resources for counsel to defend, and they claim that constitutes excusable neglect. For excusable neglect, the

Eleventh Circuit requires (i) a meritorious defense, (ii) granting the motion would not prejudice the other party, and (ii) a good reason for failing to respond. Mishandling of multiple notices on multiple days fails to constitute excusable neglect or good reason. Motion denied.

29. ***In re Shumbera***, **6:20-bk-00100-LVV**: The Court denied the debtor's motion to modify confirmed plan due to balloon payment at end of plan. The balloon payment proposed by the debtor was not equal to the preceding 59 monthly payments and thus violated § 1325(a)(5)(B)(iii)(I).

30. ***In re Stanbrough (LSREF2 Baron, LLC v. Stanbrough)***, 3:15-bk-05601-KSJ, Adv. No. 3:18-ap-00072-KSJ: The debtor real estate developer filed a joint chapter 7 owing the plaintiff $17 million from failed real estate deals. A trust of unknown value was listed. The chapter 7 trustee examined the debtor, who truthfully testified about the trust assets and that the trust would pay out upon his father's death. His father passed on May 3, 2016. The discharge was entered June 20, 2016. By September 2016, the debtors received almost $400,000 from the trust, of which $270,000 was used to purchase a home. The debtors did not amend their schedules to disclose receipt of the funds. The plaintiff timely filed its complaint to revoke discharge under § 727(d)(2) for fraudulently failing to report receipt of the funds. The debtors contend the trust was not property of the estate and they had no obligation to report. The Court held that the funds did not fall under the definition of "bequest, devise or inheritance" under the § 541(a)(5)(A) standard and turned on Florida law for the definition of those words. The parties agreed the issue turned on whether the trust was testamentary (effective when settlor dies) making it property of the estate or, instead, whether it was *inter vivos* (taking effect in settlor's lifetime). The will did not create the trust. The trust was, therefore, *inter vivos*, having been created in the settlor's lifetime. Consequently, it was not property of the estate. There was no obligation to report the funds or the settlor's death. The Court did not revoke the discharge.

31. ***In re Thomas***, 2020 WL 4919874 (Bankr. M.D. Fla.) (CPM): Amscot's refusal to cash a check unless the debtor's outstanding debt to Amscot was paid was not a violation of the automatic stay because a "sliver" of the stay terminated by operation of law under §362(c)(3) as to the debtor and his property 30 days after the filing of the bankruptcy case, as the debtors had one prior case pending within one year of the current case filing. In adopting the majority position in a circuit split on the issue concerning the extent of the expiration of the stay for a debtor who had one case pending within one year of the current case filing, the Court noted that the most recent circuit court decision in the minority failed to consider the series-qualifier canon of statutory interpretation.

32. ***In re Velasco (Rosenberg Ventures, Inc. v. Velasco)***, 617 B.R. 718 (Bankr. M.D. Fla. 2020) (MGW): In an adversary proceeding under § 727(a)(3),(5), the creditor failed to prove missing assets were the debtor's as opposed to his company's. Further, the debtor who lived "hand to mouth" as a day laborer had no duty to keep books and records, and even if he did, he satisfactorily explained why he didn't have records. For a somewhat similar case, *see* ***In re Delgado (Crystal Blue, LLC v. Delgado)***, 2020 WL 4005786 (Bankr. M.D. Fla.) (CED).

33. ***In re Wright (Gargula v. Wright)***, 2020 WL 3966954 (Bankr. M.D. Fla.) (KSJ): Individual debtor, described by the Court as a "sophisticated businessperson with decades of experience in international real estate transactions," cooperated with a (now convicted) "foreclosure swindler" to hinder foreclosure of his home. The Court found that the debtor "was a knowing participant" in the scam, and "wanted to hinder or at least delay" the foreclosure action. The U.S. Trustee therefore met its burden under § 727(a)(2). Even so, the Court used its discretion to grant the debtor a discharge because (1) the debtor was otherwise "honest," and cooperative; (2) no other creditor objected, including the bank; and (3) the debtor's actions were not heinous enough to deny discharge of debts exceeding $124 million. Also, with respect to the plaintiff's § 727(a)(4)(A) count, the lengthy list of errors in the debtor's schedules and SOFA, consisting of immaterial or incorrectly listed errors/omissions, was not by itself sufficient to constitute a materially false oath with fraudulent intent.

Northern District (Specie)

Dekom	2020 WL 4004118	349(a)--Bankruptcy court denied confirmation of Debtor's sixth amended plan and dismissed case with prejudice. The Court found that cause existed to dismiss the case based on bad faith and prejudice to creditors, as the Debtor's primary purpose was to avoid the effect of a foreclosure judgment that had been entered more than five years ago and challenged in multiple courts.
Harvey	2020 WL 4000869	523(a)(8) --Debtor seeking to discharge student loans under section 523(a)(8) has the burden to prove all three prongs of the Brunner test to prevail. The Brunner test requirements to demonstrate undue hardship are conjunctive. The third prong of the Brunner test is the good-faith prong. Good- faith efforts to repay depend upon the Debtor's efforts to obtain employment, maximize income, and minimize expenses. Debtor's actual repayment efforts are also relevant to proving good faith. Court concluded that Debtor did not demonstrate a good-faith effort to repay her student loans because Debtor: (i) did not make a single payment; (ii) never inquired about repayment options; (iii) never applied for an income contingent repayment plan; (iv) failed to seek employment; and (v) failed to reduce expenses. Summary judgment granted in favor of Department of Education.
Hill	2020 WL 4464219	524(i)--Debtor faced foreclosure action after completing Chapter 13 plan. Debtor reopened Chapter 13 case, claiming that mortgagee misapplied payments and that the Trustee did not properly apply the payments. Debtor sought an order requiring the Chapter 13 Trustee to pay additional amounts to the mortgagee. The Court denied the relief requested by the Debtor, noting that section 524(i) of the Bankruptcy Code provides the debtor with a remedy when a creditor does not comply with terms of a confirmed plan and Bankruptcy Rule 3002.1 allows the debtor to determine whether the mortgagee properly applied the payments.
Owens	2020 WL 4000851	Ripeness--The Court dismissed the chapter 13 Debtor's adversary proceeding without prejudice for the Debtor to refile the action no sooner than one year before she completes her plan payments. The Court found that determining whether the Debtor was eligible to discharge her student loans before she completed most, if not all, of her chapter 13 plan payments would be premature based on the completion of these payments being a prerequisite to the Debtor receiving a chapter 13 discharge and it not being clear if the case would reach completion at the time of consideration.
Thacker	2020 WL 4000864	503(b)--Court held that its discretion to award administrative expenses to chapter 7 creditors is not limited by 503(b)(3)(D). The Court granted the administrative expense of the chapter 7 creditor's attorney based on the efforts of the attorneys not being duplicative of the chapter 7 trustee, the reasonableness of the fee after the attorneys agreed to decrease their fees from $75,222 to $50,000 in response to another creditor's objection, and the efforts conferring substantial benefit to the estate.

Southern District

1. ***In re Clancy***, Case No. 16-17900-RAM: Where confirmed plan does not provide for mortgage lender to be reimbursed for force-placed insurance or advancement of taxes and does not obligate the debtor to maintain insurance on the mortgaged property, lender may not recover for those advances. Lender's failure to object to the plan means the plan terms are *res judicata*.

2. ***In re Hermann (Bakst v. Herrmann)***, Case No. 19-15346-MAM: Notwithstanding many nondisclosures and errors in schedules and statement of financial affairs, the Court held that the chapter 7 trustee did not prove the requisite fraudulent intent meriting a denial of the debtor's discharge under § 727(a)(2)(A),(4).

3. ***In re Hordatt***, Case No. 19-22662-PGH: A debtor who is identified as "Borrower" under a reverse mortgage transaction but who did not sign the mortgage note is subject to the reverse mortgage's anti-acceleration clause applicable to borrowers (until her death). Consequently, the only cure due to the mortgagee was for advances for taxes and insurance.

4. ***In re Hornaday***, Case No. 18-24483-PGH: One-year statute of limitations under Florida law governs deficiency claims arising from foreclosure of senior lienor.

5. ***In re Lyubarsky***, Case No. 18-16659-LMI: The Court held that a "demand coupled with a threat" was a violation of the automatic stay and not simply a continuation of settlement negotiations. Good discussion of damages, leading to an award of actual damages for emotional distress and attorney's fees and costs, plus punitive damages (using a 2x multiplier of actuals for the punitive damages).

6. ***In re Navarro***, Case No. 15-10301-SMG: Good discussion of Rule 3002.1 and requirements to file post-petition fee notices.

7. ***In re Rivera (Frost Bank v. Rivera)***, Case No. 15-10301-SMG: Good discussion of the limits of the Supreme Court's decision in *Husky International Electronics, Inc. v. Ritz* regarding § 523(a)(2)(A). Post-judgment evasion of collection of dischargeable judgment did not constitute a debt

obtained by fraud. Similarly, such post-petition conduct did not give rise to an exception to dischargeability under § 523(a)(6).

8. ***In re Schwartz***, Case No. 12-37089-LMI: Applying the Supreme Court's decision in *Taggart v. Lorenzen*, the Court held that creditors and their attorney had no objectively reasonable basis to conclude that their continuation of litigation against the debtor post-discharge was lawful, and there was no fair ground of doubt that their conduct was barred. Accordingly, the Court held that the attorney *and* the creditors were jointly and severally liable for damages (attorney's fees) for civil contempt.

Some Recent Cases from Bankruptcy Courts Outside Florida

1. ***In re Derby and In re Thomas: Midland Funding Fallout***: These two cases follow the Supreme Court of the United States' *Midland Funding v. Johnson* case (https://www.supremecourt.gov/opinions/16pdf/16-348_h315.pdf). In the *Midland* case, the Court decided that a debt collector who files a Proof Claim in a bankruptcy case after the statute limitations expired did not run afoul of the Fair Debt Collections Practices Act. In this 5-3 decision (Justice Gorsuch did not participate), SCOTUS looked at the proof of claim very closely. They could not determine that the proof of claim violated the FDCPA because it did not violate the FDCPA's five little words: The proof of claim was not false, deceptive, or misleading, nor was it unfair or unconscionable. But it left open the door to any proof of claims that were filed falsely, deceptively or misleadingly, or that were unfair or unconscionable. Now on to the *Derby* and *Thomas* cases.

In re Derby (Derby v. Portfolio Recovery Associates), 2020 Bankr. LEXIS 2589 (Bankr. E.D. Va.): In *Derby* case, PRA was filing thousands of claims. However, the claims were not in compliance with Rule 3001(c)(2)(A), which requires that claims in individual cases contain an itemization of interest, fees, expenses, or other charges incurred before the petition was filed. The plaintiff in this class action also alleged violations of the FDCPA, in that PRA's process of filing false deceptive and misleading claims is a violation of the FDCPA. The Court held that FDCPA liability is precluded at least when the creditor's alleged misconduct involves the filing of a proof of claim in a bankruptcy case for a debt that would be enforceable under state law.

In re Thomas, 2020 Bankr. LEXIS 3019 (Bankr. W.D. Va.): In a case very factually like the *Derby* case, the *Thomas* case disagreed. Here, the creditor was filing claims like those in *Derby*. The plaintiffs presented the issue differently though. The plaintiffs insist the systemic practice of filing proof of claims with false statements, was designed to avoid Rule 3001 and that that practice violates the FDCPA and cannot be resolved through Rule 3001. In *Thomas*, the judge decided that the complaint's allegations were not clearly covered by Rule 3001. She decided that it's not clear how Rule 3001 provides the exclusive means to remedy the defendant's alleged misconduct because there were allegations that the proof of claims were false, deceptive, and/or misleading, and therefore, she decided that the FDCPA allegations in the class action complaint could move forward.

2. ***In re Ritter,*** Case No.: 1:19-bk-11838-MT (Bankr. C.D. Cal. 2021) (Tighe): The Court denied the debtors an early "COVID-19 discharge" under new § 1328(i) (enacted 12-27-20) because they failed to provide evidence of the financial hardship required by the statute. The statute requires the debtor to be in default on a

residential mortgage loan for three months "caused by a material financial hardship due, directly or indirectly, by the coronavirus disease." Section 1328(i)(2) goes on to provide that a court *may* grant a discharge to a debtor who has missed the mortgage payments if: (1) the debtor's plan provides for the curing of a default and maintenance of payments on a residential mortgage under § 1322(b)(5) and (2) the debtor has entered into a forbearance agreement or loan modification agreement with the mortgage holder or servicer. The Court reviewed this new provision considering the overall statutory scheme, and in particular, the use of the word, "may" rather than "shall." In this case, the only evidence of the cause of the hardship was a temporary decrease in income that merited a three-month suspension, and "[t]his, by itself, is not sufficient to demonstrate to the Court that entry of a COVID-19 Discharge is appropriate here."

CONSUMER LAW UPDATE

Cases reported from January 1, 2020 through March 31, 2020

Prepared for Federal Judicial Center

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Legislation

The "Coronavirus Aid, Relief, and Economic Security Act" (the "CARES Act") was passed by the Senate and House and signed by the President on March 27, 2020. Section 1113 of the Act contains changes for the new Subchapter V for small business bankruptcy and for Chapter 13, all with a sunset of one year from the time of enactment. The statutory changes in section 1113 provide:

CARES Act § 1113. BANKRUPTCY.

(a) Small Business Debtor Reorganization.-

(1) In general. Section 1182(1) of title 11, United States Code, is amended to read as follows:

'(1) Debtor. The term 'debtor'-

'(A) subject to subparagraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning single asset real estate) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $7,500,000 (excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor; and

'(B) does not include-

'(i) any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $7,500,000 (excluding debt owed to 1 or more affiliates or insiders);

'(ii) any debtor that is a corporation subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)); or

'(iii) any debtor that is an affiliate of an issuer, as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c).'.

(2) Applicability of chapters. Section 103(i) of title 11, United States Code, is amended by striking 'small business debtor' and inserting 'debtor (as defined in section 1182)'.

(3) Application of amendment. The amendment made by paragraph (1) shall apply only with respect to cases commenced under title 11, United States Code, on or after the date of enactment of this Act.

(4) Technical corrections.

(A) Definition of small business debtor. Section 101(51D)(B)(iii) of title 11, United States Code, is amended to read as follows:

'(iii) any debtor that is an affiliate of an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)).'.

(B) Unclaimed property. Section 347(b) of title 11, United States Code, is amended by striking '1194' and inserting '1191'.

(5) Sunset. [1 year after the date of enactment of this Act].

(b) Bankruptcy Relief.-

(1) In general.

(A) Exclusion from current monthly income. Section 101(10A)(B)(ii) of title 11, United States Code, is amended-

(i) in subclause (III), by striking '; and' and inserting a semicolon;
(ii) in subclause (IV), by striking the period at the end and inserting '; and'; and
(iii) by adding at the end the following:

'(V) Payments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID-19).'.

(B) Confirmation of plan. Section 1325(b)(2) of title 11, United States Code, is amended by inserting 'payments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID-19),' after 'other than'.

(C) Modification of plan after confirmation. Section 1329 of title 11, United States Code, is amended by adding at end the following:

'(d)(1) Subject to paragraph (3), for a plan confirmed prior to the date of enactment of this subsection, the plan may be modified upon the request of the debtor if-

'(A) the debtor is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic; and

'(B) the modification is approved after notice and a hearing.

'(2) A plan modified under paragraph (1) may not provide for payments over a period that expires more than 7 years after the time that the first payment under the original confirmed plan was due.

'(3) Sections 1322(a), 1322(b), 1323(c), and the requirements of section 1325(a) shall apply to any modification under paragraph (1).'.

(D) Applicability.-

(i) The amendments made by subparagraphs (A) and (B) shall apply to any case commenced before, on, or after the date of enactment of this Act.

(ii) The amendment made by subparagraph (C) shall apply to any case for which a plan has been confirmed under section 1325 of title 11, United States Code, before the date of enactment of this Act.

(2) Sunset [1 year after the date of enactment of the Act].

Supreme Court Decisions

Order denying stay relief is final, subject to appeal. In a Chapter 11 case, the Supreme Court held that when the bankruptcy court enters an order denying relief from the automatic stay that order is final, assuming the order contains no conditions or reservations. The Court's unanimous opinion stated that the issue was whether the

creditor's motion for stay relief initiated a "distinct proceeding terminating in a final, appealable order when the bankruptcy court rules dispositively on the motion," and the Court concluded that such an "adjudication. . .forms a discrete procedural unit within the embracive bankruptcy case." Ritzen Group, Inc. v. Jackson Masonry, LLC, 140 S.Ct. 582, 2020 WL 201023 (Jan. 14, 2020).

Effect of remand and nunc pro tunc orders. In a per curiam decision, *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano, et al*., 140 S.Ct. 696, 2020 WL 871715 (Feb. 24, 2020), arising out of a suit removed from the Puerto Rico courts to the United States District Court, the Supreme Court first held that until the District Court formally remanded the suit, the Puerto Rico courts had no jurisdiction, citing 28 U.S.C. § 1446(d)'s provision that "the State court shall proceed no further unless and until the case is remanded." Orders entered by the Puerto Rico court prior to the remand were void. Next, the Supreme Court observed that the District Court's remand order was not effective to a prior point in time simply because it was said to be a nunc pro tunc order. Such orders must reflect the reality of what has already occurred, rather than attempt revisionist history; nunc pro tunc orders "cannot make the record what it is not," quoting *Missouri v. Jenkins*, 495 U.S. 33, 49 (1990). Nunc pro tunc orders must reflect what has already happened in the federal courts or what the federal court has already ruled upon, rather than attempt to back date effectiveness to a prior point in time. In bankruptcy practice, nunc pro tunc orders have been seen in various contexts, including approval of employment of counsel. See also In re Benitez, ___ B.R. ___, 2020 WL 1272258 (Bankr. E.D. N.Y. Mar. 13, 2020) (In Chapter 7 case, court could allow compensation for work performed by trustee's attorney before the entry of retention order, provided that the retention order was entered prior to the allowance of compensation.).

Federal common law. In *Rodriquez v. Federal Deposit Insurance Corp*., 140 S.Ct. 713, 2020 WL 889191 (Feb. 25, 2020), a unanimous opinion by Justice Gorsuch, the Court discouraged federal courts' creation of or reliance upon federal common law when there is applicable state law to determine the issue. Here, the suit involved a Chapter 7 trustee and contested ownership of a federal tax refund. The lower courts had applied a rule that relied on federal common law, and the Court observed that "the cases in which federal

courts may engage in common lawmaking are few and far between." If there is applicable state law that could determine the contested issue, federal courts must not ignore that law in favor of federal common law theories. Quoting *Butner v. United States,* 440 U.S. 48, 54 (1979), the *Rodriquez* opinion reminds us that "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law."

Appeal

Factors for appeal from Bankruptcy Appellate Panel to Circuit. The Ninth Circuit reviewed four-part test to determine if it had jurisdiction over appeal from a BAP decision that had remanded to the bankruptcy court: 1) avoidance of piecemeal litigation; 2) judicial efficiency; 3) preservation of bankruptcy court's fact-finding role; and 4) potential irreparable harm from delayed review. The appeal was dismissed for lack of jurisdiction. In re Marino, 949 F.3d 483 (9th Cir. 2020).

Automatic Stay

Stay terminated by operation of § 362(e), rendering appeal moot. The bankruptcy court had granted relief from the stay but the sixty days under § 362(e)(2) had expired prior to the entry of the order for relief. With no indication that the 60-day period was extended, the stay had terminated, making the appeal from the order granting relief moot. In re Paczkowski, 611 B.R. 619 (B.A.P. 8th Cir. 2020).

Trustee versus debtor pursuing stay violation. In a nonprecedential decision, the Ninth Circuit Bankruptcy Appellate Panel pointed out that when the Chapter 7 trustee is the one pursuing damages for a stay violation, the action is one for civil contempt, rather than under § 362(k). As a result, the BAP applied the *Taggart* standard, agreeing with the bankruptcy court that the attorney for both the debtors and junior mortgage holders violated the stay by filing new mortgages that corrected property descriptions. The attorney had no reasonable basis to conclude that his conduct was not a stay violation. In re Jeong, 2020 WL 1277575 (B.A.P. 9th Cir. Mar. 16, 2020).

Chapter 13 filing while Chapter 7 pending violated stay. In the debtor's Chapter 7 case, relief from the automatic stay was granted to a secured creditor, and the bankruptcy court denied the debtor's motion for reconsideration. The debtor then filed a separate

Chapter 13 case while the Chapter 7 was still pending, and the Bankruptcy Appellate Panel agreed with the bankruptcy court that the Chapter 13 filing was an attempt to exercise control over property of the Chapter 7 estate, in violation of the automatic stay. Dismissal of the Chapter 13 was affirmed. In re Benitez, 611 B.R. 106 (B.A.P. 8th Cir. 2020). See also In re Malloch, ___ B.R. ___, 2020 WL 1329649 (Bankr. E.D. Mich. Mar. 17, 2020) (Chapter 7 debtor's adversary proceeding seeking recovery of monetary damages for prepetition cause of action was dismissed as violation of the automatic stay, because the cause of action belonged to the estate and only the trustee could pursue it.).

Postpetition collection effort by former spouse and her attorney violated stay. The Chapter 7 debtor's former spouse and her attorney pursued collection efforts related to pre-bankruptcy divorce and support orders, and the state court had found the debtor in contempt, ordering confinement until the debtor paid $64,000. The bankruptcy court found that the contempt was civil rather than criminal and that § 362(b)(2)'s exceptions from the stay did not apply. The former spouse and her attorney had affirmative duties to avoid violations of the automatic stay and to cease collection efforts, and "creditors are obligated to refrain from the attempt to punish debtors for pursuing rights under the Bankruptcy Code." Actual damages, including loss of income and attorney fees, were awarded to debtor, and former spouse's attorney was assessed $1,000 punitive damages to deter future violations. In re Valentine, 611 B.R. 622 (Bankr. E.D. Mo. 2020). See also In re Parast, ___ B.R. ___, 2020 WL 710215 (Bankr. D. S.C. Feb. 10, 2020) (Postpetition warrant for debtor's arrest for failure to pay pendente lite support was civil contempt order violative of automatic stay. Relief from stay was granted to permit state court to determine equitable distribution but on condition that enforcement against estate assets remained subject to stay.).

Failure to terminate wage withholding resulted in punitive damages. The judgment creditor and its attorneys willfully violated the stay by delaying 19 days after being informed of Chapter 7 filing to release earnings withholding order. Under § 362(k), actual damages, attorney fees and $25,000 punitive damages were assessed against both the creditor and its attorneys, who were found to be sophisticated debt collectors. In re Legrand, 612 B.R. 604 (Bankr. E.D. Cal. 2020).

Mortgage servicer's violation of stay justified actual and $200,000 punitive damages. The mortgage servicer had notice of the Chapter 13 filing but the servicer violated its own policies concerning verification of the bankruptcy filing, and it continued with collection activity in violation of the stay. Actual damages, $100,000 emotional distress damages, attorney fees, and $200,000 punitive damages were awarded. In re Moon, ___ B.R. ___, 2020 WL 1130216 (Bankr. D. Nev. Feb. 25, 2020).

Damage proof. The Chapter 13 debtor failed to show loss of business income as result of creditor's stay violation in repossessing and refusing to return vehicle used in debtor's shuttle service business; however, stay violation was sufficiently egregious to justify $1,500 punitive damages, and $12,000 attorney fees. The repossession occurred after the creditor had filed a proof of claim in the case, establishing knowledge of the filing and intentional violation. In re Banks, ___ B.R. ___, 2020 WL 619679 (Bankr. D. S.C. Jan. 20, 2020).

Section 362(b)(22) exception to stay for residential lease. The landlord had obtained prepetition writ of ejectment of residential lessee, who filed Chapter 13 and § 362(*l*)(1) certification that she had deposited rent due in first 30 days of the case, but the landlord objected under § 362(*l*)(3). Under applicable South Carolina law, the lease had been terminated, and neither the lease nor South Carolina law required the landlord to accept cure of unpaid rents after issuance of writ of ejectment. Landlord's objection was sustained, with § 362(b)(22)'s exception from the stay immediately applicable. In re Arrieta, ___ B.R. ___, 2020 WL 710222 (Bankr. D. S.C. Jan. 23, 2020).

Avoidance Actions

City's lien on automobile was in nature of avoidable judicial lien. The City of Chicago had impounded the debtor's vehicle for traffic violations prior to the Chapter 7 filing, and the debtor sought to avoid the lien under § 522(f). Concluding that the lien arose after an administrative process gave the lien quasi-judicial status, the lien was subject to avoidance. In re Mance, ___ B.R. ___, 2020 WL 603690 (Bankr. N.D. Ill. Feb. 6, 2020).

Involuntary transfer of title in real property tax foreclosure not supported by reasonably equivalent value. The Chapter 13 debtors' real property was sold at tax

foreclosure to satisfy $1,290.29 tax lien and the property value was $28,000; therefore, the foreclosure was not for reasonably equivalent value. The county was the initial transferee of the debtor's home, and the transfer was avoided, requiring transfer of title and possession to the debtors. Because the transfer was involuntary, the debtors could avoid the constructively fraudulent transfer under §§ 522(h) and 548(a)(1)(B). In re Gunsalus, ___ B.R.___, 2020 WL 833289 (Bankr. W.D. N.Y. Feb. 19, 2020). See also In re Hampton, ___ B.R.___, 2020 WL 833045 (Bankr. W.D. N.Y. Feb. 19, 2020).

Jurisdiction

Bankruptcy court had "related to" jurisdiction to determine allocation of marital property between former spouses in separate bankruptcy cases. With consent of the parties, the bankruptcy court concluded that it may not have core jurisdiction but that it did have "related to" jurisdiction to allocate a division of marital property between the parties who were debtors in separate bankruptcy cases, with the husband's case under Chapter 12. The allocation would affect each debtor's interest in property, and with distribution of that interest in the Chapter 12 case made by that trustee. Applicable Pennsylvania divorce law guided the allocation of various assets. In re Wagner, ___ B.R. ___, 2020 WL 261757 (Bankr. W.D. Penn. Jan. 16, 2020).

Property of Estate and Exemptions

Property of Chapter 7 estate upon conversion from Chapter 13. When the Chapter 13 debtor made unauthorized and fraudulent transfers of funds, with the intent to protect those funds from creditors, and the case then was converted to Chapter 7, property of the Chapter 7 estate included those fraudulently transferred funds. Although § 348(f)(1)(A) has limitations on what constitutes property in the converted case, the statute does not clearly answer the effect of fraudulent transfers during the Chapter 13 case. The Ninth Circuit found "no basis in the structure, policy, or purpose of the Bankruptcy Code for treating the fraudulent transfers as beyond the reach of the creditors merely because the estate was converted. The only argument otherwise is that Congress used language that seemingly requires actual possession or control, despite the injustice of the result," and the Circuit rejected that statutory interpretation. The funds fraudulently transferred by the Chapter 13 debtor remained in his "constructive possession or control, and hence should

be considered property of the converted estate under § 348(f)(1)(A)." In re Brown, ___ F.3d. ___, 2020 WL 1329662 (9th Cir. Mar. 23, 2020).

Debtor's interests in IRA and 401(k) acquired in divorce were not exempt retirement funds. Noting that exemptions are determined as of the petition date and applying *Clark v. Rameker,* 573 U.S. 122 (2014), when the Debtor filed Chapter 7 interest in his wife's IRA had not been transferred to an account under his name, and at that filing the debtor did not have a QDRO as to the 401(k). Thus, the debtor had at filing date conditional interests that did not satisfy *Clark's* requirements for a "retirement fund" under § 522(b)(3)(C). The claimed exemptions were properly disallowed. In re Lerbakken, 949 F.3d 432 (8th Cir. 2020).

Judicial estoppel in Chapter 13 cases. The Fifth Circuit affirmed the decision not to apply judicial estoppel when the Chapter 13 debtor had not disclosed a postpetition personal injury claim but the bankruptcy court had ordered that any recovery by the debtor would be administered by the trustee for the benefit of creditors; therefore, there was no harm to creditors by the omission. In re Parker, 789 Fed. Appx. (5th Cir. 2020).

Chapter 7 Issues

Attorney Fees

Bifurcated fees permitted for pre- and postpetition work. Reviewing case authority on unbundling of services and bifurcating fees for Chapter 7 debtors' attorneys, the Court found that these attorneys' representation of Chapter 7 debtors under contracts providing for separate payments for pre- and postpetition work satisfied requirements of the Bankruptcy Code, Bankruptcy Rules and ethical rules. Disclosures to the clients were appropriate under § 329 and Rule 2016(b), and the applicable Kentucky Rules of Professional Conduct allowed reasonable limited-representation agreements, permitting the attorneys to give clients options of paying in full prior to the Chapter 7 filing, paying reduced amount prepetition for limited services and entering into a postpetition monthly payment agreement for postpetition services. There was no factoring by these attorneys for the postpetition payment obligation. The Court observed that "not all multiple fee arrangements will pass muster," but here the arrangement was reasonable and the

attorneys obtained informed consent from the clients in writing. In re Carr, ___ B.R. ___, 2020 WL 373507 (Bankr. E.D. Ky. Jan. 22, 2020).

Section 707(b)

Meaning of "consumer debt" for purposes of § 707(b). The United States Trustee moved to dismiss the Chapter 7 debtor's case under § 707(b)(2) or (b)(3), and the issue was whether medical debts were primarily consumer. Total unsecured debt was $375,334.25, of which three-fourths was medical related, including $300,550.99 for emergency medical treatment. The debtor had been an ICU patient for six weeks as a result of severe pneumonia. Examining the meaning of "consumer debt," that term must be narrowly construed, and the Sixth Circuit had interpreted the term under § 101(8) as requiring "volition," *In re Westberry*, 215 F.3d 589, 591 (6th Cir. 2000). That Court had concluded that tax debt was not consumer debt because it was incurred involuntarily, for a public purpose and arose from income rather than consumption. Although most routine medical debt may be consumer debt because incurred voluntarily, emergency medical care was different and "cannot be included in the limited class of consumer debts within the meaning of 11 U.S.C. § 101(8) that individuals willingly incur in their daily lives." The Chapter 7 case was not dismissed under § 707(b). In re Sijan, ___ B.R. ___, 2020 WL 755171 (Bankr. S.D. Ohio Feb. 12, 2020).

Inclusion of Social Security income in abuse analysis. Examining the split of views on whether Social Security income is included in § 707(b)(3)'s totality-of-circumstances abuse analysis, it was "telling that the exclusion of Social Security income from consideration for purposes of § 707(b)(2) means test is made by clear and explicit language in the Bankruptcy Code [by the exclusion from current monthly income in § 101(10A)(B)], while there is no such language in the Code that excludes such income for purposes of the § 707(b)(3) 'totality of circumstances' test." Those two statutory grounds for finding abuse are "separate and independent." Although Social Security income may not be considered in the calculation of Chapter 13 projected disposable income, a debtor's good faith may be at issue if a proposed plan does not include Social Security income. The opinion surveys split of authority on good faith issue, including the impact of 42 U.S.C. § 407(a)'s anti-assignment provision, concluding that consideration of Social

Security income in § 1325(a)(3)'s good-faith analysis was not contrary to § 407(a)'s provision. In light of total circumstances, including these debtors' Social Security income, a Chapter 13 plan could be funded that would pay unsecured creditors in full, and the Chapter 7 case was dismissed as abusive. In re Meehean, 611 B.R. 574 (Bankr. E.D. Mich. 2020).

Debtors not entitled to reconsideration of abuse dismissal. Having previously granted U.S. Trustee's motions to dismiss this and two other Chapter 7 cases for abuse under § 707(b)(3)(B)'s totality-of-circumstances test, *In re Kubatka*, 605 B.R. 339 (Bankr. W.D. Pa. 2019), these debtors moved for reconsideration, contending that their original Schedule J did not accurately reflect their expenses, seeking to amend that Schedule, increasing expenses $568.06. The proposed amendment suggested bad faith, because knowledge of monthly expenses was within the debtors' control, and inadvertence was inexcusable. In re Harms, ___ B.R. ___, 2020 WL 1070331 (Bankr. W.D. Pa. Jan. 29, 2020).

Discharge Issues

Late-filed state tax return was "return" for purposes of § 523(a)(1) discharge. The Eleventh Circuit considered again whether the Code's definition of a tax return incorporated a requirement that the return be timely filed. At issue was a Massachusetts state tax return, and the Court concluded "that § 523 does not incorporate that a tax return must be timely filed to be dischargeable. And we conclude that under Massachusetts tax law, a late-filed tax return does not automatically cease having the status of a 'return' merely because it was filed late." In re Shek, 947 F.3d 770, 781 (11th Cir. 2020).

Willful evasion of taxes. Applying the Sixth Circuit's two-pronged test to § 523(a)(1)(C), the government proved that the Chapter 7 debtor had engaged in conduct to evade or defeat payment of her IRS tax debt and that she voluntarily and intentionally violated her duty to pay taxes by payment of large, non-essential discretionary expenses rather than taxes. Tax debts for several years were excepted from discharge under § 523(a)(1)(C). In re Harold, ___ B.R. ___, 2020 WL 709866 (Bankr. E.D. Mich. Feb. 19, 2020).

Elements of § 523(a)(2)(A). The First Circuit reviewed § 523(a)(2)(A)'s elements of false pretenses, false representation, intent to deceive, and actual fraud, remanding for further findings on whether a false representation or false pretense through implied misrepresentation was established. The Bankruptcy Appellate Panel had erred by reweighing evidence and reaching its own findings of fact. In re Stewart, 948 F.3d 509 (1st Cir. 2020). See also In re Adesanya, ___ B.R. ___, 2020 WL 1492505 (Bankr. E.D. Pa. Mar. 24, 2020) (Reviewing elements of § 523(a)(2)(A), pre-bankruptcy U.S. District Court action made no determination that the debtors received anything of value as a result of fraudulent actions.).

"Statement respecting financial condition" under § 523(a)(2). The Bankruptcy Appellate Panel held that a Chapter 7 debtor's failure to disclose in his application to the Oregon Department of Human Services that he had obtained employment was not a "statement respecting financial condition." The bankruptcy court had concluded that the debtor's omission was an unwritten statement outside the scope of § 523(a)(2)(A), which was the Code section relied upon by the Department's complaint for exception from discharge. The Bankruptcy Appellate Panel's decision noted that fraudulent omission may constitute a false representation for purposes of § 523(a)(2)(A), and the proceeding was remanded. In re Mcharo, 611 B.R. 657 (B.A.P. 9th Cir. 2020).

False statement and reliance under § 523(a)(2)(B). The Fifth Circuit held that a debtor's financing statement became inaccurate when he failed to update it as required by his agreement with the lender, and the lender reasonably relied on the inaccurate financial statement in renewing loan. In re Osborne, 951 F.3d 691 (5th Cir. 2020).

Unscheduled debts and § 523(a)(3). A debtor's failure to list a creditor or schedule the debt "is enough to bring that debt within the rubric of § 523(a)(3), and if the unscheduled debt is of the type described in § 523(a)(2), (4), or (6), the failure unlocks the concurrent jurisdiction of a competent non-bankruptcy forum to determine whether the debt meets the criteria set forth in § 523(a)(3)." Here, the state court had authority to make that determination, and claim preclusion prevented the bankruptcy court from finding otherwise. In re Morrow, ___ B.R. ___, 2020 WL 1304141 (Bankr. N.D. Okla. Mar. 17, 2020).

Two-pronged test for § 523(a)(6). The Sixth Circuit discussed the Circuit split on § 523(a)(6)'s requirements, disagreeing with those courts that had "collapsed the terms 'willful' and 'malicious,' applying a unitary test." The Sixth Circuit had previously cited the two-pronged approach as favorable and in this opinion, it "explicitly adopt[ed] that test." Collapsing the two terms ignores that the words have separate meanings and purposes. Although in some cases the same facts may support findings of both willful conduct and malicious intent, in "other cases, a debtor may act willfully, but not maliciously. . . .Lower courts thus must analyze independently whether a debtor has willfully, and also maliciously, injured the creditor before rendering a debt non-dischargeable in accordance with § 523(a)(6)." In re Berge, ___ F.3d ___, 2020 WL 1482386 (6th Cir. Mar. 27, 2020).

***Brunner* test applied as Second Circuit originally intended it.** Finding that subsequent to the *Brunner* decision, courts had added punitive standards not intended by the Second Circuit, the bankruptcy court applied the test "as it was originally intended." The pro se debtor, who was an attorney, satisfied each prong of the test, showing that he had negative monthly income under § 707(b)(2)'s means test, that he was unable pay the full amount of the defaulted and accelerated loan, and that he had made good faith efforts to repay. Good faith was supported by the debtor's multiple requests for deferment or forbearance, which were each granted by the servicer. In re Rosenberg, 610 B.R. 454 (Bankr. S.D. N.Y. 2020). Compare Tingling v. U.S. Dept. of Education, ___ B.R. ___, 2020 WL 509147 (E.D. N.Y. Jan. 30, 2020) (Debtor, whose income was four times poverty level, did not satisfy three prongs of *Brunner* test, with income and expenses allowing loan repayments while maintaining minimal standard of living.).

Unemployed debtor entitled to undue hardship discharge under § 523(a)(8). Applying the *Brunner* test but recognizing that the Seventh Circuit in *Krieger v. Educ. Credit Mgmt.Corp.,* 713 F.3d 882 (7th Cir. 2013), had cautioned against addition of judicial gloss to that test, the unemployed Chapter 7 debtor had satisfied three prongs of test. In re Bukovics, ___ B.R. ___, 2020 WL 949936 (Bankr. N.D. Ill. Feb. 27, 2020).

Partial discharge of student loan debt. Finding that the Chapter 7 debtor satisfied the *Brunner* test, with special circumstances due to special-needs child, failure to make any payment on loans did not prevent satisfaction of good-faith prong. Without binding

authority in the Second Circuit, the Court concluded that it had power to grant a partial discharge, with all accrued interest and a portion of the principal discharged, and the remaining principal was reduced to an amount that could be paid at $250 monthly under a standard 25-year repayment plan. In re Clavell, 611 B.R. 504 (Bankr. S.D. N.Y. 2020).

Equitable distribution award from divorce court nondischargeable under § 523(a)(15). In a divorce judgment, the Chapter 7 debtor had been ordered to pay over $200,000 to her spouse in non-retirement equitable distribution, and that obligation met requirements for § 523(a)(15)'s exception from discharge. The former spouse was also ordered to pay over $300,000 to the now debtor, but over time and only after the debtor had paid her obligation. State law determined whether any offset was available and the state court had already determined that the debtor could not offset her former spouse's obligation against her debt to him, with res judicata barring any determination by the bankruptcy court. In re Kao, 612 B.R. 272 (Bankr. S.D. N.Y. 2020).

Compulsive gambler's discharge not denied under §§ 727(a)(3) and (5). Noting that there is no discharge exception for gambling, §§ 727(a)(3) and (5) "records-exception cases involving gambling are particularly fact-driven." The debtor's record-keeping of her gambling losses was "more than we might expect from a consumer debtor, and certainly more than one would expect of a seriously addicted gambler," and her bank records and casino documents provided the court and creditors with a "fair idea of the extent of her losses" for purposes of § 727(a)(3). "The Bankruptcy Code doesn't expressly penalize bad decisions like binge gambling unless the debtor simply cannot explain her losses." Here, the debtor satisfactorily explained gambling losses for purposes of § 727(a)(5). In re Amphone, ___ B.R. ___, 2020 WL 974974 (Bankr. D. Kan. Feb. 24, 2020).

Discharge Injunction

Creditor's violation of discharge injunction was not willful under *Taggert*. The primary issue was whether the prior debtor had discharged personal liability on a lease guaranty in a Chapter 7 case in 2008. The Bankruptcy Appellate Panel discussed two lines of cases on contingent claims, agreeing with the bankruptcy court that the defendant's prepetition personal guaranty was a contingent claim in the Chapter 7 case and was discharged. As a result, there was a violation of the discharge injunction in that

case when the creditors sued the defendant on that guaranty, but under *Taggart's* standard there was fair ground of doubt that the violation was willful. At the time the creditor filed suit, although with knowledge of the defendant's prior bankruptcy discharge, it had reasonable basis to believe that the contingent guaranty may not have been discharged. In re Orlandi, ___ B.R. ___, 2020 WL 986671 (B.A.P. 6th Cir. Feb. 28, 2020). See also In re Loder, 796 Fed. Appx. 698 (11th Cir. 2020) (Creditor had objectively reasonable basis to believe collection effort was lawful.); In re Krisiak, ___ B.R. ___, 2020 WL 1487298 (Bankr. M.D. Pa. Mar. 26, 2020) (Issue of material fact on whether creditor had knowledge of bankruptcy filing prevented summary judgment on allegations of violation of the automatic stay and discharge injunction.).

Dismissal

Order denying dismissal of case was final, subject to appeal. A preference defendant did not appeal the bankruptcy court's denial of a motion to dismiss the Chapter 7 case based on debtor's ineligibility under § 109(g)(2) until the bankruptcy court had later granted summary judgment to the trustee on the preference avoidance. The Bankruptcy Appellate Panel held that the denial of dismissal was final, relying on the reasoning of *In re Cherrett,* 873 F.3d 1060 (9th Cir. 2017). As a result, the preference defendant's appeal of the denial of case dismissal was untimely. The Panel then upheld the grant of summary judgment on the preference action, noting that the defenses to preference avoidance are limited to those found in § 547(c). The alleged equitable defenses were impermissible attempts to collaterally attack the bankruptcy court's denial of case dismissal. In re Liu, ___ B.R. ___, 2020 WL 638834 (B.A.P. 9th Cir. Feb. 11, 2020).

Chapter 7 Trustee Compensation

Commission based, in part, on proceeds of personal injury settlement. Sections 326 and 330(a)(7) provide presumption that the graduated percentage commission is reasonable compensation. Although the commission was largely based upon a personal injury settlement negotiated by the trustee's special counsel, this was not a rare and unusual case justifying reduction of statutory commission. However, the trustee could not include in commission calculation that portion of settlement paid to debtor's spouse

for her loss-of-consortium claim, which was never property of the bankruptcy estate. In re Lally, ___ B.R. ___, 2020 WL 995538 (Bankr. D. N.H. Feb. 28, 2020).

Chapter 13 Issues

Eligibility

Disputed claim included in calculation of eligibility. The debtor's case was dismissed for exceeding § 109(e)'s unsecured debt limit, when the debtor had signed $1,092,000 mortgage note but the mortgage was never recorded. The lender filed an unsecured claim for $1.7 million, and the Bankruptcy Appellate Panel agreed with the bankruptcy court that the claim was not contingent nor was it unliquidated. Although the debtor disputed the claim, it was still a claim for purposes of §§ 101(5) and 109(e), and as of the Chapter 13 "petition date there had been no judicial determination that Deutsche Bank could not enforce the note." The debtor argued that the bankruptcy court should not have looked beyond her schedules, but the bankruptcy court did not err in looking to the proof of claim when Deutsche Bank filed its objection to eligibility. All events giving rise to the debtor's liability on the note occurred pre-bankruptcy and the debtor's disputed liability did not render the claim contingent. And, her dispute did not make the claim unliquidated, with amount of the debt "readily determinable by reference to the note." In re Fountain, ___B.R. ___, 2020 WL 1281482 (B.A.P. 9th Cir. Mar. 16, 2020).

Classification

Separate classification and preferential treatment of student loan debt. The Chapter 13 trustee and debtors' attorney attempted to change the traditional approach in the District, seeking approval of a permissible fair discrimination in favor of student loan debt in plans so long as the preferential treatment and discrimination was no more than 20%. The proposal was that plans would be confirmed without trustee objection if the unsecured creditors would receive no more than 20% less than they would have received in the absence of proposed discrimination. Reviewing case law on discrimination in favor of student loan debt, the court adopted "baseline" test found in *In re Bentley,* 266 B.R. 229 (B.A.P. 1st Cir. 2001), considering unfair discrimination in light of: 1) equality of distribution, 2) nonpriority status of student loan debt, 3) expectation of pro rata

distribution, and 4) reality that fresh start does not necessarily dictate freedom from student loan debt. Under baseline test, the court concluded that it "cannot confirm chapter 13 plans that rearrange the priorities Congress has established in chapter 13 case." Confirmation was denied in those cases where a larger percentage was proposed for student loan debt than general unsecured creditors. In re Bennett, et al., ___ B.R. ___, 2020 WL _____, Case No. 19-60122 (Bankr. N.D. N.Y. Feb. 4, 2020).

Cure and Maintain Mortgage

Gavel rule applied under § 1322(c)(1) in New Hampshire foreclosures. Agreeing with a prior Bankruptcy Appellate Panel, *In re LaPointe*, 505 B.R. 589 (B.A.P. 1st Cir. 2014), this Panel upheld the gavel rule, identified as the majority view, of when a debtor's opportunity to cure mortgage default ended. In re Vertullo, 610 B.R. 399 (B.A.P. 1st Cir. 2020).

Plan Modification

HAVEN Act applied to modification when plan was confirmed prior to Act becoming law. The debtor proposed a plan modification deleting from disposable income $1,789 monthly VA disability benefits. First concluding that the HAVEN Act was applicable law at time of this decision, nothing in the Act, its legislative history or the Official Forms implementing the Act indicated that the HAVEN Act only applied to cases filed after enactment of the law. Although the Act did not provide for retroactive application, it nevertheless applied at time of proposed modification. Change in law subsequent to original confirmation was unanticipated post-confirmation change justifying application of the HAVEN Act to the modification. In re Gresham, ___ B.R. ___, 2020 WL 1170712 (Bankr. E.D. Mich. Mar. 10, 2020).

Discharge

Hardship discharge denied. Section 1328(b)'s requirements for hardship discharge are conjunctive and failure to satisfy any one of three conditions results in denial. Reviewing judicial decisions on requirements of the statute, the court considered "the extent of a debtor's accountability and degree of control; the substantiality and foreseeability of the changed circumstances at the time of confirmation; and whether the debtor had made

significant efforts to overcome the circumstances but ultimately remained unable to successfully compete his or her plan." In re Quintyne, 610 B.R. 462 (Bankr. S.D. N.Y. 2020).

Dismissal

Marijuana connection required case dismissal. The Chapter 13 debtors owned interests in an entity that was engaged in litigation to recover damages for breach of contract related to growing and selling marijuana, and this connection required dismissal of the case. Continuing administration of the case "would likely require the trustee or the court to become involved in administering the proceeds of the litigation" concerning an illegal business under Federal law. In re Burton, 610 B.R. 633 (B.A.P. 9th Cir. 2020). See also In re Malul, ___ B.R. ___, 2020 WL 1486775 (Bankr. D. Co. Mar. 24, 2020) (Chapter 7 debtor who had previously received discharge moved to reopen case to settle an undisclosed cause of action related to a failed marijuana business investment, and the reappointed Chapter 7 trustee moved to settle the cause of action, but the U.S. Trustee asserted that the cause of action was connected to illegal marijuana. The reopening was denied, with the court pointing out the factual and legal difficulties presented by bankruptcy filings when any connection to marijuana activity is asserted.).

Dismissal with 180-day bar affirmed. The debtors had filed eight Chapter 13 cases over eight years, with each dismissed, and in 2019 the spouses filed three more cases. A mortgage creditor moved for relief from the automatic stay and dismissal in each of the cases. The cases were dismissed with a 180-day bar to refiling, because the purpose in these filings was to stop foreclosure, and the dismissals were not abuses of discretion. In re Steiner, ___ B.R. ___, 2020 WL 1327211 (B.A.P. 8th Cir. Mar. 23, 2020).

Chapter 13 debtor had absolute right to dismiss. Facing a contested confirmation hearing, the debtor moved to dismiss the case, and his estranged spouse objected. Concluding that § 1307(b) provides an absolute right to dismiss a case that had not been previously converted, the court posed questions about whether there should be limits on this dismissal right, for example, when the debtor had engaged in bad faith actions. With no facts to establish an exception from the statute's "shall dismiss" language, such

questions were reserved for another day. In re Cenk, ___ B.R. ___, 2020 WL 957643 (Bankr. W.D. Pa. Feb. 27, 2020).

Undistributed funds returned to debtor upon dismissal. Under § 1327(b)'s vesting requirement, unless a confirmed plan provides otherwise, any undistributed funds held by the trustee at dismissal of the case must be returned to the debtor. Although not necessary to rely on § 347(b)(3), the conclusion on effect of vesting at confirmation was consistent with that section and case law interpreting it. In re Hernandez, ___ B.R. ___, 2020 WL 773475 (Bankr. D. Conn. Jan. 17, 2020). See also In re Evans, ___ B.R. ___, 2020 WL 739258 (Bankr. D. Idaho Feb. 13, 2020) (Under § 1326(a)(2), the trustee must return undistributed funds, including the trustee's percentage fee, to the debtor when case is dismissed prior to confirmation.).

Three-month delay in completing bare-bones petition. When the Chapter 13 debtor filed a skeletal petition, her motion for more time to complete schedules, statement and plan was denied, with no cause found for extending time after three-month delay, and show cause hearing was set to determine if case should be dismissed with 180-day bar to refiling. In re Ward, 610 B.R. 804 (Bankr. W.D. Pa. 2020).

Trustee's Final Report

Chapter 13 debtor lacked "person aggrieved" standing to appeal objection to trustee's final report. The bankruptcy court had overruled the debtor's objection to the trustee's final report, and debtor's appeal was dismissed, with the Bankruptcy Appellate Panel finding that debtor lacked "person aggrieved" standing to appeal. Debtor's objection had not included amount of funds returned to her upon case dismissal. In re Marshall, ___ B.R. ___, 2020 WL 781661 (B.A.P. 8th Cir. Feb. 18, 2020).

Debtor's Attorney

Attorney sanctioned for filing identical schedules in two cases without updating financial information. The same attorney represented a debtor in two cases filed sixteen months apart, but the attorney filed essentially identical schedules in both cases, violating Rule 9011 by failing to make reasonable inquiry before filing the second case. The schedules in the second case ignored claims that had been filed in the first case, and

other schedules established lack of reasonable inquiry. The sanction included no administrative expense claim, order to pay $1,000 to the Chapter 7 trustee for the benefit of the estate and referral to the U.S. Trustee for other potential disciplinary action. In re Thomas, ___ B.R. ___, 2020 WL 730900 (Bankr. E.D. Pa. Feb. 24, 2020).

Claims

Recordation of divorce judgment created secured claim. In Chapter 13 case, the debtor objected to former spouse's secured claim, with pre-bankruptcy divorce judgment awarding former marital home to the husband but ordering equalization payments to the wife. No security was mentioned in the judgment, but its recordation created a lien under Wisconsin law. Although the lien was subject to prior liens, the former spouse had partially secured claim. In re Thompson, ___ B.R. ___, 2020 WL 632664 (Bankr. E.D. Wisc. Feb. 7, 2020).

Portion of divorce award was priority domestic support claim and portion dischargeable unsecured claim. Applying Third Circuit's factors from *In re Gianakas,* 917 F.2d 759 (3d Cir. 1990), and considering special master's intent in divorce proceedings, one-third of former spouse's claim was priority domestic support but two-thirds was reclassified as general unsecured that would be subject to discharge. In re Laspina, 611 B.R. 219 (Bankr. E.D. Penn. 2020).

Objection to proof of claim barred by preclusion. The Chapter 13 debtor objected to Wells Fargo's proof of claim in an adversary proceeding that alleged the note had been procured by fraud and was unenforceable; but the debtor had previously litigated those and other issues in the state court. Preclusive effect of the state court's judgment prevented the bankruptcy court's exercise of subject matter jurisdiction. In re Jacobson, ___ B.R. ___, 2020 WL 1237930 (Bankr. E.D. Wisc. Mar. 13, 2020).

Fair Debt Collection Practices Act (FDCPA)

Debt buyer was debt collector under FDCPA. The Ninth Circuit agreed with the Third Circuit that an entity purchasing consumer debts qualified as a debt collector under the Act, 15 U.S.C. § 1692(a)(6), even though it outsourced the actual debt collection activity. McAdory v. M.N.S. & Assoc., LLC, 952 F.3d 1089 (9th Cir. 2020).

Chapter 13 debtors' FDCPA claim was not "related to" bankruptcy case. After reopening closed case, the debtors filed adversary complaint against mortgage holders and servicers, alleging various claims for violation of discharge injunction, automatic stay and FDCPA. The complaint plausibly pleaded elements required for §§ 362(k) and 524(i), but the claims under FDCPA were not "related to" the bankruptcy case, because that claim arose postpetition and did not constitute property of the bankruptcy estate. Lacking subject matter jurisdiction over that claim, the FDCPA count was dismissed. In re Williams, ___ B.R. ___, 2020 WL 411291 (Bankr. M.D. N.C. Jan. 24, 2020).

CONSUMER LAW UPDATE

Cases reported from April 1, 2020 through
June 30, 2020

Prepared for Federal Judicial Center

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Appeals

***In forma pauperis* appeal denied.** The Eleventh Circuit denied *in forma pauperis* appeal by a debtor whose Chapter 13 had been dismissed, observing that "a person who tells the bankruptcy court that she qualifies under Chapter 13 cannot persuade a court of appeals that she lacks money for judicial fees." Absent "extraordinary circumstances" debtors in Chapter 13 cases cannot appeal *in forma pauperis.* Bastani v. Wells Fargo Bank, N.A., 960 F.3d 976 (11th Cir. 2020). See also In re Marshall, 613 B.R. 458 (B.A.P. 8th Cir. 2020) (Chapter 13 debtor lacked standing to appeal overruling of her objection to trustee's final report when debtor did not challenge amount trustee would return to her.).

Automatic Stay

Under § 362(c)(3), stay terminated 30 days after order for relief only as to debtor's property. On an issue with Circuit splits but with certiorari denied in *Rose v. Select Portfolio Servicing, Inc.,* 945 F.3d 226 (5th Cir. 2019), the Bankruptcy Court agreed with the majority view and pointed out the effects on Chapter 7 cases and trustees if § 362(c)(3) were construed to terminate the stay as to property of the estate. "The phrase 'shall terminate with respect to the debtor' in § 362(c)(3) cannot be construed by inference to extend to 'with respect to the estate and property of the estate' because the consequences in chapter 7, to which § 362(c)(3) also applies, are so far at odds with basic chapter 7 administration that Congress would not have intended such dramatic consequences without unambiguous explanation. . . .Congress well knew how to terminate the automatic stay with respect to property of the estate and actually did so in plain language at § 362(h)." In re Thu Thi Dao, ___ B.R. ___, 2020 WL 2462521 (Bankr. E.D. Cal. May 11, 2020).

Creditor and attorney violated stay by demand for payment and threat. The creditor with a judgment had been pursuing collection for years and after Chapter 7 filing, with knowledge of that filing the attorney made demand for payment of $250,000, accompanied by threat of disclosure to the trustee of information damaging to debtor. The creditor and attorney were found to have willfully violated the stay, with emotional distress, attorney fee and punitive damages awarded. In re Lyubarsky, ___ B.R. ___, 2020 WL 1930143 (Bankr. S.D. Fla. Apr. 17, 2020).

In rem relief warranted. Serial filer and spouse had been in default on mortgage note for 12 years, and four bankruptcy filings were attempts to delay or prevent foreclosure. The mortgage holder established cause for relief from the stay under § 362(d)(1) and (2) and for in rem relief under § 362(d)(4). In re Conrad, 614 B.R. 20 (Bankr. D. Conn. 2020).

Failure to turn over impounded vehicle violated stay. Applying *In re Fulton,* 926 F.3d 916 (7th Cir. 2019), *cert. granted sub nom.,* 140 S.Ct. 680 (2019), the City of Chicago willfully violated the stay by refusal to turn over an impounded vehicle after the Chapter 13 filing, with actual damages of lost wages, auto repair and attorney fees awarded. The City's request for annulment of the stay was denied. In re Rice, 613 B.R. 690 (Bankr. N.D. Ill. 2020).

Nunc pro tunc relief from automatic stay denied. In an application of *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano, et al*., 140 S.Ct. 696 (2020), the Bankruptcy Court concluded that a foreclosure sale conducted after the Chapter 13 filing was void, and granting relief from the stay nunc pro tunc could not legitimize a void sale. The foreclosure was conducted without actual knowledge of the bankruptcy filing, but granting the foreclosing creditor's stay relief motion "would be squarely at odds with *Acevedo* and subject to reversal on appeal." In re Telles, 2020 WL 2121254 (Bankr. E.D. N.Y. Apr. 30, 2020).

Abandonment and Avoidance

Lien not avoidable under § 506(d) due to claim disallowance for creditor's failure to prove entitlement to enforce lien. Examining § 506(d), the Ninth Circuit panel observed that the "general idea [of the statute] is that if a creditor does not have a good secured claim, it does not have a valid lien, and therefore the court should void the lien." But, § 506(d)(2) "preserves the lien of a secured creditor who chooses to bypass the bankruptcy and enforce its lien outside of bankruptcy." The debtor here had objected to the claim, asserting that the creditor failed to establish entitlement to enforce the lien, and the Circuit held that claim disallowance on that basis merely established that the claimant was not the person entitled to enforce, but it did not have the effect of rendering any lien void under § 506(d). In re Lane, 959 F.3d 1226 (9th Cir. 2020).

Abandonment and snapshot rule on value. Applying § 541(a)(6) in a Chapter 7 case, when an increase in equity in the debtors' home resulted from a third party paying down a mortgage and that equity increase was not shown to be compensation for a debtor's postpetition services, the equity increase became property of the estate. As a result, the trustee should not be compelled to abandon the property. The Circuit panel concluded that application of the snapshot rule did not control here: "First, unlike determining what property becomes a part of the bankruptcy estate, which is measured at the time of filing, the abandonment section of the bankruptcy code says nothing about looking to the 'commencement of the case' to determine value. . . .Second, . . .every court confronted with an analogous abandonment dispute has looked to the equity contained in the debtor's property at the time the abandonment motion came before it, rather than at some static moment in the past." Coslow v. Reisz, ___ Fed. Appx. ___, 2020 WL 2317493 (6th Cir. May 11, 2020).

Trustee could avoid penalty portion of IRS lien on residence. The United States moved to require the Chapter 7 trustee to abandon the debtor's residence, on which IRS held tax liens, but the trustee could avoid the penalty portion of the liens under §§ 724(a) and 726(a)(4), with the avoided portion preserved for the benefit of the bankruptcy estate. Denial of abandonment was affirmed. In re Hutchinson, ___ B.R. ___, 2020 WL 2112275 (E.D. Cal. May 4, 2020).

Property of Estate and Exemptions

Setoff prevailed over exemption in tax refund. When Chapter 7 was filed, the debtors scheduled tax debt and claimed exemption under Virginia statutes in prepetition tax overpayment. After the Chapter 7 filing, IRS exercised setoff under 26 U.S.C.A. § 6402. The Fourth Circuit first held that the debtors' interest in the tax overpayment became property of the bankruptcy estate and the fact that the overpayment was subject to potential setoff did not exclude it from the estate. However, IRS's right to setoff superseded the debtors' right to exempt under § 522, with the Circuit panel concluding that the plain language of § 553(a) resolved any apparent conflict between setoff and exemption, by its provision that Title 11 "does not affect any right of a creditor to offset a mutual debt." The broad scope of § 553(a) "necessarily includes the property exemption

provisions contained in 11 U.S.C. § 522(c). Although Section 522(c) generally provides that exempt property cannot be used to satisfy prepetition debt, that provision, as a part of Title 11, must be read in conjunction with the unambiguous language of Section 533(a)." Section 553(a) alone does not create a setoff right; thus, the Circuit looked to 26 U.S.C.A. § 6402(a), which is unambiguous, providing IRS with setoff rights against "any overpayment." A bankruptcy court does not have discretion to "disregard the plain language of 26 U.S.C. § 6402(a) and 11 U.S.C. § 553(a)." In re Copley, 959 F.3d 118 (4th Cir. 2020).

Loan proceeds from 401(k) plan were property of Chapter 7 estate and not exempt. The Chapter 7 debtor had obtained a prepetition loan from her 401(k) plan but had not cashed the $18,000 check, and she claimed the plan, including the loan proceeds, as exempt under § 522(d)(12). The trustee sought turnover of the $18,000 as property of the estate, and all of the elements of § 542(a) were satisfied. The loan proceeds were no longer protected by § 541(c)(2)'s exclusion from the estate, because they were no longer retirement funds in an account that was exempt from taxation under the Internal Revenue Code. The Bankruptcy Appellate Panel rejected the debtor's argument that the distribution of the loan had not been finalized because she had not cashed the check. In re Brown, 614 B.R. 416 (B.A.P. 1st Cir. 2020).

Prepetition cause of action was property of two Chapter 7 estates. The debtor had filed a Chapter 7 case in 1990 in Illinois, receiving discharge, and then filed another Chapter 7 in 2009 in Missouri. The Illinois case was reopened when the debtor remembered a cause of action, which became property of that estate, but the trustee then abandoned the cause of action by filing a Report of No Distribution. That Report was not filed until after the Missouri bankruptcy was filed. The debtor argued that the cause of action never became property of the Missouri estate, but the Bankruptcy Appellate Panel disagreed. When the debtor filed the Missouri bankruptcy, he held a contingent reversionary interest, and upon the Illinois trustee's abandonment, that contingent interest re-vested in the Missouri estate; therefore, the Chapter 7 trustee in the Missouri estate could settle the cause of action. In re Boisaubin, 614 B.R. 557 (B.A.P. 8th Cir. 2020).

Absence from homestead property less than two years was not abandonment. Under Arizona statute, as construed by *In re Calderon,* 507 B.R. 724 (B.A.P. 9th Cir.

2014), once homestead is established an absence from that homestead for less than two years is presumed to be temporary, and only evidence of clear intent of permanent removal would overcome presumption. Applying that presumption, these debtors had not abandoned their Arizona homestead when they filed Chapter 13 in Pennsylvania. The claimed homestead was valid, and the debtors could avoid a lien on the homestead under § 522(f). In re Ober, 613 B.R. 631 (Bankr. E.D. Pa. 2020).

Discharge

Complaint untimely when filing before midnight failed. At 20 minutes before midnight on last day to file timely §§ 523(a) and 727(a) complaint, the creditor's attorney could not get the complaint filed and the fee paid on CM/ECF. The attorney was unfamiliar with all of the steps required by CM/ECF concerning adversary proceedings, having received that training many years ago. With no evidence of technical failure of CM/ECF, there was no cause shown to grant relief or extension of time to file, and the untimely complaint was dismissed. In re Beal, ___ B.R. ___, 2020 WL 2027225 (Bankr. D. Utah Mar. 31, 2020).

Issue preclusion applied to prebankruptcy fraud judgment. Under California's law of issue preclusion there was sufficient identity between the issues presented in state court action and the dischargeability proceeding, and the debtor's fraud was actually litigated in the state court, even though by abstentia when the defendant and his attorney failed to appear for trial. The opinion notes that this was not a default scenario, because the defendant and his attorney had participated in the state litigation and had notice of the trial and subpoena for attendance. In re Zuckerman, 613 B.R. 707 (B.A.P. 9th Cir. 2020). See also In re Delannoy, ___ B.R. ___, 2020 WL 3406066 (B.A.P. 9th Cir. June 19, 2020) (Application of issue preclusion in willful and malicious injury finding did not violate public policy under California law.); In re Hill, 957 F.3d 704 (6th Cir. 2020) (Issue preclusion given to state court default judgment on complaint alleging tortious interference with business advantage. Judgment was nondischargeable under § 523(a)(6).).

Attorney fee for creditor in state court litigation of fraud claims. Section 523(a)(2)(A)'s exception from discharge included attorney fee traceable to fraud, and the Bankruptcy Appellate Panel affirmed finding that creditor's state court fraud and non-fraud

claims were intertwined, making apportionment of the fee impossible. The entire attorney fee was nondischargeable. In re Bartenwerfer, 613 B.R. 730 (B.A.P. 9th Cir. 2020).

Fact questions of ability to pay domestic support obligation. Applying Sixth Circuit's four-factor test, *In re Calhoun,* 715 F.2d 1103 (6th Cir. 1983), the debtor's obligation to former spouse was a support obligation under §§ 101(14A) and 523(a)(5); however, fact questions existed whether the support obligation was so excessive that the debtor could not pay it. Under the Sixth Circuit's precedent, *In re Sorah,* 163 F.3d 397, 401 (6th Cir. 1998), the defendant debtor "has a burden of demonstrating 'that although the obligation is of the type that may not be discharged in bankruptcy, its amount is unreasonable in light of the debtor spouse's financial circumstances.'" At the summary judgment stage, the Court could not make that determination, with trial on that issue required. In re Valdivia, ___B.R. ___, 2020 WL 2617033 (Bankr. E.D. Mich. May 22, 2020).

Costs of attorney disciplinary proceedings were nondischargeable but discovery sanctions were not excepted from discharge. The Ninth Circuit examined again dischargeability of costs related to state bar disciplinary proceedings against the debtor/attorney, following *In re Findley,* 593 F.3d 1048 (9th Cir. 2010) and holding that the costs of the disciplinary proceedings imposed against the attorney were nondischargeable under § 523(a)(7) as in the nature of a governmental fine, penalty and forfeiture payable to and for the benefit of a governmental entity. However, the Circuit made a distinction for the separate discovery sanction. Under California law, the sanction was payable not to the governmental entity but to a third party. Under the plain text of § 523(a)(7), the sanction was not the type of debt excepted from discharge. In re Albert-Sheridan, 960 F.3d 1188 (9th Cir. 2020).

***Brunner* test not satisfied after remand from Circuit.** Following remand from the Eleventh Circuit, the District Court affirmed determination that student loan debt was nondischargeable, with the debtor failing to satisfy all three prongs of the *Brunner* test. In discussion of the good-faith prong, the Court observed that the bankruptcy court had not "adopted a *per se* rule requiring enrollment in income-based repayment," with the bankruptcy court considering "other permissible factors" in holding that the debtor had failed to meet her burden of good faith attempts to repay the loan. Graddy v. Educational Credit Management Corp., ___ B.R. ___, 2020 WL 2988370 (N.D. Ga. June 4, 2020).

Inadequate records under § 727(a)(3). Affirming denial of discharge, the well-educated collector of valuable watches and jewelry failed to keep adequate records of significant financial transactions involving purchases and returns of watches and jewelry. In re Dykes, 954 F.3d 1157 (8th Cir. 2020).

Failure to explain loss of loan proceeds established under § 727(a)(5). The well-educated debtor, with experience as a loan officer, failed to explain his loss of loan proceeds, establishing grounds to deny discharge under § 727(a)(5). Facts of case justified look-back period of five years prior to bankruptcy filing. In re McDonald, ___ B.R. ___, 2020 WL 1907533 (Bankr. N.D. Ohio Apr. 17, 2020).

Chapter 7 Issues

Dismissal

Serial filer's case properly dismissed with three-year bar. The Bankruptcy Appellate Panel found no abuse of discretion in dismissal of the serial filer's fifth case as lacking good faith or in the bankruptcy court's imposition of a three-year bar to refiling under §§ 105(a), 349(a) and 707(a). In re Riddle, 2020 WL 3498438 (B.A.P. 6th Cir. June 29, 2020).

Filing Chapter 7 as substitute for supersedeas bond was not bad faith or abuse. Reviewing § 707(a)'s causes for dismissal, the debtor became insolvent after ten years of litigation and efforts to settle a large judgment. Having insufficient funds to obtain supersedeas bond to stay execution, the debtor filed Chapter 7. The Bankruptcy Code does not preclude such a filing, and § 362(a) stays enforcement of a judgment, indicating that it is not bad faith to file for that purpose. The debtor was surrendering non-exempt assets for benefit of creditors and did not object to judgment creditor executing on specific property. For purposes of § 707(b), the moving creditor failed to establish that more than 50% of the judgment was for consumer debt. In re Kramer, ___ B.R. ___, 2020 WL 1821134 (Bankr. N.D. Okla. Apr. 8, 2020).

Discharge Injunction

Denial of arbitration of discharge violation upheld. The Second Circuit held that its precedent was clear and that the discharge injunction statute and the Federal Arbitration Act were in conflict on whether arbitration is required. The creditors argued that Circuit precedent had been undermined by *Epic Systems Corp. v. Lewis,* 138 S.Ct. 1612 (2018), but the Circuit disagreed. The debtors were not relying on the discharge injunction as defense to collection; rather, they were asserting the injunction affirmatively to recover damages for violation, and only the bankruptcy court that entered the discharge order may offer a contempt remedy. Having ruled that an inherent conflict existed, the contempt action was not subject to arbitration, but the panel then expressed doubt whether a nationwide class action was appropriate for enforcement of the discharge injunction—"permitting a bankruptcy court to adjudicate compliance with another court's order appears to be in severe tension with *[in re Anderson,* 884 F.3d 382 (2d Cir. 2018)]." In re Belton & Bruce, 961 F.3d 612 (2d Cir. 2020).

Bankruptcy court should have determined whether discharge injunction would be violated. The bankruptcy court had dismissed a creditor's adversary proceeding that sought declaratory relief and determination whether its intended state court suit would violate the discharge injunction from a prior Chapter 7 case. The proposed state litigation involved issues of whether the former Chapter 7 debtor had alter ego connections to entities and whether a settlement with the prior Chapter 7 trustee extinguished claims held by LLC entities. The Bankruptcy Appellate Panel held that declining to clarify the scope of the discharge injunction was an abuse of discretion. In re Moser, 613 B.R. 721 (B.A.P. 9th Cir. 2020).

Discharge injunction violations by servicer's attempts to collect. Under the *Taggart* standard, the mortgage servicer's thirty-plus calls to collect a discharged debt could not be "considered technical, unintended, or quickly remedied," and the calls continued after the servicer received a cease-and-desist letter from debtor's attorney. The bankruptcy court correctly found that there was no fair ground of doubt about whether the discharge order barred the servicer's conduct. The finding of contempt for violation of the discharge injunction was affirmed. In re DiBattista, ___ B.R. ___, 2020 WL 1819948 (S.D. N.Y. Apr. 9, 2020).

Chapter 13 Issues

Confirmation

Confirmation conditions violated potential modification. The Fifth Circuit accepted certified appeal from the District Court on conditions that had been imposed in some bankruptcy courts. The issue was whether confirmation could be conditioned upon what was known as *Molina* requirements, derived from *Molina v. Langehennig,* 2015 WL 8494012 (W.D. Tex. 2015). Applying that requirement in the current case, the debtor had excess disposable income and he had proposed a plan that would pay 100% of unsecured claims in full while paying secured claims. The trustee objected to confirmation, insisting on inclusion of the *Molina* requirement that the plan could not be modified to pay less than 100% to unsecured and if 100% were not paid the debtor would be ineligible for discharge. The plan was confirmed with the *Molina* language but the debtor appealed. The Circuit decision discusses the alternatives to satisfying § 1325(b)(1)'s confirmation requirement, holding that when the debtor's plan satisfied § 1325(b)(1)(A)'s condition of full payment of unsecured claims, "We conclude a debtor does not need to comply with both subsection (b)(1)(A) and (b)(1)(B)." The Circuit decision was ultimately based on its conclusion that the confirmation condition violated § 1329 by unnecessarily limiting the debtor's future ability to modify the plan. There was no bad faith finding by the bankruptcy court under § 1325(a), and inappropriate or bad faith attempts to modify a confirmed plan are best addressed when modification is sought, not by the *Molina* condition imposed at confirmation. Brown v. Viegelahn, 960 F.3d 711 (5th Cir. 2020).

In absence of objection, plan not required to have fixed duration. Reversing its Bankruptcy Appellate Panel, the Ninth Circuit held that unless there is an objection to confirmation, there is nothing in the Code preventing a debtor's proposed plan having an estimated duration rather than fixed term. In prior local plans, the bankruptcy courts had permitted proposed plans to estimate the term of months, but when the local model plan was revised in 2016, only a fixed number of months was permitted. The appealing debtors had deviated from the model plan by proposing estimated durations, and neither the trustee nor unsecured creditors objected to confirmation. The Bankruptcy Court denied confirmation on the basis that the plans permitted modifications without notice to

creditors and were not proposed in good faith. The debtors amended the plans to comply but then appealed. First, the Circuit panel found that it had jurisdiction over the appeals because the debtors demonstrated "injury in fact" to justify appellate standing. As to the substance of the appeal, the panel found no express provision of the Chapter 13 provisions in the Code prohibited plans with estimated lengths. Only two Code provisions address plan duration: section 1322 imposes a maximum length of three or five years, depending upon above-median or below-median status; and section 1325(b)(4) mandates a fixed applicable commitment period of three to five years, but only if there is an objection filed by the trustee or unsecured creditors. "Neither § 1322 nor § 1325 point to an express fixed or minimum duration requirement for Chapter 13 plans absent an objection. Conversely, neither provision prohibits estimated term plans." Other aspects of the Code's structure supported the Circuit's conclusions, including § 1328's failure to condition discharge on any fixed time period. The opinion also concluded that estimated plan duration did not offend § 1329, because trustees and unsecured creditors retained the opportunity to move for modification of estimated-term plans. Further, there was no bad faith in the debtors' proposals of estimated plan duration. In re Sisk, ___ F.3d ___, 2020 WL 3408715 (9th Cir. June 22, 2020).

Below-median debtors' plans may exceed three years but are not required to be for determinate number of months. Below-median debtors proposed to extend plans longer than thirty-six months, for as long as necessary to allow payment of allowed administrative, secured and priority claims. The trustee objected, contending that such extensions required that the plans be for a definite number of months, questioning whether cause existed for extensions and whether they were in good faith. Section 1322(d)(2) provides that the court may approve, for cause, "a longer period" for below-median debtors, but no longer than five years. The Code does not require that such debtors state their plan term beyond three years in "a finite number of months," and here the debtors had good cause for extension, because they could not afford plan payments that would be required over thirty-six months. The opinion suggested that counsel for debtors proposing plans exceeding thirty-six months "clearly articulate the basis for a cause finding in the plan itself." These plans were proposed in good faith and confirmed. In re Flinn, ___ B.R. ___, 2020 WL 2188653 (Bankr. D. Kan. Apr. 22, 2020).

TitleMax's objection to confirmation overruled. Applying Alabama's Pawnshop Act, the Chapter 13 debtor had possession of the pawned vehicle at filing and was not in default until the expiration of the redemption period under the contract. That redemption period had not expired at filing date; therefore, the debtor still held legal title and TitleMax had a lien, which was also a security interest under the contract. That interest was subject to modification and payment in the plan under § 1322(b)(2). The Court distinguished *In re Northington,* 876 F.3d 1302 (11th Cir. 2017), in which the pawn contract had matured prior to the bankruptcy filing. In re Womack, ___ B.R. ___, 2020 WL 3066438 (Bankr. M.D. Ala. June 9, 2020). See also In re Deakle, ___ B.R. ___, 2020 WL 3446362 (Bankr. S.D. Ala. June 24, 2020) (TitleMax failed to object to confirmation of plan treating loan as secured claim, waiving its title pawn status, with Court distinguishing *Northington* in which TitleMax acted prior to confirmation.); In re Cottingham, 2020 WL 3410170 (Bankr. N.D. Ala. May 4, 2020) (Plan treated TitleMax as secured creditor and TitleMax failed to object to confirmation.).

Disposable Income

Sixth Circuit revisits deductions of 401(k) contributions. In an earlier decision, *In re Seafort,* 669 F.3d 662 (6h Cir. 2012), the Circuit held that a Chapter 13 debtor could continue paying a 401(k) loan, because such repayments were explicitly excluded from disposable income under § 1322(f), but upon completion of the loan payments that debtor could not initiate 401(k) contributions and deduct them from projected disposable income. In the current case, the debtor had a history of making 401(k) contributions before filing Chapter 13 and proposed to continue making those contributions. In a split decision, the Circuit panel's majority concluded that BAPCPA's § 541(b)(7)'s hanging paragraph had changed preexisting law, now permitting the deduction so long as the debtor had a history of contributions and did not contribute more than such history supported. The opinion reviews the pre-2005 split and *Seafort's* holding as well as its dictum. "We conclude that the hanging paragraph is best read to exclude from disposable income the monthly 401(k)-contribution amount that Davis's employer withheld from her wages prior to bankruptcy. That interpretation reads the amendment to § 541(b), which added the hanging paragraph, in a way that actually amends the statute. It also gives a meaningful

effect—one not already accomplished by § 1325(b)(2)—to Congress's instruction in § 541(b)(7) that 401(k) contributions 'shall not constitute disposable income.'" The majority opinion observes that a good faith analysis could be required "to minimize the risk that a debtor contemplating bankruptcy might begin making 401(k) contributions prior to filing to lower the amount she must ultimately repay her creditors." In re Davis, 960 F.3d 346 (6th Cir. 2020).

Liquidated value of exempt personal injury claim included in disposable income. The debtor scheduled a prepetition personal injury claim as fully exempt under Colorado law, and the plan proposed to pay 3.24% to unsecured creditors. The trustee objected to confirmation, asserting that the exempt asset's value must be included in the disposable income calculation. Noting the pre-BAPCPA split of authority on whether exempt income is a part of disposable income, the Court adopted the majority view of inclusion, citing *In re Koch,* 109 F.3d 1285 (8th Cir. 1997). The Court concluded that BAPCPA amendments statutorily answered the question, because "current monthly income does not exclude exempt assets and it is the starting point for calculating disposable income." Quoting *In re Brah,* 397 B.R. 922, 924 (Bankr. E.D. Wis. 2017). Moreover, § 1325(b)(2) expressly excluded specific income from disposable income, and "if Congress had intended to exclude exempt personal injury recoveries from the calculation of a debtor's disposable income, it certainly could have done so." In re Adamson, ___ B.R. ___, 2020 WL 2510363 (Bankr. D. Colo. May 12, 2020).

Curing Default

Under Arkansas law, foreclosed property not "sold" until recordation of mortgagee's deed. For purposes of § 1322(c), when Chapter 13 was filed prior to recordation of the mortgagee's deed after foreclosure, the debtor still retained possession and had opportunity to cure the mortgage default, with the Court discussing Arkansas foreclosure law and bankruptcy court precedent on the issue. However, the purchaser at the foreclosure was not adequately protected and the automatic stay was terminated to permit necessary steps to complete the foreclosure and obtain possession. In re King, ___ B.R. ___, 2020 WL 2315870 (Bankr. E.D. Ark. Apr. 30, 2020).

Assumption

Plan didn't eliminate trustee's requirement to assume lease. The confirmed Chapter 13 plan proposed to assume a lease on personal property and to cure arrears on the lease through plan payments, but the debtor defaulted post-confirmation. The lessor then moved for allowance of its administrative expense claim for the missed payments, but the Eleventh Circuit held that § 365(p)(1) was clear in automatically terminating the lease if it is not timely assumed by the trustee. The Circuit rejected the argument that the use of "trustee" in the section should be understood to mean the "debtor." Section 1322(b)(7) only states what a plan may contain concerning such leases or executory contracts, but that section is specifically "subject to § 365." The Circuit construed § 365(p)(1) to require the trustee's assumption of the lease; otherwise, the lease was no longer property of the estate, and the lessor was not entitled to administrative expense. As to § 365(p)(3)'s provision that if a personal property lease is not assumed in a Chapter 13 plan, it is deemed rejected at conclusion of the confirmation hearing, the Circuit concluded that "it makes much more sense—and gives meaning to each of the words that Congress used—to interpret § 365(p)(1) as addressing the trustee's (as in the trustee's) authority to assume a lease on behalf of the estate and § 365(p)(3) as addressing the debtor's ability to assume the lease on behalf of himself." In re Cumbess, 960 F.3d 1325 (11th Cir. 2020).

Plan Modification

Re-vesting did not prevent modification. The debtor received postconfirmation compensation in the form of stock options and the trustee sought modification to obtain a portion of the compensation to pay creditors in full. The debtor argued that the estate terminated at confirmation due to re-vesting language. The Bankruptcy Appellate Panel affirmed the modification, citing precedent for increasing payments to creditors when a debtor's income increased during the plan. "Confirmation does not shield increases in the debtor's postconfirmation income from the reach of the chapter 13 trustee or creditors." Although the BAP previously held in *In re Black,* 609 B.R. 518 (B.A.P. 9th Cir. 2019), that "the estate terminates at confirmation," with re-vesting putting property of the estate back in the ownership of the debtor, "under § 1329, the bankruptcy court can approve a plan modification that increases the debtor's plan payments due to a

postconfirmation increase in the debtor's income, whether or not the additional income is property of the estate." In re Berkley, 613 B.R. 547 (B.A.P. 9th Cir. 2020).

Conversion and Dismissal

Debtor had absolute right to dismiss. The Chapter 13 debtor's former spouse moved to convert the case to Chapter 7 based on alleged bad faith conduct, and the debtor responded with dismissal motion. Reviewing the split of judicial authority, the Court disagreed with *In re Jacobsen,* 609 F.3d 647 (5th Cir. 2010), concluding that the debtor had an absolute right to dismiss under § 1307(b). "As *Law [v. Siegel]* makes clear, the answer for a bankruptcy court to deal with the bad actor in these situations is to employ those remedies that the Bankruptcy Code and the bankruptcy court's inherent authority do afford, not rewrite the Bankruptcy Code by creating remedies that directly contravene Bankruptcy Code provisions." In re Fulayter, ___ B.R. ___, 2020 WL 1943208 (Bankr. E.D. Mich. Apr. 22, 2020).

On pre-confirmation conversion, funds held by trustee are first paid to debtor's attorney. Concluding that *Harris v. Viegelahn,* 575 U.S. 510 (2015), did not control the present case, *Harris* involved a confirmed plan prior to conversion to Chapter 7, while here, the plan had not been confirmed prior to the debtor's conversion to Chapter 7. The Court concluded that § 1326(a)(2) specifically controlled, with the third sentence of that section providing that if a plan has not been confirmed the trustee shall return payments to the debtor "after deducting any unpaid claim allowed under section 503(b)." The Supreme Court had no reason to consider the effect of that sentence in *Harris* because it was a post-confirmation case; therefore, *Harris* did not overrule the plain language of § 1326(a)(2) concerning pre-confirmation cases. Here, the trustee must pay the allowed fees to the debtor's attorney before refunding the balance on hand to the debtor. In re Arnold, ___ B.R. ___, 2020 WL 2462525 (Bankr. E.D. Mich. May 12, 2020).

Dismissal for bad faith filing affirmed. The District Court affirmed dismissal of Chapter 13 filing, with no error or abuse of discretion in bankruptcy court's finding a history of serial filings involving a two-party dispute with a single creditor and failure to make plan payments. In re Buhl, ___ F.Supp.3d ___, 2020 WL 1849393 (D. Conn. Apr. 13, 2020).

See also Mileusnic v. Chael, ___ B.R. ___, 2020 WL 2307497 (D. N.D. Ind. May 8, 2020) (Dismissal for failure to make plan payments affirmed.).

Debtor's § 523(a)(8) complaint mooted by voluntary dismissal of case. The Chapter 13 debtor had filed an adversary proceeding objecting to the student loan creditor's proof of claim and seeking determination of dischargeability, but the debtor subsequently voluntarily dismissed the Chapter 13 case. The Court concluded that constitutional mootness was triggered by case dismissal, leaving no Article III actual case or controversy concerning dischargeability. When there would be no discharge entered in the case, determination of dischargeability of the student loan debt would be "a purely hypothetical endeavor." Moreover, the bankruptcy court had discretion not to retain jurisdiction over the proceeding, which was dismissed. In re Steed, 614 B.R. 395 (Bankr. N.D. Ga. 2020).

Discharge Injunction

IRS and collection agent violated discharge injunction but exhaustion of administrative remedies prevented damages against IRS. After receiving notice of the Chapter 13 filing, IRS participated, filed proofs of claim and "had the opportunity to raise the issue of dischargeability of these tax debts by filing an adversary proceeding. Instead, . . .the IRS made its own determination that the debt was nondischargeable and proceeded with collection activity." IRS engaged a collection agent, and both violated the discharge injunction. However, 26 U.S.C.A. § 7433 prohibits an action against IRS for damages associated with the violation unless administrative remedies have been exhausted. That protection was not extended by the statute to the private collection agency, under 26 U.S.C.A. § 7433A, with compensatory damages awarded but no punitive damages. In re Starling, ___ B.R. ___, 2020 WL 3422348 (Bankr. S.D. N.Y. June 22, 2020).

Claims

Creditor's attorney's failure to respond to debtor's motion to value collateral was not excusable neglect. The creditor's attorney failed to respond to the debtor's motion to value collateral securing a loan, and that failure was not excusable neglect justifying

relief from the order determining amount of secured claim. In re Peek, 614 B.R. 274 (Bankr. E.D. Mich. 2020).

Debtor's objection to tardily filed amended mortgage claim sustained. The mortgage creditor objected to the trustee's notice of final cure and filed amended claims, increasing the amount of its claim two years after the claims bar date. The plan provided for full payment of the mortgage in the plan, in contrast to the typical "cure and maintain" mortgage treatment, and the mortgagee failed to read or understand that the plan provided for payment of the entire mortgage debt. It filed its original claim for what appeared to be an arrearage amount, but the mortgagee was actively engaged in the case, failing to timely amend its claim to reflect the full debt. The opinion contains discussion of the differences between "cure and maintain" and full-payment plans. The error in the original proof of claim was the mortgagee's and no basis existed for extending the time to allow late-amended claims. Because the debtor had completed plan payments, the debtor was entitled to discharge, objection to the amended claims was sustained, and the mortgage was deemed satisfied. In re Bozeman, ___ B.R. ___, 2020 WL 3071824 (Bankr. M.D. Ala. June 9, 2020).

Debtors' Attorney

Fee-sharing prohibition did not apply to local attorney who was also member of national firm. The District Court rejected the U.S. Trustee's position that a local attorney improperly shared fees with the national law firm UpRight Law LLC, finding that the local attorney was in fact a partner of UpRight. As a result, the local attorney could share fees in Chapter 13 cases with UpRight under § 504(b)(1). Deighan Law, LLC v. Daugherty, ___ B.R. ___, 2020 WL 1862671 (E.D. Mo. Apr. 14, 2020).

Requirements for debt relief agency. The Chapter 13 trustee challenged validity of debtors' contracts with their attorneys under the requirements of §§ 526-528, and the Court found that the contracts did not comply with material requirements of those sections, failing to "clearly and conspicuously explain the services to be provided or the fees or charges for such services." As a result of the failures, the contracts were unenforceable. The attorneys had forfeited right to charge for services and were required

to refund all legal fees to the debtors. In re Negron, ___ B.R. ___, 2020 WL 2047977 (Bankr. D. Puerto Rico Apr. 28, 2020).

CONSUMER LAW UPDATE

Cases reported from July 1, 2020 through

September 15, 2020

Prepared for Federal Judicial Center

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Automatic Stay

Supreme Court's *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano* does not prevent retroactive stay relief. The Ninth Circuit Bankruptcy Appellate Panel found no error in the bankruptcy court's retroactive stay relief to permit claimants who had no knowledge of bankruptcy filing to liquidate their wrongful-death claim, with the opinion analyzing the impact of *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano, et al*., 140 S.Ct. 696 (2020). The claimants had moved to annul the stay and the bankruptcy court's decision was reviewed for abuse of discretion, with the BAP finding sufficient evidence to support the motion and cause for granting retroactive relief. The Supreme Court's decision was entered while this appeal was pending, and the BAP disagreed with the analysis of *Acevedo* found in *In re Telles*, 2020 WL 2121254 (Bankr. E.D. N.Y. Apr. 30, 2020), in which that Court had concluded that it lacked authority to grant retroactive stay relief concerning a foreclosure sale. *Acevedo* dealt with the removal statute's prevention of the state court's exercise of jurisdiction over the removed cause of action, and the BAP did "not interpret *Acevedo* as pertaining to the bankruptcy court's power to annul the automatic stay under § 362(d)." That section "does not purport to deprive the bankruptcy court of jurisdiction; rather, it explicitly grants the court the power to modify the stay to permit another court or entity to exercise control over an asset or claim." In re Merriman, 616 B.R. 381 (B.A.P. 9th Cir. 2020).

Postpetition foreclosure bidder violated stay. The investment company that was high bidder at a foreclosure sale conducted after filing of a Chapter 7 violated the automatic stay when it tendered a cashier's check to the attorney who conducted the foreclosure. The bidder then willfully violated the stay by wiring the bid funds to the attorney and again by filing a lis pendens against the property after the bidder had learned of the bankruptcy filing. The Fifth Circuit affirmed on the stay violations and also on the holding that the bidder was not entitled to equitable subordination to the rights of the deed of trust lender or to unjust enrichment recovery. The facts included that the attorney conducting the sale had stolen the funds, using them to reimburse other defrauded clients. Matter of Okedokun, 968 F.3d 378 (5th Cir. 2020).

Incarceration for civil contempt was stay violation. The District Court concluded that the Chapter 7 debtor's incarceration by the domestic relations court was a sanction for civil contempt, with a discussion of the distinctions between civil and criminal contempt for purposes of the automatic stay. Section 362(b)(4) did not protect this incarceration from being a stay violation. In re Erhardt, ___ B.R. ___, 2020 WL 4035506 (N.D. Ill. July 15, 2020).

Avoidance

Chapter 7 debtor's legal fee paid by his mother was not preference. In a case converted from Chapter 13, the Chapter 7 trustee sued the debtor's law firm to recover an alleged preferential payment made to the firm by the debtor's mother. The payment was for legal services prior to the filing of bankruptcy, and the mother wrote a check on her account directly to the firm and delivered it to the firm. The Tenth Circuit concluded that the payment was not a preference, because the debtor did not exercise dominion or control over the funds and the payment from the mother did not diminish the debtor's bankruptcy estate. The payment was not a transfer of an interest of the debtor under § 547(b). In Matter of Wagenknecht, ___ F.3d ___, 2020 WL 4930035 (10th Cir. Aug. 24, 2020).

Discriminatory Treatment

Section 525(b) damages explored. Chapter 7 debtor sued her employer and two individuals as agents of employer for firing her after bankruptcy filing. The two individual defendants were not shown to be the "employer" under § 525(b) and they were dismissed from suit. The Court considered the type of damages potentially recoverable under § 525(b), concluding that the statute did not itself provide a remedy for violations. The plaintiff was not entitled to recover emotional distress, punitive or attorney fee damages. Vaughan-Williams v. First Commerce Bank, et al., ___ F.Supp.2d ___, 2020 WL 3638245 (D. N.J. July 6, 2020).

Property of Estate and Exemptions

Snapshot rule applied to homestead by First Circuit. In a case converted from Chapter 13 to 7, debtor had claimed homestead exemption under Maine's law and in the Chapter 13 phase the Court approved the debtor's motion to sell the property, paying the mortgage and non-exempt proceeds to the trustee. The sale was completed but the debtor then converted to Chapter 7 and that trustee objected to the exemption, asserting that any remaining funds belonged to the Chapter 7 estate. Both the bankruptcy and district judges had applied the snapshot rule as of the Chapter 13 petition date, denying the Chapter 7 trustee's objection. The First Circuit affirmed application of the snapshot rule to determination of the allowable exemption as of the petition date, with conversion to Chapter 7 not changing the date of filing under § 348(a). The sale of the home during the Chapter 13 phase of the case did not destroy the exemption, even though Maine's law required proceeds from sale of homestead to be reinvested in a residence within six months. In re Rockwell, 968 F.3d 12 (1st Cir. 2020).

Lien satisfied pre-bankruptcy could not be avoided on exemption-impairment grounds. The Chapter 7 debtor's interest in funds subject to judgment creditor's execution lien was terminated prior to the bankruptcy filing under applicable California law. The debtor's interest had ceased either by payment of the funds to the sheriff or by denial of the debtor's state-law exemption claim and release of the funds to the judgment creditor. The Chapter 7 debtor no longer had avoidance rights under §§ 522(f) or (h), when "the lien did not impair an interest in his property on the date he filed his chapter 7 bankruptcy petition." In re Elliott, ___ F.3d ___, 2020 WL 4669421 (9th Cir. Aug. 12, 2020).

Disclosure of pending litigation in Statement of Financial Affairs but not in Schedules of assets did not result in abandonment by trustee. The Ninth Circuit Bankruptcy Appellate Panel followed what it identified as the majority of courts' reading of § 554(c), holding that "the word 'scheduled' in § 554(c) refers only to assets listed in a debtor's Schedules. On its face, § 554(c) provides that an asset must be 'scheduled under section 521(a)(1)' to be technically abandoned." Such a "narrow reading" was found to be "consistent with sound bankruptcy policies and reasonable expectations for a debtor's performance of statutory duties." Here, the listing of the pending suit only in

the Statement of Financial Affairs was not sufficient to result in abandonment, and the trustee had reopened the Chapter 7 case, with the Bankruptcy Court approving trustee's settlement of the unscheduled cause of action. In re Stevens, 617 B.R. 328 (B.A.P. 9th Cir. 2020).

Chapter 7 Issues

Means Test

Special circumstances under § 707(b). Although a presumption of abuse arose in the case due to the debtors' income, the debtors asserted rebuttal because of special circumstances related to student loan debt and 401(k) deductions. Discussing the split of authority on whether nondischargeable student loan debt may be a special circumstance, the Court concluded that nondischargeability alone did not make the debt a special circumstance. Further, the debtors' voluntary monthly 401(k) contribution was not a special circumstance, rejecting the argument that unavailability of those funds from Chapter 13 disposable income satisfied the special circumstances threshold. In re Hanks, ___ B.R. ___, 2020 WL 4530069 (Bankr. W.D. La. July 20, 2020).

Social Security benefits included in § 707(b)(3)(B) analysis. Affirming the Bankruptcy Court's opinion at 611 B.R. 574 (Bankr. E.D. Mich. 2020), the District Court held that Social Security benefits are included in § 707(b)(3)'s totality-of-circumstances abuse analysis, and inclusion did not violate 42 U.S.C. § 407(a)'s protection of those benefits. In re Meehean, ___ B.R. ___, 2020 WL 4783299 (E.D. Mich. Aug. 18, 2020).

Discharge

"Conduct" prong of § 523(a)(1)(C). Applying its prior two-prong test for whether a tax is dischargeable under § 523(a)(1)(C), from *In re Jacobs,* 490 F.3d 913 (11th Cir. 2007), the Eleventh Circuit affirmed the determination that the debtors had willfully attempted to evade federal tax debt. The conduct prong of that test requires the government to "demonstrate that the debtor 'engaged in affirmative acts to avoid payment or collection of taxes either through commission or culpable omission.'" Quoting *Jacobs,* 490 F.3d at

921. The government met that burden here. In re Feshbach, ___ F.3d ___, 2020 WL 5406113 (11th Cir. Sept. 9, 2020).

Lease Assumption

Lease assumption of vehicle survived discharge, without requirement of reaffirmation. The Ninth Circuit affirmed interpretation of § 365(p) as allowing the Chapter 7 debtor to assume a personal property lease, here a vehicle, without the need to also reaffirm the debt. To require "debtors to reaffirm lease assumptions would make section 365(p)'s safe-harbor provisions superfluous. Section 365(p)(2)(C) clarifies that if the parties contact each other to negotiate an assumption agreement, their communications will not violate either the 'stay under section 362 [or] the injunction under section 524(a)(2).'" Moreover, "if every lease assumption must be reaffirmed to survive discharge, then section 524(c)'s more onerous requirements would displace section 365(p)'s more informal ones." Once this debtor executed the lease assumption the liability survived her discharge. Bobka v. Toyota Motor Credit Corp., 968 F.3d 946 (9th Cir. 2020). See also In re Paschal, ___ B.R. ___, 2020 WL 4669067 (Bankr. M.D. Ga. Aug. 11, 2020), for discussion of true vehicle lease versus disguised security interest under Georgia law.

Chapter 13 Issues

Co-debtor Stay

Definition of consumer debt for purposes of co-debtor stay. Noting that courts generally look to "the purpose for which the debt was incurred" in determining whether a particular debt is a consumer debt, the attorney fees and damages incurred in a state-court injunctive action were not consumer debt, "as it has not been voluntarily incurred and it is not the type of debt that the Debtor would expect to incur in her daily affairs." The debts resulted from neighbors' suit for damages related to the debtor's possession of numerous animals that were causing excessive noise and interfering with the neighbors' use and enjoyment of their property. The co-debtor stay was not triggered. In re Alvarelz Velez, 617 B.R. 158 (B.A.P. 1st Cir. 2020).

Confirmation

Retaining property in estate requires case-specific reasons. In another opinion on the effect of plans retaining property in the estate rather than re-vesting in the debtor, the Seventh Circuit held that confirmation of a plan that retains property, here again vehicles, in the estate requires that the bankruptcy court find "good case-specific reasons for that action." The plan form had a check-off box retaining property but that did not satisfy the Circuit panel. Matter of Cherry, 963 F.3d 717 (7th Cir. 2020).

Failure to provide for known secured claim prevented confirmation for lack of good faith. Noting that full and accurate disclosure is an "unchanging constant" requirement underlying good faith, when the debtors knew of a secured claim but failed to schedule the secured vehicle or the secured debt, the plan lacked good faith under § 1325(a)(3), with the trustee's objection to confirmation upheld. In re White, ___ B.R. ___, 2020 WL 5187570 (Bankr. E.D. N.C. Aug. 28, 2020).

Local Plan Form

Local plan form requiring debtor's turnover of postpetition tax refunds. The Fifth Circuit vacated and remanded confirmation which had incorporated the local plan form requirement that debtors turn over to the trustee all postpetition tax refunds in excess of $2,000 as disposable income, finding that plan requirement invalid. The requirement applied to below-median and above-median debtors, violating § 1325(b)(2)'s provision for below-median debtors to "retain any income that is reasonably necessary for their maintenance and support." This local plan term "could abridge a below-median income debtor's substantive right to use her 'excess' refund amount for reasonably necessary expenses for her maintenance and support." In re Diaz, ___ F.3d ___, 2020 WL 5035800 (5th Cir. Aug. 26, 2020).

Applicable Commitment Period

Applicable commitment period begins on date first payment is due. In an above-median case, the debtors had begun pre-confirmation payments on their 60-month plan, but the trustee argued that the applicable commitment period did not begin until confirmation, which would require the debtors to continue payments for a total of 74

months. The model plan for the district adopted the trustee's position, but the debtors sought to modify that provision of the model plan to begin the applicable commitment period with their first pre-confirmation plan payment. The Court agreed with the debtors' position, adopting what it found to be the majority position that the 60-month applicable commitment period began with the date the first payment was due pre-confirmation. In re Kinne, ___ B.R. ___, 2020 WL 5505912 (Bankr. E.D. Mich. Sept. 11, 2020).

Modification of Plan

Modification does not require showing of unforeseen change in circumstances. The Eleventh Circuit, on direct appeal, affirmed that it is not a requirement for post-confirmation modification that there be an unforeseen change in circumstances, noting a split in Circuit authority. In this case, after confirmation the debtor's attorney incurred additional fees related to an adversary proceeding, and the debtor moved to modify the plan to reduce payments to unsecured creditors so that she could pay those attorney fees. The trustee objected, asserting the res judicata effect of confirmation. The Circuit held that "§ 1329 carves out a limited exception to this general rule," and the plain text of that section "does not impose a requirement that the bankruptcy court find any change in circumstances before modifying a confirmed plan." In contrast, Chapter 11's § 1127(b) requires that circumstances warrant modification, but the same showing is not required for Chapter 11 debtors who are individuals under § 1127(e). The opinion observes that a change in circumstances may be a good reason to permit modification, but it is not a required reason. In re Guillen, ___ F.3d ___, 2020 WL 5015287 (11th Cir. Aug. 25, 2020).

CARES Act did not permit modification of plan not confirmed before enactment. The debtor proposed to amend a plan, extending to seven years under the CARES Act, asserting that interim confirmation of the plan under local procedure was effectively a confirmation before enactment of the CARES Act. The Court concluded that interim confirmation was a creature of local practice "employed to provide adequate protection to secured and priority creditors pending 'final' plan confirmation." Such interim confirmation was "not confirmation under section 1325." As a result, the interim confirmation did not subject this plan to the potential of seven-year term, and the plan could not be confirmed for longer than five years. In re Roebuck, ___ B.R. ___, 2020 WL 5249597 (Bankr. W.D.

Pa. Sept. 3, 2020). See also In re Drews, ____ B.R. ___, 2020 WL 4382071 (Bankr. E.D. Mich. July 30, 2020) (Plan was confirmed after enactment of CARES Act and could not be extended to seven years.).

Valuation

GAP insurance did not result in cram down of 910-vehicle. GAP insurance cost of $295 was financed as part of purchase of vehicle within 910 days of filling Chapter 13, and the debtor proposed to bifurcate the loan and cram down the value of vehicle, contending that financing of the GAP insurance destroyed the purchase money security interest. The Court determined that whether the creditor had a PMSI securing its debt was a matter of state law, here Colorado, and for consumer-goods transactions, the Colorado legislature gave deference to the courts. Although the parties conceded that the creditor had no PMSI on the portion of debt related to the GAP insurance, the PMSI continued in effect for the balance of the financed debt. The Tenth Circuit in *In re Billings,* 838 F.2d 405 (10th Cir. 1988), had adopted the "dual status rule" under Colorado law for a PMSI in the context of § 522(f), holding that refinancing of a purchase-money consumer debt did not destroy or transform the PMSI nature of the debt. Other bankruptcy courts have endorsed the dual status rule subsequent to *Billings.* In re Madrid-Baskin, ___ B.R. ___, 2020 WL 5047406 (Bankr. D. Colo. Aug. 25, 2020).

Discharge

Section 523(a)(8)(A)(ii) construed. The Chapter 13 plan had provided that student loan debt would be treated as unsecured and payment deferred to the end of the plan, and the Tenth Circuit interpreted that plan language as not deciding dischargeability of the student loans at issue. The real question was whether the debtors' private-lender Tuition Answer Loans were covered by the exception found in § 523(a)(8)(A)(ii), and the Tenth Circuit agreed with the Bankruptcy Court that they were not excepted from discharge, "because, as student loans, they are not 'obligations to repay funds received as an educational benefit.'" The statutory terms "obligations to repay funds received as an educational benefit" and "educational loan" mean separate things. The word "benefit" implies something "that ordinarily does not need to be repaid." As a result, the Circuit's

conclusion "excludes student loans from the reach of § 523(a)(8)(A)(ii)." In re McDaniel, ___ F.3d ____, 2020 WL 5104560 (10th Cir. Aug. 31, 2020).

Deceased debtors, through personal representative, entitled to hardship discharge. In an analysis of the requirements for hardship discharge in the face of the trustee's motion to dismiss the case, the Court granted the motion of the deceased debtors' personal representative for hardship discharge. Although the debtors had materially defaulted under the plan, which could provide cause for dismissal, there was justification for hardship discharge under § 1328(b). The debtors had 81% payment history in the case. The Court analyzed the meaning of "further administration" of deceased debtors' estates under Rule 1016, concluding that the term did not require additional payments to the trustee. The Rule requires the Court to consider "the best interest of the parties," which here included creditors secured by the debtors' home. One secured creditor's claim had been reduced in the Chapter 13 but if hardship discharge were denied, that reduction would not survive and there would be little or no equity in the home. Unsecured creditors would receive nothing in the case, but there were substantial postpetition claims, which would not be discharged but would have better chance of recovery through equity in the home if hardship discharge were granted. On balance, the best interest of parties favored hardship discharge. In re Sanford, ___ B.R. ___, 2020 WL 5105181 (Bankr. E.D. Mich. Aug. 28, 2020).

Discharge Injunction

Failure to exhaust administrative remedies deprived court of jurisdiction over alleged discharge violation by IRS. Chapter 13 debtors alleged that IRS violated the discharge injunction by collection attempts for post-petition interest on discharged tax debts, but the debtors did not plead or show that they had exhausted IRS's administrative remedies under 26 C.F.R. § 301.7433-2(e) for their damage claims. As a result, the bankruptcy court lacked jurisdiction to grant the requested relief, and the adversary proceeding was dismissed. In re Francisco Negron Yordan, ___ B.R. ___, 2020 WL 5105689 (Bankr. D. Puerto Rico Aug. 25, 2020).

Dismissal

Chapter 13 debtor's right to voluntarily dismiss is not absolute. The Ninth Circuit Bankruptcy Appellate Panel affirmed denial of the debtor's voluntary dismissal and grant of the creditors' motion to convert to Chapter 7, holding that § 1307(b)'s right to dismiss is not absolute. The Ninth Circuit's *In re Rosson,* 545 F.3d 764 (9th Cir. 2008), is still good law and binding, but the BAP exercised discretion to consider the issue. The Ninth Circuit had relied on *Rosson* subsequent to *Law v. Siegel,* 571 U.S. 415 (2014), and that decision did not require rejecting *Rosson.* "[L]imiting a chapter 13 debtor's § 1307(b) right voluntarily to dismiss a case when there is bad faith conduct or abuse of process warranting conversion is consistent with the objectives of the Bankruptcy Code and is otherwise sound statutory construction." The Bankruptcy court did not err in finding grounds for conversion. In re Nichols, ___ B.R. ___, 2020 WL 4674090 (B.A.P. 9th Cir. Aug. 12, 2020).

On pre-confirmation dismissal, trustee must pay administrative claim. Finding that the debtor's attorney had an allowed administrative expense claim for unpaid "no look" fee and that amount should be paid by the trustee before returning funds to the debtor, the debtor's motion to compel recoupment of those fees was denied. The Court distinguished *Harris v. Viegelahn,* 575 U.S. 510 (2015), as addressing a post-confirmation conversion under § 348 rather than the pre-confirmation dismissal in this case, which was controlled by §§ 349 and 1326(a)(2). Section 1326(a)(2) requires the trustee, upon dismissal prior to confirmation, to return undistributed funds to the debtor only after deducting any unpaid allowed claim under § 503(b). In re Nelums, 617 B.R. 70 (Bankr. D. S.C. 2020).

Reopening Closed Case

Defendants in post-petition personal injury case lacked standing to contest reopening of Chapter 13 case or to object to exemption claim. In an extensive discussion of reopening requirements to disclose a post-petition cause of action and to claim exemption, the Court held that the state court defendants in the personal injury action were not parties in interest and lacked Article III standing to contest reopening or

to object to the debtor's claim of exemption or employment of special counsel. In re Boyd, ___ B.R. ___, 2020 WL 4196012 (Bankr. D. S.C. July 17, 2020).

Claims

Untimely domestic support claim disallowed but debt not discharged. Under § 502(b)(9), when objection is made to an untimely-filed claim, the claim must be disallowed, but because the debt was for a domestic support obligation, the creditor had a remedy—the debt was not dischargeable in the Chapter 13 case. Disallowance meant that the debt would not be paid in the plan but the debt would survive discharge. In re Dillon, ___ B.R. ___, 2020 WL 4004886 (Bankr. S.D. Miss. July 14, 2020).

Domestic support obligation under Sixth Circuit's *Sorah* test. Under the Sixth Circuit's precedent, *In re Sorah,* 163 F.3d 397, 401 (6th Cir. 1998), the defendant debtor "has a burden of demonstrating 'that although the obligation is of the type that may not be discharged in bankruptcy, its amount is unreasonable in light of the debtor spouse's financial circumstances.'" After trial, the Court determined that the Chapter 13 debtor failed to carry this burden. Although the debt created in the state court divorce judgment was $300,000, the debtor did not show lack of present or foreseeable future ability to pay the debt; therefore, the debt was not so unreasonable as to be dischargeable under the *Sorah* test. Although the debtor filed the Chapter 13 with the goal of discharging this debt, the effort was not frivolous or in bad faith. In re Valdivia, 617 B.R. 278 (Bankr. E.D. Mich. 2020).

Fees awarded to attorneys were domestic support obligation. FDIC, as receiver for a bank, objected to proofs of claim filed by attorneys for fees and sanctions awarded to them in state divorce action, but the Court found the state court's intention to be clear that the fees and sanction were domestic support in nature. The fees were in connection with the debtor's obligation to pay child support, and the sanction was related to the debtor's inaccurate and misleading financial affidavit. FDIC argued that the awards were not domestic support obligations under the test of *In re Trentadue,* 837 F.3d 743 (7th Cir. 2016), but the state court's declarations were that the awards were part of support obligations. The opinion notes that generally fees paid to a third party, such as attorney,

"on behalf of a child or former spouse can be as much support as payments made directly to a former spouse or child." In re Kowalski, 617 B.R. 116 (Bankr. N.D. Ill. 2020).

Debtor's Attorney

Disgorgement of fees for nondisclosure. The Tenth Circuit held that the "default sanction" for an attorney's failure to satisfy disclosure obligation is full disgorgement of fees paid. While full disgorgement may not be required in particular circumstances, the "default sanction" principle required reversal and remand. The bankruptcy court, affirmed by the BAP, had ordered disgorgement of a small part of a large fee without providing adequate reasons. In re Stewart, ___ F.3d ___, 2020 WL 4726521 (10th Cir. Aug. 14, 2020).

Debtors' attorney fees not authorized under Equal Access to Justice Act (EAJA). Although the Chapter 13 debtors had prevailed before the Ninth Circuit, *In re Sisk*, 962 F.3d 1133 (9th Cir. 2020), their application for attorney fees as prevailing parties under EAJA was denied. That Act did not authorize awards of attorney fees to debtors against the bankruptcy and appellate panel courts that had ruled against them. Those courts did not fall within the EAJA's definition of "United States," and the prior actions were not against the United States. "Uncontested Chapter 13 cases [are not] brought 'by or against' the United States—they are brought by Debtors seeking relief from their creditors." In re Sisk, ___ F.3d ___, 2020 WL 5200918 (9th Cir. Sept. 1, 2020).

Sanctions against nationwide firm affirmed. The Eleventh Circuit affirmed the Bankruptcy and District Courts' sanctions against the UpRight Law firm and its local attorney, finding that the Bankruptcy Court had authority to impose sanctions for actions including misleading fee disclosures under § 526(a)(2), and the Bankruptcy Court did not violate the firm's or attorney's due process rights by its show cause hearing. The monetary sanction of $25,000 per case was affirmed, and the sanction of temporary suspension from practice in the Bankruptcy Court was a moot issue because the suspension period had expired. Law Solutions of Chicago, LLC v. Corbett, ___ F.3d ___, 2020 WL 4915335 (11th Cir. Aug. 21, 2020). See also In re Taulbee, 2020 WL 5521045 (E.D. Ky. Sept. 14, 2020) (Remand of disbarment of Chapter 13 debtor's attorney required due to lack of sufficient due process notice.).

Application for nunc pro tunc employment of special counsel for Chapter 13 debtor denied. Citing *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano, et al*., 140 S.Ct. 696 (2020), the use of nunc pro tunc orders to retroactively employ special counsel for the Chapter 13 debtors' representation in personal injury suit was improper. However, applicable Code and Rule requirements "do not require employment and compensation to be authorized prior to performance of services," with the Court having discretion to approve employment, after notice, even though the attorney's services had begun. In re Roberts, ___ B.R. ___, 2020 WL 4195204 (Bankr. S.D. Ohio July 15, 2020).

CONSUMER LAW UPDATE

Cases reported from September 16, 2020 through December 31, 2020

Prepared for Federal Judicial Center

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Legislation

Consolidated Appropriations Act, December 27, 2020

This legislation includes several bankruptcy-related provisions, in addition to government funding and other COVID relief. Consumer bankruptcy provisions are addressed in Title X of the Act. Section 1001 amends Bankruptcy Code § 541(b)'s exclusions from property of the estate, adding subsection 11 for certain coronavirus relief, defined as "recovery rebates made under section 6428 of the Internal Revenue Code." This provision has a one-year sunset from enactment.

Section 1001 also amends Bankruptcy Code § 1328 to add subsection (i)(1), giving bankruptcy courts discretion to grant discharge under § 1328(a) to debtors who had defaulted in plan payments to the trustee or directly to a "creditor holding a security interest in the principal residence," with defaults up to three monthly payments due on a "residential mortgage" that was being cured and maintained under § 1322(b)(5). The defaults must have been on or after March 13, 2020 and be related to "material financial hardship due, directly or indirectly, by" COVID-19. Presumably, this would not be a discharge of the mortgage debt itself, because it is excepted from discharge under § 1328(a)(1), and the amendment seems to address those situations in which a debtor would otherwise be eligible for plan-completion discharge but had defaulted on up to three residential mortgage payments within the specific time.

Code § 1328(i)(2)'s amendment also adds potential discharge for debtors whose confirmed plans provided for § 1322(b)(5) cure and maintenance and who have entered into forbearance or loan modification agreements that qualify under RESPA and CARES. These amendments to § 1328 discharge sunset one year after enactment, and the amendments present administrative issues for trustees and bankruptcy courts.

The Act also amends Bankruptcy Code § 525 to add subsection (d), providing for protection against denial of the relief under three CARES Act provisions, 15 U.S.C. § 9056 (mortgage foreclosure moratorium and forbearance); § 9057 (mortgage forbearance on multifamily property); and § 9058 (eviction moratorium). This amendment also sunsets one year after enactment.

Under amended Code §§ 501 and 502, creditors under Federally backed mortgages qualified under the CARES Act and RESPA who entered into forbearance may file proofs of claim for the deferred forbearance payments, even when the claim would otherwise be untimely. Generally, such claims would be timely if filed before a date that is 120 days after expiration of the forbearance period. This amendment also sunsets one year after enactment.

Code § 1329 is also amended to add subsection (e), providing that a Chapter 13 debtor may amend a confirmed plan to provide for a forbearance proof of claim, and if the debtor does not so move within 30 days after the filing of such claim, the bankruptcy court, United States trustee, Chapter 13 trustee, bankruptcy administrator, or a party in interest may request modification to provide for such a claim. This amendment also sunsets one year after enactment.

Code § 366(d) is amended to prohibit a utility provider's termination of services to an individual debtor when the debtor does not offer adequate assurance of payment but pays for services rendered in the 20-day period after commencement of the bankruptcy case and continues to make postpetition utility payments. This amendment sunsets in one year.

Other non-consumer sections of the Bankruptcy Code are amended by the Consolidated Appropriations Act, including extension of time to perform under an unexpired non-residential real property lease in Subchapter V cases, and extension of time to assume or reject such a lease, with these changes to Code § 365 having a two-year sunset after enactment. Code § 547 is amended to exclude from preference recovery defined "covered rental arrearages" and "covered supplier arrearages," with this amendment having a two-year sunset. Code § 507(d) is amended to subrogate certain customs duties paid on behalf of an importer, and this amendment has a one-year sunset.

Other bankruptcy-related legislation that had been introduced in the 116th Congress is expected to be re-introduced in the new Congress, including the Consumer Bankruptcy Reform Act of 2020.

Appeal

Fourteen-day deadline for appeal not jurisdictional but still mandatory. The Sixth Circuit had previously treated the appeal deadline under Rule 8002(a)(1) as jurisdictional but considering more recent Supreme Court guidance on jurisdictional requirements, the Circuit panel concluded that the Rule's 14-day deadline was not jurisdictional. Nevertheless, the deadline was mandatory under the "shall" direction of 28 U.S.C. § 158(c)(2) and the "must" language of Rule 8002(a)(1). As a result, the Chapter 13 debtor's untimely appeal from mortgagee's stay relief was properly dismissed. In re Tennial, 978 F.3d 1022 (6th Cir. 2020).

No stay pending appeal. Discussing the extraordinary remedy of stay pending appeal under Rule 8007(a)(1)(A), Chapter 13 debtor was not entitled to stay when case was dismissed because only creditor's claim had been reduced to zero after repossession and sale of vehicle. In re Session, 622 B.R. 102 (Bankr. S.D. Ala. 2020).

Automatic Stay

Collateral estoppel applied in stay relief. When the standing of the mortgage creditor to foreclose had been previously litigated in District Court action, the bankruptcy court properly granted stay relief to allow foreclosure, and it was not abuse of discretion to decline to hold evidentiary hearing on creditor's standing. In re Nelson, 621 B.R. 542 (B.A.P. 1st Cir. 2020).

Rebuttal of petition's time stamp presumption. The foreclosing creditor moved for stay relief, asserting that the foreclosure had been completed before the Chapter 13 debtor's petition filing, with the foreclosure completed at 11:41 a.m. on the date of filing. After reviewing internal records of the clerk and hearing testimony of the debtor, the Court found that the debtor attempted to transmit the petition documents at 9:00 a.m. but could not physically do so at the clerk's offices. The debtor then transmitted the documents by fax and email at 9:03 am, but technical difficulties prevented actual receipt by the clerk until 11:09 a.m., with electronic opening by the clerk at 11:41 a.m. Neither the Code nor Bankruptcy Rules specifically indicate how to determine exactly when a filing occurs, and the "time-stamp" is only a presumption that may be rebutted by credible evidence. The

presumption was rebutted, and the Court deemed the petition filed at 9:03 a.m., prior to the foreclosure's completion. In re Manzueta, 620 B.R. 195 (Bankr. D. Mass. 2020).

Under § 362(c)(3)(A), stay terminated only with respect to debtor. Although first concluding that prior Tenth Circuit Bankruptcy Appellate Panel decision on the issue, *In re Holcomb,* 380 B.R. 813 (B.A.P. 10th Cir. 2008), was "persuasive authority but not binding precedent," the Court analyzed the split of authority on whether the stay terminates under § 362(c)(3)(A) only with respect to the debtor or to both the debtor and property of the estate. Agreeing with the majority view, which included *Holcomb,* the statute provides only for termination of the stay as to actions against the debtor. A creditor has an available remedy of seeking relief from the stay as to property of the estate if termination as to the debtor is not sufficient. In re McGrath, 621 B.R. 260 (Bankr. D. N.M. 2020). See also In re Cannady, 621 B.R. 16 (Bankr. D. Colo. 2020) (Assuming that the stay terminates only as to the debtor under § 362(c)(3)(A), as held by *In re Holcomb,* the Chapter 13 debtor held no valid legal or equitable claim to property on which prepetition foreclosure was complete, and the automatic stay had terminated 30 days after the petition filing as to the debtor, permitting the purchaser at foreclosure to bring eviction action in state court.).

Waiver of potential stay violations. Chapter 7 debtors who waited 7 and 10 years after alleged stay violations were barred by laches from pursuing violations, when debtors had knowledge of facts underlying alleged violations that would have permitted timely action. Under Sixth Circuit authority, *Easley v. Pettibone Mich. Corp.,* 990 F.2d 905 (6th Cir. 1993), actions in violation of stay are voidable but not void. In re Ottoman, 621 B.R. 768 (Bankr. E.D. Mich. 2020).

Foreclosure postponements did not violate stay. To establish that foreclosure postponement violated the automatic stay, the debtor must show that the actions harassed or coerced the debtor, and there was no showing that the postponements were anything other than maintenance of status quo. In re Rellstab, ___ B.R. ___, 2020 WL 6588405 (Bankr. D. Mass. Nov. 10, 2020).

In rem stay relief. The Bankruptcy Court did not abuse discretion in granting in rem relief from the stay when the debtor and family members had filed six bankruptcy petitions after strict foreclosure had been entered four years earlier. The prepetition foreclosure had

preclusive effect on the note holder's entitlement to enforce the obligation, and the *Rooker-Feldman* Doctrine barred the debtor from contesting the creditor's standing. In re Porzio, 622 B.R. 134 (D. Conn. 2020). See also Baker v. Bank of America, N.A., ___ Fed.Appx. ____, 2020 WL 7706473 (11th Cir. Dec. 29, 2020) (In per curiam, Circuit affirmed grant of retroactive and prospective stay relief under § 362(d)(4) when the Chapter 13 debtor had filed five petitions as part of scheme to hinder, delay or defraud the creditor.).

Avoidance

Tax foreclosure sale was constructively fraudulent transfer but not preference. Property **t**ax foreclosure sale for $21,000 redemption amount was constructively fraudulent transfer when property was valued at $200,000. Chapter 13 debtor's adversary proceeding alleged transfer was preferential and fraudulent, but transfer was not a preference because with that property's value and other assets the debtor was not insolvent. However, the transfer at the tax sale rendered the debtor insolvent, satisfying § 548(B)(ii)(I)'s insolvency requirement. The debtor did not receive reasonably equivalent value from the tax sale. In re Kopec, 621 B.R. 621 (Bankr. D. N.J. 2020). See also In re Polanco, ___ B.R. ___, 2020 WL 6938147 (Bankr. D. N.J. Nov. 24, 2020) (City's tax foreclosure was not a single transfer but multiple transfers of debtor's properties; foreclosure transfers were perfected by lis pendens lien prior to 90-day preference period; and debtor failed to provide evidence of insolvency at time of transfers for purposes of § 548.).

Avoidance and community property presumption. In fraudulent transfer action brought by Chapter 7 trustee concerning conveyance by debtor-husband and nondebtor-wife to a trust, issue was whether the property had been owned as community property or as joint tenancy. If joint tenancy, only the debtor's one-half interest came into the estate, but if community property, entire interest came into the estate. The Ninth Circuit had previously certified question to the California Supreme Court concerning presumption in favor of community property when the property was purchased during the marriage with community property, and the answer from that Court was that it depended upon when the property at issue was acquired. Under California law, if joint tenancy property was

acquired during a marriage before 1975, each spouse's interest was presumptively separate, but if acquired after that date, the property was presumptively community in character. In re Brace, 979 F.3d 1228 (9th Cir. 2020).

Property of Estate and Exemptions

Non-primary residence was subject to homestead exemption. Interpreting "residence" in § 522(d)(1), that term includes both primary and non-primary residence. The debtor was divorced but still jointly owned property that was the primary residence of her former husband, and the parties had joint custody of a son, who lived most of the time with the debtor but part of the time with his father. The son also attended school in the town where the property was located. The Second Circuit concluded that congressional use of the term "residence" in this Code section, rather than "principal residence," as used in §§ 1322(b)(2) and (b)(5) was deliberate. The homestead was allowed, which permitted the debtor to avoid a judicial lien resulting from a $70,000 judgment in favor of her former divorce counsel. In re Maresca, ___ F.3d ___, 2020 WL 7329217 (2d Cir. Dec. 14, 2020).

On conversion from 13 to 7, debtors entitled to increased value of homestead property. In a slip opinion, now appealed to the Tenth Circuit, the Bankruptcy Appellate Panel affirmed the Bankruptcy Court's application of § 348(f) in a case converted from Chapter 13 to 7. In the Chapter 13 phase of case, the debtors claimed homestead exemption, which combined with two liens exceeded the petition's valuation of the property, and confirmation vested all property of the estate in debtors. The property increased in value, and the debtors sold it, resulting in net proceeds more than the homestead exemption. The debtors then converted to Chapter 7, and that trustee sought turnover of the excess. The BAP agreed with the Bankruptcy Court that § 348(f)(1)(A)'s use of the term "property" was ambiguous, justifying consideration of legislative history, and the Panel discussed that history. The question on appeal was "whether § 348(f)'s definition of the phrase 'property of the estate' includes postpetition appreciation in value of an asset owned by a debtor on the petition date." Courts' majority have held that "postpetition appreciation in value of real property does not flow into a chapter 7 estate upon conversion." The Panel concluded that the "Bankruptcy Code provides that property of the estate upon converting from chapter 13 to other chapters consists of property of

the estate as of the date of the original petition. However, neither § 348(f) nor § 541(a) clearly delineate a debtor's interest in the postpetition appreciation of a homestead. Interpreting congressional intent as incentivizing chapter 13 repayment and following the guidance of other courts that have reviewed this issue, we hold that any postpetition appreciation in the value of the debtor's prepetition property—including postpetition appreciation of a homestead—belongs to the debtor and does not become property of the estate upon conversion to chapter 7." In re Barrera, 2020 WL 5869458 (BAP 10th Cir. Oct. 2, 2020).

Personal injury claim and settlement proceeds were property of estate for purposes of turnover from debtors' attorneys. In an examination of the duties of debtors' counsel, including special counsel for the personal injury claim, attorney had duty to file fee application and disclose any fee-sharing arrangements, and terms of a proposed settlement must be approved by the court. Case had been converted from 7 to 13 and then back to 7, and the debtors had improperly received settlement proceeds from prepetition personal injury claim. While in Chapter 13 the debtors had applied to employ special counsel to pursue that claim, but the application did not disclose all terms, including fee-sharing arrangement, and the confirmed plan required the debtors to report to the trustee any proceeds and to obtain court permission before disposing of proceeds. The personal injury claim was settled, and proceeds disbursed to the debtors, without turning them over to the trustee for payment on allowed claims. The attorney also received one-third of the proceeds, without court approval. The case was reconverted to Chapter 7 and the trustee sought turnover from the debtors and attorneys. The trustee was entitled to turnover judgment against all parties, and the liability was joint and several—if the debtors did not turn over their portion of settlement proceeds, their attorneys were liable, and the attorneys also must disgorge all fees and expense reimbursements. Although the settlement was relatively small, $22,500, the principles would apply to all unapproved fees and settlements. In re Rosales, 621 B.R. 903 (Bankr. D. Kan. 2020). See also for turnover *In re Waggoner,* ___ B.R. ___, 2020 WL 6839147 (Bankr. D. N.M. Nov. 20, 2020) (Although debtor may be subject to turnover of value of property disposed of, Chapter 7 trustee failed to establish that irrigation equipment had more than inconsequential value to estate.).

Debtor's cause of action from divorce judgment was property of estate. Under Michigan law, a consent judgment of divorce creates contractual obligations, and the Chapter 7 debtor's former spouse had obligation to pay one half of debts remaining after sale of home. Former spouse's obligation became property of Chapter 7 estate, and the bankruptcy filing did not alter terms of the divorce judgment, which trustee could enforce. In re Aikens, ___ B.R. ___, 2020 WL 7082417 (Bankr. E.D. Mich. Dec. 3, 2020).

Section 522(o). Examining § 522(o)'s triggering requirements, Chapter 7 debtor and her mother had exchanged quit claim deeds to property pre-bankruptcy, with the final quit claim deed placing ownership of the residence in the debtor and mother jointly sixteen months prior to the bankruptcy filing. The debtor claimed homestead exemption and moved to avoid a judgment lien impairing exemption. The Court concluded that the lien creditor failed to establish four requirements to trigger § 522(o). When the debtor quit claimed her interest in the property to her mother within the ten-year period, there was no evidence to establish any value related to the transfer, and the debtor was not transferring property in which she then lacked homestead exemption. Also, there were no proceeds to the debtor from that quit claim transfer, and the transfer from the mother back to the debtor of a joint interest did not trigger § 522(o) because it was not a transfer from the debtor. The creditor also failed to establish that the final quit claim transfer from the debtor was with intent to hinder, delay or defraud a creditor. The debtor's § 522(f) motion to avoid the lien was granted and creditor's motion to limit the homestead under § 522(o) was denied. In re Shaw, ___ B.R. ___, 2020 WL 6816549 (Bankr. D. Conn. Nov. 12, 2020).

Debtor not entitled to exemption of payments from annuity purchased with inheritance proceeds. Under Missouri's exemption for defined pension and disability plans, and applying Eighth Circuit precedent, exempt annuity must have been intended to protect against lost wages, akin to retirement plans. This annuity did not meet the requirements as a "similar plan or contract" under applicable Missouri exemption. In re Tayloe, 620 B.R. 911 (Bankr. W.D. Mo. 2020). See also In re Bentley, 622 B.R. 296 (Bankr. W.D. Ok. 2020) (Under Oklahoma's exemptions, the debtor's interest in an annuity at issue was exempt, and a separate statute exempted proceeds from that annuity that were deposited into debtor's bank account, but only to the extent the proceeds were

traceable to their exempt source. The entire bank account did not become exempt because of the deposits.).

Trustee's pursuit of cause of action was subject to arbitration. The Chapter 13 trustee intervened in debtor's adversary proceeding for breach of fiduciary duty by an entity related to a debt relief service, and the defendant moved to compel arbitration. The trustee argued that liquidation of property of the estate should not be delegated to an arbitrator, but the Court concluded that the trustee was standing in the shoes of the debtor and was bound by the arbitration agreement. Any recovery would be property of the estate whether the claim was heard by arbitrator or the Court. The claim subject to arbitration was a state-law claim, with motion to compel arbitration granted. In re McCollum, 621 B.R. 655 (Bankr. N.D. Miss. 2020).

Discharge Issues

Timely objection to discharge. Bankruptcy Court had equitable power under § 105(a) to correct clerk's error in changing date of first meeting of creditors after case was transferred from one district to another. Creditor reasonably relied on issuance by transferee court's clerk of second date for meeting and corresponding later deadline for filing objections to discharge. Complaint filed in compliance with second deadline was timely. In re Ward, 978 F.3d 298 (5th Cir. 2020). Compare In re Ray, 620 B.R. 418 (Bankr. M.D. Ga. 2020) (Although Court had discretion to extend time to file dischargeability complaint, technical difficulties with ECF did not justify equitably tolling, when creditor made no effort to submit paper filing.); In re Paulsen, 2020 WL 7765800 (Bankr. N.D. Ill. Dec. 22, 2020) (Although original Chapter 7 trustee resigned, notice of reset § 341 meeting did not reset deadline to object to discharge, and Rule 4004(a) required complaint to be filed "no later than 60 days after the first date set for the meeting of creditors. Complaint was untimely.).

Report to State Franchise Tax Board of increased Federal tax liability triggered § 523(a)(1)(B). The Chapter 13 debtor had filed California tax return but then failed to file a required report of an increased tax assessment from the IRS. The Ninth Circuit Bankruptcy Appellate Panel held that this report required under the State Tax Code was an "equivalent report" within the meaning of § 523(a)(1)(B). Thus, the state tax debt for

the relevant tax year was excepted from discharge. In re Berkovich, 619 B.R. 397 (B.A.P. 9th Cir. 2020). See also In re Boudreau, ___ B.R. ___, 2020 WL 7331480 (B.A.P. 1st Cir. Dec. 11, 2020) (In proceeding on dischargeability of tax debt, bankruptcy court had jurisdiction to also decide scope of tax liability.).

Breach of contract claim did not support fraud or willful and malicious injury exceptions. Distinguishing *Husky v. Ritz,* 136 S.Ct. 1581 (2016), debt arising from state court judgment for breach of contract did not fall within fraud or willful and malicious injury exceptions. Under § 523(a)(2)(A), the money or property giving rise to the debt must have been obtained by fraud, and the debt here arose from a contract claim, not related to fraud. Also, the contract debt existed prior to any alleged wrongful transfers of assets, and § 523(a)(6) requires that the debt be "*for* a willful and malicious injury." The bankruptcy court properly denied creditor's motion to amend complaint. In re Gaddy, 977 F.3d 1051 (11th Cir. 2020).

Breaking beer mug on creditor's head was willful and malicious. In analysis of § 523(a)(6)'s dual requirements and in the context of a bar fight, the debtor was found to have willfully and maliciously injured the plaintiff when a glass mug was broken on the plaintiff's head, causing injury to the hand, face and neck. However, the injury to another patron was not intentional, because the debtor was unable to see and was "swinging wildly" when that party's elbow was injured. Recklessly or negligently inflicted injuries are not within the scope of § 523(a)(6). In re Judge, 621 B.R. 34 (Bankr. D. Colo. 2020).

State court judgment had preclusive effect on § 523(a)(6) issue. The state court had issued a citation to discover assets and subsequently entered judgment against the future Chapter 7 debtor for contempt in selling personal property that was subject to citation lien. The issues under § 523(a)(6) were the same as before the state court for purposes of issue preclusion. The sale of assets caused injury to the creditor's property interest, and the sale conduct was willful and malicious. In re Borsellino, 619 B.R. 910 (Bankr. N.D. Ill. 2020). See also In re Lockwood, 2020 WL 7706881 (Bankr. D. Maine Dec. 23, 2020) (Preclusive effect given to state court finding of elements required for § 523(a)(6).).

Qualified educational loans under § 523(a)(8)(B). The Sixth Circuit construed the term "qualified educational loans," concluding that the proper inquiry focused on initial purpose of the loan rather than actual use, because "the statutory definition. . .specifically focuses

on whether the loan was 'incurred . . .to pay' qualified higher education expenses, rather than on its ultimate uses." The sole purpose of the private loans at issue here was to pay cost of university attendance, with the purpose "generally discerned from the lender's agreement with the borrower." The debts were excepted from discharge, absent a showing of undue hardship. In re Conti, 982 F.3d 445 (6th Cir. 2020).

Partial discharge of student loans. Under *Brunner* test and § 523(a)(8), student loans may be discharged in full or in part if undue hardship is established, and debtor's $440,000 student loan debt related to medical school education was discharged, except for approximately $8,000. Notwithstanding medical degree, debtor had been unable to obtain residency and thus could not be licensed as physician, and debtor had been unable to obtain employment with sufficient income to repay loans. The debtor was currently earning poverty-level income, which was expected to persist due to inability to become licensed. The opinion weighed all factors and the methodology of *In re Carnduff,* 367 B.R. 120 (B.A.P. 9th Cir. 2007), in determining the amount of student loan debt that the debtor could repay over his expected remaining working life. Good faith was established, despite the debtor's dropping out of income-based repayment program. In re Koeut, ___ B.R. ___, 2020 WL 7230762 (Bankr. S.D. Cal. Dec. 4, 2020). See also In re Mendenhall, 621 B.R. 472 (Bankr. D. Idaho 2020) (Applying *Brunner* test and *In re Carnduff*, Chapter 7 debtor established grounds to partially discharge all but $45,000 of $400,000 student loan debt. Court calculated nondischargeable amount, on which interest would not accrue, but did not set specific payment terms on that amount.).

Failure to read schedules and statements did not warrant false oath denial of discharge. Immigrant debtor who was not native English speaker relied on his spouse to handle paperwork and monetary transactions, including reliance on her to accurately complete petition documents. Creditor objected to discharge under § 727(a)(4)(A)'s false oath, but there was no evidence that the debtor intended to deceive, and failure to read documents was not basis to deny discharge. In re Tzabari, ___ B.R. ___, 2020 WL 6817651 (Bankr. E.D. Pa. Nov. 4, 2020). See also In re Portunato, 620 B.R. 432 (Bankr. D. R.I. 2020) (Vague and conflicting descriptions of truck owned by debtor did not support false oath objection, but debtor's secret sale of equipment and concealment of sale

proceeds did support discharge denial under § 727(a)(2) for fraudulent postpetition transfer of estate assets.).

Discharge Injunction

***Taggart* on remand.** After remand from the Supreme Court, the Ninth Circuit considered whether the Chapter 7 debtor's former partners violated the discharge injunction by seeking attorney fees in state court litigation. The question is "not whether Taggart actually 'returned to the fray' in the Oregon state court litigation. Nor is it whether the Creditors had an objectively reasonable basis for concluding that Taggart had 'returned to the fray.' Rather, the question is whether the Creditors had some—indeed, *any* objectively reasonable basis for concluding that Taggart *might have* 'returned to the fray' and that their motion for post-petition attorney fees *might have* been lawful." Under the "significantly high standard" adopted by the Supreme Court, the creditors were not liable for contempt sanctions. In re Taggart, 980 F.3d 1340 (9th Cir. 2020). See also In re Hazelton, ___ B.R. ___, 2020 WL 6817652 (Bankr. W.D. Wisc. Sept. 25, 2020) (Applying *Taggart*, university had objectively reasonable basis to believe collection of unpaid prepetition tuition debt was not violation of discharge injunction in Chapter 7 case.).

Chapter 7 Issues

Section 707(b)

707(b) applies in converted case. In case originally filed under Chapter 13 but converted to Chapter 7, language of § 707(b)(1) is ambiguous as to its application to converted cases, with the opinion discussing conflicting views. The Court concluded that historical context of the Code section and policy considerations supported the "majority approach that section 707(b) applies to cases currently pending under chapter 7, whether or not the case originally commenced under that chapter." In re Amaro, ___ B.R. ___, 2020 WL 6937704 (Bankr. N.D. Ill. Sept. 30, 2020).

Reaffirmation

Reaffirmations unenforceable when lacking signed declaration by represented debtors' attorney. Chapter 7 debtors indicated in statement of intention that they would

"retain, remain current, reaffirm if required" collateral under two secured claims, which, although somewhat ambiguous, sufficiently stated intention to reaffirm. The creditor submitted reaffirmation agreements, which the debtors signed, but their attorney did not sign the agreements before returning them to the creditor. The debtors were represented and § 524(c)(3) requires that the reaffirmations "be accompanied by a certification by their attorneys. Attorney's decision not to sign the certifications rendered the Reaffirmation Agreements unenforceable. Because the Debtors were represented, [the Court did] not have authority to independently review or approve them." To satisfy § 362(h)(1)(A), the reaffirmations must be enforceable, and lack of enforceability resulted in termination of automatic stay protection. The creditor could enforce *ipso facto* clauses in the underlying agreements. The Court also discussed and concluded that ride-through option was no longer available to the debtors under BAPCPA's changes. In re Wright, ___ B.R. ___, 2020 WL 5823346 (Bankr. D. Ore. Sept. 29, 2020).

Chapter 7 Trustee

Trustee's special counsel entitled to compensation for pre-employment services. Although under *Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano,* 140 S.Ct. 696 (2020), nunc pro tunc employment is not permitted, that opinion is "not a *per se* prohibition of all retroactive relief in all instances. . . .There is a distinct difference between retroactive relief granted by *nunc pro tunc* orders which purport to create facts and rewrite history, . . .and discretionary grants of retroactive compensation in orders that do neither." Retroactive authority to compensate estate professionals is not barred by §§ 327 or 330, which have "no requirement that compensated services must have been performed only after the effective date of an employment order." Rule 6003(a) provides that an application for employment of professional persons under Rule 2014 may not be approved within the first 21 days of a case, recognizing that pre-approval compensation is permissible. In this case, the Chapter 7 trustee's employment of special counsel was approved, and that counsel was entitled to compensation for pre-approval services that benefitted the estate, with Court providing conditions for such allowance. In re Miller, 620 B.R. 637 (Bankr. E.D. Cal. 2020).

Chapter 13 Issues

Eligibility

In rem mortgage lien exceeded debt limit. Debtor had previously received Chapter 7 discharge of personal liability on mortgage, but in rem liability remained under *Johnson v. Home State Bank,* 501 U.S. 78 (1991). The in rem lien of $4.4 million was secured claim that exceeded debt limit for eligibility, with trustee's motion to dismiss granted. In re Porzio, 622 B.R. 20 (Bankr. D. Conn. 2020).

Curing Mortgage

Debtor making direct mortgage payments entitled to benefit of Rule 3002.1. Although District's administrative order provided that the automatic stay terminated as to secured creditors being paid directly by debtors, and as result Rule 3002.1's notice requirements didn't apply to principal residence secured creditors, the Court could reinstate application of the Rule on debtors' motion. The last sentence of Rule 3002.1(a) provides that the Rule does not apply upon termination of the stay, "unless the court orders otherwise," giving authority to reimpose the Rule. The Court read the Rule's Committee Notes for the 2016 amendments to clarify that the Rule applied when debtors had no prepetition arrearage to be cured at the time of commencement of the case and the plan provided for maintenance of the contractual payments. The debtors were entitled to application of the Rule to know if payments on their mortgage were changed. In re Olson, 619 B.R. 774 (Bankr. M.D. Fla. 2020).

Disposable Income

Above-median debtors could only deduct vehicle expense in IRS guidelines. The Ninth Circuit Bankruptcy Appellate Panel held that above-median debtors could only deduct standardized vehicle operating expenses that are specified in the IRS Local Standards tables, and not the higher actual monthly operating expenses. The IRS Manual generally provides guidance, but "once Congress expressly incorporated the Standards into § 707(b)(2)(A)(ii)(I), this portion of the Manual was elevated and made authoritative in the chapter 13 context; the Standards largely dictate which expenses are reasonably necessary for above-median-income debtors and, hence, may be subtracted

from their current monthly income to calculate their disposable income." In re Rodriquez, 620 B.R. 94 (B.A.P. 9th Cir. 2020).

Lien Modification

Junior mortgage lienholder not affected by modifications of senior mortgage. Under Pennsylvania law, the prepetition modification of terms of the senior mortgage had recapitalized interest and costs already owed but had not created new liabilities. As a result, the junior mortgage holder was not materially prejudiced. The Chapter 13 debtors could avoid the wholly unsecured junior mortgage lien, with that creditor's claim allowed as unsecured. In re Fraction, ___ B.R. ___, 2020 WL 6821059 (Bankr. E.D. Pa. Nov. 19, 2020).

Wholly unsecured junior lien stripped on property awarded to debtor in divorce. Creditor held junior mortgage with ex-husband, but wife did not execute that loan or mortgage, and the ex-husband's one-half-interest in property was awarded to wife in divorce. The creditor held an in rem claim against the debtor or her property at petition date, subject to treatment in the plan. Citing other authority, the Court concluded that the wholly unsecured in rem mortgage was subject to avoidance. In re Short, 619 B.R. 655 (Bankr. S.D. Ohio 2020).

Plan Confirmation

Balloon payment not prohibited under §§ 1322(c)(2) and 1325(a)(5). The mortgage creditor's motion for stay relief was based in part on contention that § 1325(a)(5) requires equal periodic payments that would pay mortgage in full when the contractual mortgage matures before the end of the plan. The Court disagreed, denying stay relief, and adopting interpretation of that Code section, coupled with § 1322(c)(2), that a balloon payment is not prohibited. When the plan proposes a combination of periodic and balloon payment on such a short-term mortgage, "the periodic payments have to be equal, per § 1325(a)(5)(B)(iii)(I), but the lump sum payment only has to pay the claim in full." In re McGrath, 2020 WL 7663168 (Bankr. D. N.M. Dec. 23, 2020).

Plan Modification

For modification purposes, best interests test remains at petition date. In an examination of post-confirmation sale of the debtor's home that yielded excess of homestead exemption, the Court concluded that the best-interests of creditors' calculation was performed as of the petition date, rather than time of modification. Section 1329 does not provide a measuring date, and the Court examined three views of the applicable time, agreeing with the majority view that the petition date was appropriate. The Court next examined the five different approaches to the effect of confirmation on property of the estate, adopting the view that the estate terminates upon confirmation, concluding that this view "respects the plain meaning of the language of § 1327(b)," with its use of "vesting" as referring to a "transfer of ownership." In this case, confirmation vested ownership of the residence in the debtor, and the post-confirmation sale proceeds exceeding homestead exemption belonged to the debtor rather than estate. The mortgage debt had been paid from post-confirmation sale, and the debtor's modification eliminated continuing payments on the mortgage. The trustee's motion for turnover of the funds exceeding the homestead was denied. In re Baker, 620 B.R. 655 (Bankr. D. Colo. 2020).

Proposed plan modification could not relitigate confirmation issue. First agreeing that the debtor did not have to show change of circumstances to support plan modification, the Court then analyzed the binding effect of confirmation, holding that a proposed plan modification could not relitigate an issue that was or could have been litigated at the time of confirmation. Although the debtor was below median, at the time of confirmation the debtor had proposed a 60-month plan. Proposed plan modification sought to reduce the plan to 36 months, which would relitigate a confirmation issue in violation of § 1327. In re Ellison, 620 B.R. 594 (Bankr. E.D. Mich. 2020).

CARES Act permitted modification of plan when debtor had fallen behind in plan payments before enactment. On debtors' motions to modify plans that were confirmed prior to enactment of CARES, the trustee objected in those cases in which the debtors had fallen behind prior to CARES enactment, contending that CARES permitted modification only when the default was traceable to pandemic effects. First noting that § 1329 does not require showing of a substantial change in circumstances, the CARES Act

amended § 1329(d), applicable to plans confirmed prior to CARES enactment, to permit modification and extension of the plan up to seven years, conditioned on "material financial hardship due, directly, or indirectly, to the coronavirus disease . . .pandemic." The Court concluded that this added provision did not limit the modification relief only to debtors who were current at time of CARES enactment and then fell behind. The Court declined to overlay that requirement on the statute, with debtors only required to show the material financial hardship due directly or indirectly to COVID-19. In re Gilbert, ____ B.R. ___, 2020 WL 5939097 (Bankr. E.D. La. Oct. 6, 2020).

Redemption From Tax Sale

Section 511 applied to interest rate for redemption. The Chapter 13 plan could propose to cure arrearages on real property taxes and to redeem property that was subject to a tax sale, but the plan must comply with both §§ 1322 and 1325. Maryland's law on redemption controlled, in conjunction with § 511, on the interest rate that must be paid on redemptions from property tax sales. In re Ford, ___ B.R. ____, 2020 WL 6887435 (Bankr. D. Md. Oct. 16, 2020).

Surrender

Surrender of vehicle in plan did not require creditor's repossession. The confirmed plan provided for surrender of a vehicle to the secured creditor, but the plan did not require the creditor to repossess the vehicle or to release its lien. The plan only provided for surrender and relief from the automatic stay to permit the creditor to exercise state-law remedies. The opinion discusses the prevailing views on the meaning of "surrender" in a plan. In re Loucks, 619 B.R. 908 (Bankr. E.D. Mich. 2020).

Conversion and Dismissal

Debtor's failure to comply with order converting case from 13 to 7 was civil contempt. The Chapter 13 debtor had failed to comply with conversion order, which required debtor to submit to examination and file schedules, and the Court had previously warned the debtor of necessity to comply. The debtor had already been found in civil contempt for failure to comply and had rejected multiple chances to comply. Concluding that incarceration was a form of sanction for civil contempt, debtor's history of

noncompliance provided the bankruptcy court with power to incarcerate, citing *In re Burkman Supply, Inc.,* 217 B.R. 223 (W.D. Mich. 1998). The debtor was subject to apprehension by the United States Marshall, with opportunity for release when she purged her contempt by compliance. In re Skandis, 621 B.R. 218 (Bankr. W.D. Mich. 2020).

Discharge

Failure to pay postpetition fees under Rule 3002.1 did not prevent discharge. The debtor had completed payments to the trustee and postpetition mortgage payments to the creditor, but she had not paid $1,370 in postpetition fees that had been asserted by the mortgage creditor and noticed to the debtor under Rule 3002.1. That Rule "does not go so far as to say that nonpayment of additional interest or charges will prevent the entry of a debtor's discharge. It is § 1328(a) that governs the entry or denial of discharge." And that section only addresses completion of "all payments *under the plan."* The additional fees or charges asserted under Rule 3002.1 "never made their way into the plan," and "have no bearing on the debtor's eligibility for discharge." Nevertheless, those unpaid fees or charges "will remain due and owing and the general discharge will not apply to them. Thus, a debtor ignores these notices at her own peril." In re Roper, 621 B.R. 899 (Bankr. D. Colo. 2020).

Discharge Injunction

Section 541(i) applies only to long-term debts not discharged through plan. Whether § 541(i) applied to short-term secured debts that are paid in full and discharged through a Chapter 13 plan was a matter of first impression, with the Court finding no other court had yet decided precise question. Factors used in Supreme Court's interpretations of BAPCPA's amendments included: statutory language, context of the specific amendment, whether other Code provisions are affected, and Congressional purpose in the amendment. The Court concluded that "a reading of § 524(i) that is limited in application to long-term debts clearly aligns with the plain text of the provision, is contextually consistent with the surrounding sections of § 524, including those contemporaneously added through BAPCPA, and most accords with Congressional purpose. . . .The commentary provided by bankruptcy courts and treatises indicates the

overarching purpose and motivation behind enacting § 524(i) was to curtail the failures of long-term debt holders to accurately credit payments. . . .The Court finds the application of § 524(i) to be limited to long-term debts that are not discharged through a chapter 13 plan." In this case, the debt was partially secured and was paid fully and discharged in the completed plan; therefore, § 524(i) did not apply. The debtor in the reopened case did plead a claim for relief under §§ 105(a) and 524(a)(2). In re Carnegie, 621 B.R. 392 (Bankr. M.D. N.C. 2020)

Claims

IRS tax claim based on statute did not require writing to support claim. Although creditors had standing to object to claim filed by IRS for federal income taxes, Rule 3001(c)(1) did not require a "writing" to be attached to the proof of claim, because the claim was based on statutory obligations rather than on a writing, citing majority authority from other courts in agreement. In re Zimmer, ___ B.R. ___, 2020 WL 7090170 (Bankr. W.D. Pa. Dec. 4, 2020). See also In re Zimmer, ___ B.R. ___, 2020 WL 7343416 (Bankr. W.D. Pa. Dec. 14, 2020) (Denying creditors' motion to dismiss case when purpose of motion was to deprive IRS of distribution from assets of estate, party in interest had no absolute right to obtain dismissal of Chapter 7 case.).

Fair Debt Collections Practices Act

Chapter 13 debtor not precluded from FDCPA claim when debt was fully satisfied through plan. Distinguishing *Walls v. Wells Fargo Bank N.A.,* 276 F.3d 502 (9th Cir. 2002), when the disputed debt had been fully paid through a Chapter 13 plan prior to entry of discharge, the former debtor's FDCPA claim was not based on violation of the discharge injunction; rather, the claim was based on unlawful collection of a fully paid debt. The plaintiff was not barred by *Walls.* Manikan v. Peters & Freedman, L.L.P., 981 F.3d 712 (9th Cir. 2020),

BANKRUPTCY CODE INSERT

Relevant Bankruptcy Sections from Consolidated Appropriations Act, 2021

Compiled by:
Elena Paras Ketchum, Stichter, Riedel, Blain & Postler, P.A.

The Consolidated Appropriations Act, 2021 (the "Act") was signed into law and became effective on December 27, 2020.

The Act, by the provisions therein entitled (1) *Division N (Additional Coronavirus Response and Relief), Title III (Continuing the Paycheck Protection Program and Other Small Business Support), Section 320* and (2) *Division FF (Other Matter), Title X (Bankruptcy Relief), Section 1001*, amends specific sections of the United States Bankruptcy Code (the "Bankruptcy Code"). Sections 320 and 1001 of the Act are set out in full below so as to be inserted into your Bankruptcy Code for ease of reference. The amendments reflected in Sections 320 and 1001 of the Act sunset either on the date that is one (1) year after the date of enactment of the Act (December 27, 2021), or two (2) years after the enactment date (December 27, 2022).

Note, however, Section 320, pursuant to its own terms (paragraph (f)(1)), is not currently in effect. Section 320 shall only become effective upon the Administrator of the Small Business Administration's submitting to the Director of the Executive Office for United States Trustees a written determination that any debtor or trustee in bankruptcy is eligible for a loan under paragraphs (36) and (37) of section 7(a) of the Small Business Act. As of March 2, 2021, such determination has not been furnished.

I. Section 320 of Act:

The following (as set forth in Section 320 of the Act) are amendments to Sections 364, 503(b), 1191, 1225, and 1325 of the Bankruptcy Code. As noted in "Effective Date; Sunset; and Applicability" below, these amendments are not currently in effect. If the amendments do become effective, they shall apply to any bankruptcy case commenced before December 27, 2022 (the date that is two (2) years after the Act's enactment) and shall sunset on December 27, 2022.

Section 364 is amended by adding at the end the following:

> ''(g)(1) The court, after notice and a hearing, may authorize a debtor in possession or a trustee that is authorized to operate the business of the debtor under section 1183, 1184, 1203, 1204, or 1304 of this title to obtain a loan under paragraph (36) or (37) of section 7(a) of the Small Business Act (15 U.S.C. 636(a))[1], and such loan shall be treated as a debt

[1] This is what is commonly referred to as a PPP loan.

to the extent the loan is not forgiven in accordance with section 7A of the Small Business Act or subparagraph (J) of such paragraph (37), as applicable, with priority equal to a claim of the kind specified in subsection (c)(1) of this section.

''(2) The trustee may incur debt described in paragraph (1) notwithstanding any provision in a contract, prior order authorizing the trustee to incur debt under this section, prior order authorizing the trustee to use cash collateral under section 363, or applicable law that prohibits the debtor from incurring additional debt.

''(3) The court shall hold a hearing within 7 days after the filing and service of the motion to obtain a loan described in paragraph (1). Notwithstanding the Federal Rules of Bankruptcy Procedure, at such hearing, the court may grant relief on a final basis.''.[2]

Section 503(b) is amended—

in paragraph (8)(B), by striking ''and'' at the end;

in paragraph (9), by striking the period at the end and inserting ''; and''; and

by adding at the end the following:
''(10) any debt incurred under section 364(g)(1) of this title.''.

Section 1191 is amended by adding at the end the following:

''(f) SPECIAL PROVISION RELATED TO COVID–19 PANDEMIC.—Notwithstanding section 1129(a)(9)(A) of this title and subsection (e) of this section, a plan that provides for payment of a claim of a kind specified in section 503(b)(10) of this title may be confirmed under subsection (b) of this section if the plan proposes to make payments on account of such claim when due under the terms of the loan giving rise to such claim.''.

Section 1225 is amended by adding at the end the following:

''(d) Notwithstanding section 1222(a)(2) of this title and subsection (b)(1) of this section, a plan that provides for payment of a claim of a kind specified in section 503(b)(10) of this title may be confirmed if the plan proposes to make payments on account of such claim when due under the terms of the loan giving rise to such claim.''.

Section 1325 is amended by adding at the end the following:

''(d) Notwithstanding section 1322(a)(2) of this title and subsection (b)(1) of this section, a plan that provides for payment of a claim of a kind specified in section 503(b)(10) of this title may be confirmed if the plan proposes to make payments on account of such claim when due under the terms of the loan giving rise to such claim.''.

[2] Rule 4001(c)(2) states that a final hearing on a motion under §364 is to be held no earlier than 14 days after service of the motion. The rule is being amended to provide for the 7-day time period in the event Section 320 takes effect.

EFFECTIVE DATE; SUNSET; AND APPLICABILITY PROVISIONS:

The foregoing amendments to Sections 364, 503(b), 1191, 1225, and 1325 shall —

> (A) take effect on the date on which the Administrator submits to the Director of the Executive Office for United States Trustees a written determination that, subject to satisfying any other eligibility requirements, any debtor in possession or trustee that is authorized to operate the business of the debtor under section 1183, 1184, 1203, 1204, or 1304 of title 11, United States Code, would be eligible for a loan under paragraphs (36) and (37) of section 7(a) of the Small Business Act (15 U.S.C. 636(a)); and
>
> (B) apply to any case pending on or commenced on or after the date described in subparagraph (A).

If the foregoing amendments made to Sections 364, 503(b), 1191, 1225, and 1325 of title 11, United States Code take effect in accordance with the "effective date" provision above, effective on the date that is 2 years after the date of enactment of this Act (or December 27, 2022) (i) section 364 of title 11, United States Code, is amended by striking subsection (g); (ii) section 503(b) of title 11, United States Code, is amended (I) in paragraph (8)(B), by adding ''and'' at the end; (II) in paragraph (9), by striking ''; and'' at the end and inserting a period; and (III) by striking paragraph (10); (iii) section 1191 of title 11, United States Code, is amended by striking subsection (f); (iv) section 1225 of title 11, United States Code, is amended by striking subsection (d); and (v) section 1325 of title 11, United States Code, is amended by striking subsection (d).

Notwithstanding the foregoing amendments, if the amendments made to Sections 364, 503(b), 1191, 1225, and 1325 of title 11, United States Code take effect in accordance with the "effective date" provision above, such amendments shall apply to any case under title 11, United States Code, commenced before the date that is 2 years after the date of enactment of this Act (or before December 27, 2022).

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II. Section 1001 of Act:

The following (as set forth in Section 1001 of the Act) are amendments to Sections 541(b), 1328, 525, 501, 502(b)(9), 1329, 365(d), 547, 366, and 507(d) of the Bankruptcy Code. As noted in the "sunset" provisions below, the amendments shall sunset either on the date that is one (1) year after the date of enactment of the Act (December 27, 2021), or two (2) years after the enactment date (December 27, 2022).

Section 541(b) is amended—

in paragraph (9), in the matter following subparagraph (B), by striking ''or'';

in paragraph (10)(C), by striking the period at the end and inserting ''; or''; and

by inserting after paragraph (10) the following:
''(11) recovery rebates made under section 6428 of the Internal Revenue Code of 1986.''.

Effective on the date that is 1 year after the date of enactment of this Act, section 541(b) of title 11, United States Code, is amended in paragraph (9), in the matter following subparagraph (B), by adding ''or'' at the end; in paragraph (10)(C), by striking ''; or'' and inserting a period; and by striking paragraph (11).

Section 1328 is amended by adding at the end the following:

''(i) Subject to subsection (d), 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—

''(1) the debtor defaults on not more than 3 monthly payments due on a residential mortgage under section 1322(b)(5) 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

''(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 (as defined in section 6(i) of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2605(i)) of the mortgage described in subparagraph (A).''.

Effective on the date that is 1 year after the date of enactment of this Act, section 1328 of title 11, United States Code, is amended by striking subsection (i).

Section 525 is amended by adding at the end the following:

''(d) A person may not be denied relief under sections 4022 through 4024 of the CARES Act (15 U.S.C. 9056, 9057, 9058) because the person is or has been a debtor under this title.''.

Effective on the date that is 1 year after the date of enactment of this Act, section 525 of title 11, United States Code, is amended by striking subsection (d).

Section 501 is amended by adding at the end the following:

''(f)(1) In this subsection—

''(A) the term 'CARES forbearance claim' means a supplemental claim for the amount of a Federally backed mortgage loan or a Federally backed multifamily mortgage loan that was not received by an eligible creditor during the forbearance period of a loan granted forbearance under section 4022 or 4023 of the CARES Act (15 U.S.C. 9056, 9057);

''(B) the term '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 a Federally backed multifamily mortgage loan of the debtor that is provided for by a plan under section 1322(b)(5);

''(C) the term 'Federally backed mortgage loan' has the meaning given the term in section 4022(a) of the CARES Act (15 U.S.C. 9056(a)); and

''(D) the term 'Federally backed multifamily mortgage loan' has the meaning given the term in section 4023(f) of the CARES Act (15 U.S.C. 9057(f)).

''(2)(A) Only an eligible creditor may file a supplemental proof of claim for a CARES forbearance claim.

''(B) If an underlying mortgage loan obligation has been modified or deferred by an agreement of the debtor and an eligible creditor of the mortgage loan in connection with a mortgage forbearance granted under section 4022 or 4023 of the CARES Act (15 U.S.C. 9056, 9057) in order to cure mortgage payments forborne under the forbearance, the proof of claim filed under subparagraph (A) shall include—

''(i) the relevant terms of the modification or deferral;

''(ii) for a modification or deferral that is in writing, a copy of the modification or deferral; and

''(iii) a description of the payments to be deferred until the date on which the mortgage loan matures.''.

Section 502(b)(9) is amended to read as follows:

> ''(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) or under the Federal Rules of Bankruptcy Procedure, except that—
>
> > ''(A) a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide;
> >
> > ''(B) in a case under chapter 13, a claim of a governmental unit for a tax with respect to a return filed under section 1308 shall be timely if the claim is filed on or before the date that is 60 days after the date on which such return was filed as required; and
> >
> > ''(C) a CARES forbearance claim (as defined in section 501(f)(1)) shall be timely filed if the claim is filed before the date that is 120 days after the expiration of the forbearance period of a loan granted forbearance under section 4022 or 4023 of the CARES Act (15 U.S.C. 9056, 9057).''.

Effective on the date that is 1 year after the date of enactment of this Act, section 501 of title 11, United States Code, is amended by striking subsection (f); and section 502(b)(9) of title 11, United States Code, is amended (i) in subparagraph (A), by adding ''and'' at the end; (ii) in subparagraph (B), by striking ''; and'' and inserting a period; and (iii) by striking subparagraph (C).

Section 1329 is amended by adding at the end the following:

> ''(e)(1) A debtor of a case for which a creditor files a proof of claim under section 501(f) may file a request for a modification of the plan to provide for the proof of claim.
>
> ''(2) If the debtor does not file a request for a modification of the plan under paragraph (1) on or before the date that is 30 days after the date on which a creditor files a claim under section 501(f), after notice, the court, on a motion of the court or on a motion of the United States trustee, the trustee, a bankruptcy administrator, or any party in interest, may request a modification of the plan to provide for the proof of claim.''.

Effective on the date that is 1 year after the date of enactment of this Act, section 1329 of title 11, United States Code, is amended by striking subsection (e).

Section 365(d) is amended—

> **in paragraph (3)—**
>
> > (i) by inserting ''(A)'' after ''(3)'';
> >
> > (ii) by inserting '', except as provided in subparagraph (B)'' after ''such 60-day period''; and
> >
> > (iii) by adding at the end the following:

''(B) In a case under subchapter V of chapter 11, the time for performance of an obligation described in subparagraph (A) arising under any unexpired lease of nonresidential real property may be extended by the court if the debtor is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID–19) pandemic until the earlier of—

''(i) the date that is 60 days after the date of the order for relief, which may be extended by the court for an additional period of 60 days if the court determines that the debtor is continuing to experience a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID–19) pandemic; or

''(ii) the date on which the lease is assumed or rejected under this section.

''(C) An obligation described in subparagraph (A) for which an extension is granted under subparagraph (B) shall be treated as an administrative expense described in section 507(a)(2) for the purpose of section 1191(e).''; and

in paragraph (4), by striking ''120'' each place it appears and inserting ''210''.

Effective on the date that is 2 years after the date of enactment of this Act, section 365(d) of title 11, United States Code, is amended (i) in paragraph (3) by (I) striking ''(A)'' after ''(3)''; (II) striking '', except as provided in subparagraph (B)'' after ''such 60-day period''; and (III) striking subparagraphs (B) and (C); and (ii) in paragraph (4), by striking ''210'' each place it appears and inserting ''120''. Notwithstanding the amendments made by the foregoing, the amendments made in paragraphs (3) and (4) above shall apply in any case commenced under subchapter V of chapter 11 of title 11, United States Code, before the date that is 2 years after the date of enactment of this Act.

Section 547 is amended—

in subsection (b), in the matter preceding paragraph (1), by striking ''and (i)'' and inserting '', (i), and (j)''; and

by adding at the end the following:

''(j)(1) In this subsection:

''(A) The term 'covered payment of rental arrearages' means a payment of arrearages that—

''(i) is made in connection with an agreement or arrangement—

''(I) between the debtor and a lessor to defer or postpone the payment of rent and other periodic charges under a lease of nonresidential real property; and

''(II) made or entered into on or after March 13, 2020;

''(ii) does not exceed the amount of rental and other periodic charges agreed to under the lease of nonresidential real property described in clause (i)(I) before March 13, 2020; and

''(iii) does not include fees, penalties, or interest in an amount greater than the amount of fees, penalties, or interest—

''(I) scheduled to be paid under the lease of nonresidential real property described in clause (i)(I); or

''(II) that the debtor would owe if the debtor had made every payment due under the lease of nonresidential real property described in clause (i)(I) on time and in full before March 13, 2020.

''(B) The term 'covered payment of supplier arrearages' means a payment of arrearages that—

''(i) is made in connection with an agreement or arrangement—

''(I) between the debtor and a supplier of goods or services to defer or postpone the payment of amounts due under an executory contract for goods or services; and

''(II) made or entered into on or after March 13, 2020;

''(ii) does not exceed the amount due under the executory contract described in clause (i)(I) before March 13, 2020; and

''(iii) does not include fees, penalties, or interest in an amount greater than the amount of fees, penalties, or interest—

''(I) scheduled to be paid under the executory contract described in clause (i)(I); or

''(II) that the debtor would owe if the debtor had made every payment due under the executory contract described in clause (i)(I) on time and in full before March 13, 2020.

''(2) The trustee may not avoid a transfer under this section for—

''(A) a covered payment of rental arrearages; or

''(B) a covered payment of supplier arrearages.''.

Effective on the date that is 2 years after the date of enactment of this Act, section 547 of title 11, United States Code, is amended (i) in subsection (b), in the matter preceding paragraph (1), by striking '', (i), and (j)'' and inserting ''and (i)''; and (ii) by striking subsection (j). Notwithstanding the amendments made by the foregoing, the amendments made to section 547 above shall apply

in any case commenced under title 11, United States Code, before the date that is 2 years after the date of enactment of this Act.

Section 366 is amended by adding at the end the following:

> ''(d) Notwithstanding any other provision of this section, a utility may not alter, refuse, or discontinue service to a debtor who does not furnish adequate assurance of payment under this section if the debtor—
>
> > ''(1) is an individual;
> >
> > ''(2) makes a payment to the utility for any debt owed to the utility for service provided during the 20-day period beginning on the date of the order for relief; and
> >
> > ''(3) after the date on which the 20-day period beginning on the date of the order for relief ends, makes a payment to the utility for services provided during the pendency of case when such a payment becomes due.''.

Effective on the date that is 1 year after the date of enactment of this Act, section 366 of title 11, United States Code, is amended by striking subsection (d).

Section 507(d) is amended—

> **by striking** '', (a)(8)'';
>
> **by inserting** ''or subparagraphs (A) through (E) and (G) of subsection (a)(8)'' after ''(a)(9)''; and
>
> **by inserting** ''or subparagraph'' after ''such subsection''.

Effective on the date that is 1 year after the date of enactment of this Act, section 507(d) of title 11, United States Code, is amended by inserting '', (a)(8)'' before '', or (a)(9)''; by striking ''or subparagraphs (A) through (E) and (G) of subsection (a)(8)''; and by striking ''or subparagraph'' after ''such subsection''.

Faculty

Carmen Dellutri is the founder and president of The Dellutri Law Group in Fort Meyers, Fla., where he focuses his practice on personal injury, consumer bankruptcy and consumer protection. He actively litigates cases involving catastrophic injuries and wrongful death on behalf of the victims, and represents consumers in all forms of bankruptcy and consumer protection litigation. Mr. Dellutri is a member of the Bars of New Jersey, New York and Florida. He is Board Certified in Consumer Bankruptcy Law by the American Board of Certification and is also a Florida Supreme Court Certified Circuit Court, County Court, Appellate and Family Law mediator and qualified arbitrator. Mr. Dellutri is a member of ABI, the National Association of Consumer Bankruptcy Attorneys (NACBA), the National Association of Consumer Advocates (NACA) and the National Association of Chapter 13 trustees. He received his undergraduate degree from the University of South Florida and his J.D. in 1993 from Loyola University School of Law, during which time he clerked for Hon. Charles Ward of the Louisiana Fourth District Court of Appeals. He also received his LL.M. from Tulane University School of Law in 1994 and his M.B.A. from Florida Gulf Coast University in 1999.

Hon. Catherine P. McEwen is a U.S. Bankruptcy Judge for the Middle District of Florida in Tampa, appointed by the Eleventh Circuit Court of Appeals on Aug. 22, 2005, and an adjunct professor at Western Michigan University Cooley Law School. She is the first female judge appointed in her district. Prior to becoming a judge, she was in private practice for almost 23 years in Tampa and was a solo practitioner from 2001 until the date of her appointment to the bench. Before opening her solo practice, she was a shareholder of Akerman Senterfitt & Eidson, P.A., formerly known as Moffitt, Hart & Herron, P.A., where she practiced law from 1982-2001 in its Tampa office, concentrating on commercial litigation with an emphasis on representing parties in bankruptcy cases. Judge McEwen was elected into the American Law Institute in 2012. Among her other honors are the Stetson University College of Law Distinguished Alumnus Award (2007), Hillsborough County Bar Association Jimmy Kynes Pro Bono Service Award (2008), the Stetson University College of Law J. Ben Watkins Award (2009), the Florida Association for Women Lawyers Leaders in the Law inaugural class designation (2010), the Tampa Bay Hispanic Bar Association's Luis "Tony" Cabassa Award (2012), the George Edgecomb Bar Association's Delano S. Stewart Diversity Award (2015), the inaugural Florida Supreme Court Chief Justice's Distinguished Federal Judicial Service Award (2016), the Stetson Lawyers Alumni Association Ben C. Willard Award (2016), the University of South Florida Distinguished Alumna Award (2016) and the Bay Area Legal Services Inc. Judge Don Castor Justice Award (2016). In 2017, Judge McEwen was appointed by Chief Justice John Roberts, Jr. to serve a two-year term as the nonvoting bankruptcy judge observer to the Judicial Conference of the United States, which ended on Sept. 30, 2019. Prior to becoming a lawyer, she was a sportswriter from 1975-79 for the *Tampa Tribune* and the *Tampa Times*. Judge McEwen received her B.A. in political science from the University of South Florida in 1979 and her J.D. *cum laude* from Stetson University in 1982.

Nicole M. Noel is a shareholder at Kass Shuler, P.A. in Tampa, Fla., where she has been practicing in the fields of bankruptcy and business litigation since 2009. She practices throughout the state of Florida in all districts. Ms. Noel co-chairs the Case Law Update Subcommittee for the Real Property Finance and Lending Committee of the RPPTL Section of the Florida Bar, and co-chairs the Bankruptcy Practice Group for the American Legal and Financial Network (ALFN). Her published work

includes "Was *Brown* a *Rash* Decision?" (*The Cramdown*, Summer 2014), "Incompatible Personalities: Investigating the Mutually Exclusive Nature of § 1322(b)(2), (5)" (*ABI Journal*, November 2012), and "Stripping Down Your Spouse: Tenancy by the Entirety Property Ownership under § 506" (ABI YLC Newsletter, September 2012). Ms. Noel is active in the community and frequently volunteers her time to speak at local universities on such topics as ethical concerns facing young attorneys, time-management and first-year law practice pointers. She is an adjunct professor at St. Petersburg College, where she teaches bankruptcy and civil litigation, and she participated in the 2016 Next-Generation program held by the Bankruptcy Judges during the National Conference of Bankruptcy Judges. Most recently, she was named a Fellow of the Florida Bar Leadership Academy, as well as one of ALFN's stand-out young professionals to watch in 2016. Ms. Noel received her undergraduate degree from Florida State University and her M.B.A. and J.D. from Stetson University School of Business Administration and Stetson University College of Law, respectively.

Laurie K. Weatherford is the chapter 13 standing trustee for the Middle District of Florida in Orlando. Prior to her appointment in 1996, Ms. Weatherford was Of Counsel with the law firm of Maguire, Voorhis & Wells, representing primarily debtors and creditor committees in chapter 11 cases, and was a panel trustee. She tried a jury trial in the *In re Braniff* case and helped develop the Mortgage Modification Mediation Program for the U.S. Bankruptcy Court in Orlando. Ms. Weatherford frequently lectures on mortgage modification and various chapter 13 issues. She is a member of the National Association of Chapter 13 Trustees, for which she serves on its Human Resources Committee. She also served on the Board of Directors of the Central Florida Bankruptcy Law Association and is a past chairman of the Bankruptcy Committee of Orange County, Fla. Ms. Weatherford received her B.A. with honors from the University of Florida and her J.D. with honors from Cumberland School of Law, where she was an honor court justice, a member of the International Law Moot Court Team and copy editor for the *Cumberland Law Review*.