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About *Consumer Bankruptcy Abstracts & Research*

Consumer Bankruptcy Abstracts & Research (*CBAR*), which began publication in fall 2007, abstracts written opinions released in recent Chapter 7 and 13 consumer bankruptcy cases, collecting cases on a wide range of issues important to consumer bankruptcy practitioners. *CBAR* discusses both published and unpublished opinions, including those not available in commercial databases.

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The subscription rate for *CBAR* is $350 for one year, commencing with the next issue to be released. This rate is for a license permitting a law firm to provide copies of the newsletter to up to three members or employees. The subscription may be extended to additional persons at the rate of $100 per additional recipient per year. Paralegals and nonprofit organizations, such as legal aid societies, may be eligible for an annual subscription rate of $300. Subscriptions are free to bankruptcy court judges and their law clerks upon request. For pricing for other types of organizations, please contact the publisher.

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Subscribers to *CBAR* receive free access to back issues of the newsletter, as well as collections of previous abstracts organized by circuit and by topic, all of which may be accessed at any time on the newsletter's website.

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How to Use This Newsletter

CBAR is an integrated product consisting of both a monthly newsletter of new cases and collections of older cases on the newsletter website. To access the resources located on the website, you will need to log in using the user name and password that were assigned to you in the e-mail confirming your subscription.

In both the newsletter and the website, cases are organized separately by topic (inclusive of all circuits) and circuit (inclusive of all topics). Additionally, CBAR follows pending bankruptcy appeals to the extent possible; these are collected in the "Pending Appeals" document found on the main subscribers' page on the website.

The first portion of this "how to" section describes the monthly newsletter. Following that there is a description of the resources available on the website.

The Monthly Newsletter

The Table of Contents

Most entries in the Table of Contents are hyperlinks that allow the user to jump directly to the corresponding section of the newsletter. Other entries have a "Go" option that accomplishes the same result. (Hyperlinks are indicated by blue text. Note that, in Microsoft Word, the default setting requires the user to hold down the "control" key while clicking a link in order to follow the link to its destination.) After you have jumped to the section, clicking the boxed "R" at the end of the section takes the user back to the table of contents:

R

This "How to Use This Newsletter" section follows the Table of Contents. After this are found the substantive divisions of the newsletter:

- This Issue's New Cases: Summary (consisting of "This Issue's Highlights" and "Case Summaries Arranged by Circuit")
- This Issue's New Cases: Full Abstracts
- Permanent Resources

This Issue's New Cases: Summary

The "This Issue's New Cases: Summary" division of the newsletter has two sections:

- "This Issue's Highlights" describes cases abstracted in the issue that readers may find particularly significant or interesting. A link is also given to the full text of the opinion.

- The "Case Summaries Arranged by Circuit" section lists all the cases abstracted in the issue, gives the main holdings of each case, and provides a link to the full text of the opinion. Within each circuit, cases are grouped by level of court, and, within each of those groupings, alphabetically.

This Issue's New Cases: Full Abstracts

The "This Issue's New Cases: Full Abstracts" division of the newsletter contains the full abstracts of the cases discussed in the issue. The first three sections of this division of the newsletter have abstracts of new bankruptcy cases, while the fourth section, "Cases under Related Federal Statutes," has abstracts of occasional new cases that discuss issues arising under the Fair Credit Reporting Act (FCRA), Fair Debt Collection Practices Act (FDCPA), Real Estate Settlement Procedures Act (RESPA), or the Truth in Lending Act (TILA).

The abstracts of the new bankruptcy cases found in the first three sections are classified to the 60 topics in the newsletter's organizational scheme. At the top of the page for each topic there are links to various resources located on the newsletter website, including a collection of the case abstracts classified to that topic over the course of CBAR's publication. (For more information on the resources found on the newsletter website, see later in this "how to" section.)

Permanent Resources

The "Permanent Resources" division of the newsletter includes several sections whose content may change only slightly from issue to issue:

- "Bankruptcy Code, Rules and Forms" provides links to the current versions of the Bankruptcy Code, the Bankruptcy Rules, and the Official Forms, as well as information on proposed amendments to the Rules and Forms.

- "Internet Resources" provides access to various documents available on the Web.

- "Supreme Court Case Status" describes the consumer bankruptcy cases that the U.S. Supreme Court has accepted for review as well as those for which a petition for certiorari is pending.

Using the Website Resources

The website resources for subscribers are a significant part of the value provided by the Consumer Bankruptcy Abstracts & Research newsletter project. The vision for CBAR is for these resources to become, over time, an online consumer bankruptcy legal reference library.

The subscribers-only area of the newsletter's website may be accessed by clicking on "Subscribers' Entrance" in the upper left corner of the newsletter's home page. To access this area, you must log in using the case-sensitive user name and password that were contained in the e-mail confirming your subscription to the newsletter. The first page you reach is the main subscribers' page.

This area offers a number of types of resources, in both Word 2003 and PDF formats:

- All published issues of the newsletter.
- A list of pending appeals in consumer bankruptcy cases, updated periodically.
- Compilations, for each circuit, of all the cases abstracted in the newsletter since its inception. Note that this section is not presently current but is in the process of being updated.
- Compilations, for each of the topics in the newsletter's topical scheme, of all the cases abstracted in the newsletter since its inception, plus additional original research. This scheme creates a systematic organization of consumer bankruptcy cases. This section is also not presently current but is in the process of being updated.

The Circuit Compilations

Within each circuit compilation, the cases are grouped by level of court. Within each group, the cases are ordered from newest to oldest.

Each case entry includes a short case summary and a link to the full text of the opinion; the case entries are taken from the circuit-by-circuit listings at the front of the newsletter. Case citations are updated as time allows.

The Topical Compilations

Each topical compilation includes the case abstracts assigned to that topic in the newsletter since its inception. The topical compilations generally include the full case abstract, although in some areas the abstracts are condensed to make the collection more manageable. The main topical compilations page states the most recent newsletter issue whose cases have been added to the topical compilations. Many of the topical compilations have been updated recently, while others are awaiting updating.

The amount of material within each topic varies widely. The newsletter has aggressively followed BAPCPA issues from its first issue. Other areas were gradually added, and now the newsletter covers most consumer Chapter 7 and 13 issues under the Bankruptcy Code. The main topical compilation page lists the number of pages in each compilation.

Many of the topical compilations have introductory information. The "Scope note" clarifies the coverage of that compilation, while the "Organization" is a table of contents for the compilation.

Search Capabilities

The CBAR website does not have a search function; the topical compilations are intended as an alternative. Note, however, that both Adobe Acrobat and Microsoft Word have built-in search functions capable of searching multiple files in a single operation, although the searches must be quite simple. Instructions for multiple-file searches are available on the newsletter's website.

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This Issue's New Cases: Summary

This Issue's Highlights

Some of the most significant holdings from the cases discussed in this issue of *Consumer Bankruptcy Abstracts & Research* are the following:

Avoidable transfers—Receipt of "reasonably equivalent value": The transfer of the debtor's home pursuant to a prepetition tax foreclosure sale was constructively fraudulent under Code § 548(a)(1)(B), and the debtor could avoid the transfer under Code § 522(h), where the home was worth $40,700 at the time of the sale, the home was subject to a mortgage of about $25,000, and the debtor's tax debt was $11,259. *In re Clay*, 2015 WL 3878454 (Bankr. E.D. Wis., June 22, 2015) (text of opinion).

Discharge injunction—Debt "provided for" in Chapter 13 plan: In two cases, the court held that the Chapter 13 debtors' personal liability on a mortgage debt was not discharged under Code § 1328(a) where the only mention of the debt in the debtors' plan stated that the debtors would make the payments "outside the plan." Such a debt is not "provided for by the plan," the court concluded, and under § 1328(a) a discharge extends only to debts "provided for by the plan." Moreover, if the debt was provided for by the plan, it would come within the discharge exception in § 1328(a)(1) for a debt "provided for under section 1322(b)(5)," even if there were no arrearages paid under the plan. See *In re Dukes*, 2015 WL 3856335 (Bankr. M.D. Fla., June 19, 2015), appeal filed, *Dukes v. Suncoast Credit Union*, Case No. 2:15-cv-420 (M.D. Fla., filed July 13, 2015) (text of opinion); *In re Park*, 532 B.R. 392 (Bankr. M.D. Fla., June 19, 2015), appeal filed, *Park v. Multibank 2009-1 RES-ADC Venture, LLC*, Case No. 2:15-cv-414 (M.D. Fla., filed July 8, 2015) (text of opinion).

Dischargeability of debt: The Ninth Circuit Court of Appeals held that the wrongdoing of the debtor, an attorney who stole $25,000 from a judgment creditor that was a California medical marijuana dispensary, outweighed that of the creditor, such that the doctrine of unclean hands did not preclude a determination that the creditor's state-court judgment against the debtor of nearly $350,000 was nondischargeable under Code § 523(a)(4). *Northbay Wellness Group, Inc. v. Beyries*, 789 F.3d 956 (9th Cir., June 5, 2015) (text of opinion).

Dischargeability of debt—Status as domestic support obligation: An attorney's fee award entered against the Chapter 7 debtor for filing a meritless motion to show cause in state-court child custody litigation with her former husband, with no finding of her former husband's need for support or the debtor's ability to pay it, was imposed to punish the debtor for her meritless filing and to deter similar conduct by others, and not to provide support for the spouses' child. Accordingly, the attorney's fee award was not a domestic support obligation. *In re Olsson*, 532 B.R. 810 (D. Or., June 17, 2015) (text of opinion).

Dischargeability of debt—Student loan debt under Code § 523(a)(8)—Prematurity of proceeding: The Chapter 13 debtors' adversary proceeding seeking a determination that their student loan debt should be included in the debtors' discharge was not yet ripe, where the debtors filed the proceeding six months into a 60-month plan term. Projecting whether the payment of student loans after discharge would cause an undue hardship was at best a difficult

process; hearing the matter years before the beginning of the projection period would only compound the difficulty. *In re Murray*, 2015 WL 3929582 (Bankr. D. Kan., June 24, 2015) (text of opinion).

Dischargeability of debt—Tax debt under Code § 523(a)(1)—Filing of "return": Rejecting the *McCoy* rule, despite its adoption by three Courts of Appeals, the bankruptcy court held, in a strong, well-reasoned opinion, that the debtor's late-filed tax return was a "return" for the purpose of Code § 523(a)(1). The court reasoned that the "draconian result" occasioned by excluding from discharge the debt arising from a late-filed tax return was inconsistent with the principal purpose of the Bankruptcy Code, namely, to grant a fresh start to the honest but unfortunate debtor. The court said that it agreed with the dissent in *In re Fahey*, 779 F.3d 1 (1st Cir 2015) that the majority's position "defies common sense." *In re Maitland*, 531 B.R. 516 (Bankr. D. N.J., June 10, 2015) (text of opinion).

Dischargeability of debt—Tax debt under Code § 523(a)(1)—Filing of "return": Rejecting the *McCoy* rule with regard to late-filed tax returns, the court held that, instead, the hanging paragraph of Code § 523(a) requires a court to look to relevant nonbankruptcy law to determine what qualifies as an acceptable return under that law. This approach is consistent with the plain language of the hanging paragraph, preserves the viability of the nondischargeability provisions for taxes found in Code §§ 523(a)(1)(B)(ii) and (a)(1)(C), and is consistent with the long-standing principle that § 523(a) exceptions to discharge are to be strictly construed in favor of the debtor. It also takes into account that tax codes do not generally require a perfectly-prepared tax document, compliant with all aspects of the tax code and its filing requirements, in order for that document to qualify as a return. *In re McBride*, 534 B.R. 326 (Bankr. S.D. Ohio, April 9, 2015) (text of opinion).

Fair Debt Collection Practices Act: Courts continue to disagree as to whether a creditor's filing a proof of claim violates the Fair Debt Collection Practices Act. Compare *Taylor v. Galaxy Asset Purchasing, LLC*, --- F.Supp.3d ----, 2015 WL 3645668 (N.D. Ill., June 11, 2015) (text of opinion) (filing may violate act) and *In re Avalos*, 531 B.R. 748 (Bankr. N.D. Ill., June 12, 2015) (text of opinion) (same) with *In re Broadrick*, 532 B.R. 60 (Bankr. M.D. Tenn., June 19, 2015), appeal filed, *Broadrick v. LVNV Funding, LLC*, Case No. 3:15-cv-742 (M.D. Tenn., filed July 2, 2015) (text of opinion) (filing does not violate act) and *In re Murff*, 2015 WL 3690994 (Bankr. N.D. Ill. June 15, 2015), subsequent opinion, 2015 WL 4585167 (July 28, 2015) (text of opinion) (same).

Fair Debt Collection Practices Act: Asking "[w]hat do you do when your bank repeatedly tries to collect a debt that is not due, you repeatedly try to tell them that they are making a mistake but they just won't listen, and then they file a foreclosure action on your home?," the court awarded the Chapter 13 debtors, who cured their mortgage arrearage under their Chapter 13 plan, $204,000 in damages under the Fair Debt Collection Practices Act, consisting primarily of $100,000 in punitive damages and $100,000 in emotional distress damages, $50,000 for each debtor. *Goodin v. Bank of America, N.A.*, --- F.Supp.3d ----, 2015 WL 3866872 (M.D. Fla., June 23, 2015) (text of opinion).

Means test—Expenses—Secured debt expense: A Chapter 7 debtor who is not actually making a secured debt payment on the petition date is not entitled to a secured debt expense deduction under the means test. The Supreme Court's reasoning in *Lanning* and *Ransom*, that the means test is designed to "ensure that [debtors] pay creditors the maximum they can afford," should apply with equal force in Chapter 7 cases. *In re Powers*, 534 B.R. 207 (Bankr. N.D. Fla., May 1, 2015) (text of opinion).

Property of the estate—Exemptions—Objection to exemption—Burden of proof: Bankruptcy Rule 4003(c), which provides that the objecting party has the burden of proving that a debtor's exemptions are not properly claimed, is invalid to the extent it assigns the burden of proof on an objection to a state-law claim of exemption in a manner contrary to state law. The Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075, forbids rules that alter substantive rights. *In re Tallerico*, 532 B.R. 774 (Bankr. E.D. Cal., June 30, 2015) (text of opinion). To the same effect is *In re Pashenee*, 531 B.R. 834 (Bankr. E.D. Cal., June 8, 2015) (text of opinion).

Property of the estate—Exemptions—Under state law: The Eighth Circuit Court of Appeals held that the debtor could exempt, as a "public assistance benefit" under Mo. Rev. Stat. § 513.430.1(10)(a), the portion of her federal income tax refund that was attributable to an additional child tax credit. The various amendments to the additional child tax credit statute since its initial enactment demonstrated Congress's intent to help low-income families. *In re Hardy*, 787 F.3d 1189 (8th Cir., June 2, 2015) (text of opinion).

Property of the estate—Exemptions—Under state law—Constitutionality: The Eleventh Circuit Court of Appeals held that Ga. Code Ann. § 44-13-100(a)(9), a provision of Georgia's bankruptcy-specific exemption statute limiting the exemption of the cash value of a life insurance policy to $2,000, while general debtors had an unlimited exemption under a different statute, does not violate the uniformity provision of the Bankruptcy Clause of the U.S. Constitution or the equal protection clause of the Georgia Constitution. The Bankruptcy Clause, which vests Congress with the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States," does not require states to treat bankruptcy and non-bankruptcy debtors exactly alike. And, although the statute provides a lower exemption to bankruptcy debtors than to general debtors, the Georgia legislature had at least rationally balanced the needs of creditors and bankruptcy debtors and therefore had not transgressed equal protection. *In re McFarland*, 790 F.3d 1182 (11th Cir., June 22, 2015) (text of opinion).

Violation of stay—Damages: The bankruptcy court did not err in awarding the Chapter 11 debtors $31,500 in damages for a creditor's willful violation of the automatic stay, consisting of $8,000 in damages for medical expenses, $15,000 in emotional distress damages, $7,500 in punitive damages, and $1000 in attorney's fees, despite the lack of expert medical evidence. The debtors testified that, while the debtor husband had pre-existing high blood pressure, after the creditor filed a postpetition lawsuit against them, the husband began to notice physical symptoms that he had not previously experienced, was subsequently diagnosed with atrial fibrillation, and incurred more than $9,000 in medical bills in connection with this heart problem. *Haugen v. Murray*, 2015 WL 3864879 (N.D. Cal., June 22, 2015) (text of opinion).

Violation of stay—Damages: Where the Chapter 13 debtor's testimony demonstrated that she suffered "significant emotional distress" as a result of her mortgage servicer's sending her two letters threatening foreclosure following the debtor's bankruptcy filing, the court awarded the debtor $69,405 in damages for the servicer's violation of the automatic stay, consisting of $10,000 in emotional distress damages, $35,000 in punitive damages, and $24,405 in attorney's fees. Although the debtor offered no medical evidence corroborating her emotional distress, and the court had "always had a somewhat knee jerk reaction against awarding emotional distress damages without corroborating medical testimony or other evidence," the court said it found the debtor's testimony regarding her emotional distress to be very compelling. *In re Ogden*, Case No. 1:11-bk-19841 (Bankr. D. Colo., June 1, 2015), appeal filed, Case No. 1:15-cv-1274 (D. Colo., filed June 16, 2015) (text of opinion).

Chapter 7—Duties of trustee: The Ninth Circuit Court of Appeals held that the plain language of Code § 503(b)(1)(B) establishes conclusively that "notice and a hearing" are required before a Chapter 7 trustee may pay an administrative expense, even if the administrative expense is a federal income tax liability of the bankruptcy estate that, under 28 U.S.C. § 960(b), the trustee is obligated to pay. The hearing requirement insures that interested parties have an opportunity to contest the amount of tax paid before the estate's funds are diminished, perhaps irretrievably. *In re Cloobeck*, 788 F.3d 1243 (9th Cir., June 12, 2015) (text of opinion).

Chapter 13—Attorney's fees—Payment by creditor: Where the secured motor vehicle creditor refused to release its lien after receiving full payment of its claim under the debtors' confirmed Chapter 13 plan, the court found the creditor's actions to be unreasonable and in bad faith and awarded attorney's fees to the debtors in the amount of $7,325. *In re Crawford*, 532 B.R. 645 (Bankr. D. S.C., June 8, 2015) (text of opinion).

Chapter 13—Confirmation of plan—Good faith under Code § 1325(a)(3): The below-median Chapter 13 debtor's plan was proposed in good faith for the purpose of Code § 1325(a)(3), even though the debtor failed to income the income of his live-in girlfriend on Schedule I and in computing his plan payments. *In re Broadbent*, 531 B.R. 840 (Bankr. D. Idaho, June 8, 2015) (text of opinion).

Chapter 13—Confirmation of plan—Standing to object: A city was not a party in interest with standing to object to confirmation of the debtor's proposed Chapter 13 plan (which redeemed the debtor's property from the city's tax sale by paying the tax sale purchaser over the term of the plan), where the city had not filed a proof of claim and was not a creditor of the debtor, and the plan contained no language directed at the city that could give rise to even a "trifling interest" in the adjudication of plan confirmation. The city's allegation that confirmation of the plan would chill the capital market for future tax sales was too speculative an injury. *In re Minor*, 531 B.R. 564 (Bankr. E.D. Pa., June 9, 2015), appeal filed, Case No. 2:15-cv-3562 (E.D. Pa., filed June 25, 2015) (text of opinion).

Chapter 13—Confirmation of plan—Treatment of secured claims—Acceptance of plan by creditor: A secured creditor that received notice of the Chapter 13 debtors' bankruptcy case and filed a proof of claim but did not object to plan confirmation, appeal the confirmation order, or otherwise raise any issue as to the treatment of its claim until the motorcycle was totaled in an accident accepted the debtors' plan for the purpose of Code § 1325(a)(5)(A) even though the plan bifurcated the creditor's claim in violation of the hanging paragraph of Code § 1325(a). *In re Ross*, 2015 WL 3781074 (Bankr. D. S.C., June 16, 2015) (text of opinion).

Chapter 13—Confirmation of plan—Treatment of secured claims—Permissibility of modification: The debtors' Chapter 13 plan could permanently modify the interest rate on a secured claim, although the debtors were not eligible for a discharge, because the creditor's failure to object to confirmation of the plan amounted to acceptance of the plan under Code § 1325(a)(5)(A). As a result, § 1325(a)(5)(B)(i), requiring a plan to provide for a creditor's retention of its lien until the debtor received a discharge or the creditor's claim was paid in full, was inapplicable. *In re Crawford*, 532 B.R. 645 (Bankr. D. S.C., June 8, 2015) (text of opinion).

Chapter 13—Confirmation of plan—Treatment of secured claims—Requirement of equal monthly payments: The meaning of "payment" in Code § 1325(a)(5)(B)(iii)(I), requiring payments to secured creditors under a Chapter 13 plan to be in "equal monthly amounts," is broad enough to encompass a Chapter 13 debtor's proposed monthly deposits into an escrow account. Accordingly, the debtor's proposed plan, under which the debtor would

make monthly deposits into escrow accounts for two secured creditors until the debtor was able to pay the debts in full via balloon payments, violated § 1325(a)(5)(B)(iii)(I). *Ehiorobo v. Talmer Bank and Trust*, 2015 WL 3936936 (E.D. Wis., June 26, 2015) (text of opinion).

Chapter 13—Confirmation of plan—Treatment of secured claims—Surrender of collateral: In a Chapter 13 case in which the debtors' compliance with the court's Mortgage Modification Mediation Program Procedures required them to modify their Chapter 13 plan so as to provide for the surrender of their real property to the secured creditor, the court held that "surrender" meant that the debtors could not thereafter take any overt action to defend or impede the creditor's foreclosure proceedings. *In re Calzadilla*, 534 B.R. 216 (Bankr. S.D. Fla., June 17, 2015) (text of opinion).

Chapter 13—Confirmation of plan—Treatment of secured claims—Surrender of collateral: The court could not confirm a Chapter 13 plan that proposed to surrender one of three parcels of real property securing a creditor's claim to the creditor, and to pay any deficiency through payments over the term of the plan. Partial surrender (i.e., surrender of some but not all of the creditor's collateral) is not allowed under Code § 1325(a)(5)(C). Nor could the surrender provision be confirmed as a method of payment of the creditor's claim under § 1325(a)(5)(B). *In re Lemming*, 532 B.R. 398 (Bankr. N.D. Ga., June 18, 2015) (text of opinion).

Chapter 13—Confirmation of plan—Treatment of secured claims—Transfer of collateral to creditor: A Chapter 13 plan may provide for transferring title to mortgaged real estate to the mortgagee in full satisfaction of its claim subject to the mortgagee's right to object, in which case the court must determine if the plan has been proposed in good faith and is otherwise in compliance with the Code. The words "vesting of property" in Code § 1322(b)(9) and "surrender the property" in § 1325(a)(5)(C) are different and mean different things. Any argument that Congress intended § 1325(a)(5)(C) to trump § 1322(b)(9) and so "vest" must be read to mean "surrender" is implausible. These provisions are not in conflict. *In re Sagendorph*, 2015 WL 3867955 (Bankr. D. Mass., June 22, 2015) (text of opinion). But see *In re Lemming*, 532 B.R. 398 (Bankr. N.D. Ga., June 18, 2015) (text of opinion) (stating that a Chapter 13 plan cannot require a secured creditor to accept a surrender of property or to take possession of or title to the property through repossession or foreclosure).

Chapter 13—Confirmation of plan—Treatment of unsecured claims—Payment of interest:, Because Code § 101(14A) defines a "domestic support obligation" as including postpetition interest, the interest is considered part of the underlying claim rather than interest on a claim; therefore, Code § 1322(b)(10), which provides that a Chapter 13 plan may not pay interest on nondischargeable claims unless the plan provides for full payment of all allowed claims, does not prohibit a plan that provides for the payment of postpetition interest on a prepetition DSO arrearage. Moreover, because § 101(14A) states that its definition of "domestic support obligation" applies "notwithstanding any other provision of this title," neither Code § 502(b)(2), which disallows claims for unmatured interest, nor § 502(b)(5), which disallows claims for unmatured DSOs, prohibits a Chapter 13 plan from providing for the payment of postpetition interest on a prepetition DSO arrearage. In fact, the debtors were not only allowed, but were required under Code § 1322(a)(2), which mandates full payment of most priority claims, to provide in their proposed plan for the payment of the 6% interest that accrued under Texas law on a DSO claim filed by the debtor husband's former wife. *In re Lightfoot*, 2015 WL 3956211 (Bankr. S.D. Tex., June 22, 2015) (text of opinion).

Chapter 13—Dismissal of case under Code § 1307(c): The court was not required to dismiss the Chapter 13 debtors' case under Code § 1307(c) although the debtors made their final payment 63 months after their petition date. The debtors made all of the monthly payments called for in their 60-month plan, tendering in excess of $170,000 to the Chapter 13 trustee. At the end of the plan term, they owed less than one-half of a plan payment to complete the plan base. To deprive the debtors of a discharge under these circumstances would be contrary to the spirit and intent of the Bankruptcy Code which offered a "fresh start" to the honest but unfortunate debtor. *In re Klaas*, 533 B.R. 482 (Bankr. W.D. Pa., June 4, 2015), aff'd, *Shovlin v. Klaas*, Case No. 2:15-cv-802 (W.D. Pa., August 28, 2015) (text of opinion).

Chapter 13—Dismissal of case under Code § 1307(c): Denying the U.S. Trustee's motion to dismiss a Chapter 13 case filed by a debtor who was a licensed marijuana grower under the Michigan Medical Marihuana Act (MMMA), the court said that to balance the court's (and the debtor's) obligations under federal law, the debtor's legitimate need for relief under Chapter 13, and Michigan's policy choices reflected in the MMMA, the court would refrain from dismissing the debtor's case at this time, but would enjoin him from conducting his medical marijuana business (and violating the federal Controlled Substances Act), while his case was pending. If, however, the debtor preferred to continue his illicit business activity (albeit subject to the possibility of federal criminal prosecution), he needed only to file a motion to dismiss the case and the court's injunction would cease upon dismissal. *In re Johnson*, 532 B.R. 53 (Bankr. W.D. Mich., June 16, 2015) (text of opinion).

Chapter 13—Disposition of funds held by trustee: *Harris v. Viegelahn*, 135 S.Ct. 1829, 191 L.Ed.2d 783 (2015) applies only in the instance of conversion and does not abrogate Code § 1326(a)(2), which provides that, where a Chapter 13 case is dismissed prior to the confirmation of a plan, administrative expenses are to be paid out of undisbursed funds held by the Chapter 13, with the balance returned to the debtor. *In re Ulmer*, 2015 WL 3955258 (Bankr. W.D. La., June 26, 2015) (text of opinion).

Chapter 13—Employment of nonbankruptcy attorney: A Chapter 13 debtor is not required to obtain court approval of special counsel that the debtor has retained to litigate a claim, such as, here, counsel retained to litigate a prepetition workers' compensation claim. Code § 327(e) applies only to the bankruptcy trustee and persons charged with performing the duties of a trustee, and nothing in the Bankruptcy Code suggests that the term "trustee" used in § 327(e) is intended to include a Chapter 13 debtor. *In re Scott*, 531 B.R. 640 (Bankr. N.D. Miss., June 9, 2015) (text of opinion).

Chapter 13—Entitlement to discharge: Two courts held that the Chapter 13 debtors did not complete "all payments under the plan," and therefore were not entitled to a discharge under Code §1328(a), where, although the debtors made all payments to the Chapter 13 trustee called for by the plan, the debtors did not maintain current payments to their mortgage creditor, which the debtors paid directly, as was also required under the plan. See *In re Kessler*, 2015 WL 4726794 (Bankr. N.D. Tex., June 9, 2015), appeal filed, *Kessler v. Wilson*, Case No. 6:15-cv-40 (N.D. Tex., filed June 19, 2015) (text of opinion); *In re Gonzales*, 532 B.R. 828 (Bankr. D. Colo., June 9, 2015) (text of opinion).

Chapter 13—Stripping unsecured lien: Three courts held that the recent Supreme Court decision in *Bank of America, N.A. v. Caulkett*, 135 S.Ct. 1995, 192 L.Ed.2d 52 (2015) does not eliminate a Chapter 13 debtor's ability to strip a wholly-unsecured junior lien. See *In re Grossman Rivera*, 2015 WL 3932381 (Bankr. D. Puerto Rico, June 25, 2015) (text of

opinion); *In re Wilson*, 532 B.R. 486 (S.D. N.Y., June 5, 2015) (text of opinion); *In re Turman*, 2015 WL 3745304 (Bankr. D. Neb., June 12, 2015) (text of opinion).

R

Case Summaries Arranged by Circuit

Supreme Court R

There are no cases in this issue.

First Circuit (10) R

In re Charbono, 790 F.3d 80 (1st Cir., June 15, 2015)

(case no. 14-2151) Text of opinion

- **Authority of the court—Imposition of sanctions—Under inherent authority:** Bankruptcy courts possess the inherent power to impose punitive non-contempt sanctions for failures to comply with their orders. See generally *Pearson v. First NH Mortg. Corp.*, 200 F.3d 30 (1st Cir. 1999) (a bankruptcy court has the inherent power to impose sanctions); *Fellheimer, Eichen & Braverman, P.C. v. Charter Techs., Inc.*, 57 F.3d 1215 (3d Cir. 1995) (a bankruptcy court has the inherent power to impose sanctions); *In re Weiss*, 111 F.3d 1159 (4th Cir. 1997) ("[a] federal court also possesses the inherent power to regulate litigants' behavior and to sanction a litigant for bad-faith conduct"); *In re Case*, 937 F.2d 1014 (5th Cir. 1991) ("the bankruptcy court has the inherent power to award sanctions for bad-faith conduct in a bankruptcy court proceeding. This power does not reach conduct which does not occur in proceeding in the bankruptcy court"); *In re Downs*, 103 F.3d 472 (6th Cir. 1996) ("[b]ankruptcy courts, like Article III courts, enjoy inherent power to sanction parties for improper conduct"); *Isaacson v. Manty*, 721 F.3d 533 (8th Cir. 2013) (bankruptcy court has inherent authority to sanction bad-faith conduct); *In re Rainbow Magazine, Inc.*, 77 F.3d 278 (9th Cir. 1996) (by enacting Code 105(a), "Congress impliedly recognized that bankruptcy courts have the inherent power to sanction"); *In re Mroz*, 65 F.3d 1567 (11th Cir. 1995) (a bankruptcy court has the inherent power to impose sanctions for bad-faith conduct).

- **Authority of the court—Imposition of sanctions—Under inherent authority:** While an award of attorneys' fees as an inherent-power sanction requires a showing of bad faith, a finding of bad faith is not ordinarily required where an inherent-power sanction does not take the form of an award of attorneys' fees (and thus does not involve a departure from the American Rule).

- **Authority of the court—Imposition of sanctions—On debtor:** Affirming *Charbono v. Sumski*, 2014 WL 4922988 (D. N.H., Sept. 30, 2014), the Court of Appeals held that the bankruptcy court did not abuse its discretion in imposing a $100 sanction on the Chapter 13 debtor for failing to deliver a copy of his request for an extension of the filing deadline for his federal income tax return to the Chapter 13 trustee within the time allowed under the terms of the debtor's confirmed plan, in accordance with the court's standing policy, even though the debtor had provided the copy to the trustee prior to the court's imposition of the sanction.

In re Garcia, 532 B.R. 173 (1st Cir. B.A.P., June 24, 2015)

(case nos. 14-64, 14-71) Text of opinion

- **Appellate procedure—Scope of appeal:** An appeal from an order denying reconsideration is generally not considered to be an appeal from the underlying judgment. *Chamorro v. Puerto Rican Cars, Inc.*, 304 F.3d 1 (1st Cir. 2002). However, there are two exceptions to this rule. One is when it is clear that the appellant

intended to appeal both orders, and where both parties brief issues relating to the underlying judgment. The second is where the case involves an appeal of an order resolving a motion under Fed. R. Civ. Pro. 59, the timely filing of which tolls the appeal period for the underlying order by operation of Bankruptcy Rule 8002(b)(1)(B) or (C). This result may not occur on an appeal from an order disposing of a Rule 60(b) motion unless that motion is filed within 14 days of the underlying judgment.

- Appellate procedure—Scope of appeal: Here, where the appellant did not file his Motion for Reconsideration until 22 days after the order of which he sought reconsideration, the filing of the motion did not toll the appeal period for the underlying order. Thus, even if the appellant had included the underlying order in his notice of appeal, it would have been untimely. Accordingly, the panel's review was limited to the order denying reconsideration.

- Reconsideration of decision: Rule 60(b)(6) motions should be granted only where exceptional circumstances justifying extraordinary relief exist. Additionally, a 60(b)(6) movant must make a suitable showing that the movant has a meritorious claim. *Ahmed v. Rosenblatt*, 118 F.3d 886 (1st Cir. 1997).

- Reconsideration of decision; Contested matters—Evidentiary hearing: The bankruptcy court has the discretion to decide an issue without holding an evidentiary hearing, and, here, the bankruptcy court did not abuse its discretion in denying the creditor's motion for reconsideration without holding an evidentiary hearing, where the creditor made a bare request for such a hearing and the matter involved the debtor's amending his schedules, to which Bankruptcy Rule 1009 adopts a permissive approach.

- Property of the estate—Avoidance of lien impairing exemption—Determination of impairment: The extent to which a lien may be avoided under Code § 522(f) may be easily computed once four variables are determined: (1) the amount of the lien in question; (2) the sum of all other liens on the property; (3) the amount of the debtor's exemption; and (4) the value of the subject property. A debtor who moves under § 522(f) to avoid a creditor's lien bears the burden of proof by a preponderance of the evidence on every statutory element. The "petition date is the operative date for determining the various § 522(f) calculations." *In re Wilding*, 475 F.3d 428 (1st Cir. 2007).

- Appellate procedure—Standard of review: Valuation of an asset of the bankruptcy estate is a question of fact reviewed for clear error.

- Appellate procedure—Clearly erroneous standard: A factual finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *In re IDC Clambakes, Inc.*, 727 F.3d 58 (1st Cir. 2013).

- Valuation of property—Real property: The bankruptcy court's conclusion that the value of the Chapter 7 debtor's residential property was $635,000 was not clearly erroneous, where the bankruptcy court was confronted with four values for the property and the court found the $635,000 value of the property established by the licensed appraiser most probative of the actual value of the property on the petition date. Although this appraisal postdated the petition date by 15 months, there was nothing in the record to refute the debtor's representation that the condition of the

property was essentially the same on the petition date as on the date of the appraisal. Additionally, the bankruptcy court's determination of value was well within the range set forth in a $625,000–$660,000 valuation the Chapter 7 trustee had obtained. Further, the court's decision was informed by the inability of the trustee to sell the property and the lack of any offers for the property.

In re Carrasquillo Gonzalez, 532 B.R. 1 (Bankr. D. Puerto Rico, June 19, 2015)

(case no. 3:14-bk-1400; adv. proc. no. 3:14-ap-250) (Chief Bankruptcy Judge Enrique S. Lamoutte) Text of opinion

- **Automatic stay—Exceptions to stay:** Distinguishing *In re Centeno Sanchez*, 2013 WL 140453 (Bankr. D. Puerto Rico 2013), the court held that a notice sent to the debtor postpetition by the Puerto Rico Treasury Department was a threatened seizure that did not come within the exception to the automatic stay found at Code § 369(b)(9)(D) for "the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment." The notice stated that "We remind you that the law empowers the Secretary of the Treasury to use for the collection steps, mechanisms such as the embargo of personal property (including banking account; garnish of 25% of the wages of the taxpayer or real estate property with their auction afterward." See also *In re Otero–Lopez*, 492 B.R. 595 (Bankr. D. Puerto Rico 2013) ("post-petition notices that involve threats by a taxing authority to collect, garnish, lien and/or levy the debtor's property to secure pre-petition tax debts do not fall under the exception provided in Section 369(b)(9)(D)").

In re Crespo Torres, 532 B.R. 195 (Bankr. D. Puerto Rico, June 22, 2015)

(case no. 3:14-bk-1611; adv. proc. no. 3:14-ap-127) (Chief Bankruptcy Judge Enrique S. Lamoutte) Text of opinion

- **Violation of stay:** An unsecured creditor did not violate the automatic stay by mailing a letter to the Chapter 13 debtor, about five weeks after his bankruptcy filing, that simply informed the debtor that his account had been sold to another entity and that payments should be made to the second entity at the address specified in the letter. Concluding that the letter was not an attempt to collect a prepetition debt, but was merely an informative letter from a predecessor creditor disclosing the name and address of a successor creditor, the court said that Code § 362 should not be misinterpreted to prohibit all contact between creditors and debtors after a bankruptcy petition has been filed.

In re Garcia, 2015 WL 3933992 (Bankr. D. Puerto Rico, June 25, 2015)

(case no. 3:14-bk-4028) (Bankruptcy Judge Brian K. Tester) Text of opinion

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Rate of interest:** The plurality decision in *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S.Ct. 1951, 158 L.Ed.2d 787 (2004) establishes a "prime plus" formula for determining the interest rate to be paid on a secured claim in a Chapter 13 case that is paid in monthly payments under Code § 1325(a)(5)(B). Here, where the debtor's amended Chapter 13 plan was filed on March 30, 2015, at which time the national prime rate was 3.25%, the debtor's proposed interest rate of 5% was reasonable. While *In re Ibarra*,

235 B.R. 204 (Bankr. D. Puerto Rico 1999) required payment of interest at a market rate, that decision had been superseded by *Till*.

In re Grossman Rivera, 2015 WL 3932381 (Bankr. D. Puerto Rico, June 25, 2015)

(case no. 3:13-bk-7968; adv. proc. no. 3:14-ap-100) (Bankruptcy Judge Brian K. Tester)

Text of opinion

- **Chapter 13—Stripping unsecured lien:** The recent Supreme Court decision in *Bank of America, N.A. v. Caulkett*, 135 S.Ct. 1995, 192 L.Ed.2d 52 (2015) does not eliminate a Chapter 13 debtor's ability to strip a wholly-unsecured junior lien.

In re Ortiz-Feliciano, 532 B.R. 185 (Bankr. D. Puerto Rico, June 15, 2015)

(case no. 3:13-bk-5388) (Chief Bankruptcy Judge Enrique S. Lamoutte) Text of opinion

- **Chapter 13—Confirmation of plan—Calculation of projected disposable income:** Following the approach taken in *In re Welch*, 347 B.R. 247 (Bankr. W.D. Mich. 2006), the court said that, if the Chapter 13 debtor and his non-filing spouse operated as a "single economic unit," the spouse's income and expenses would need to be taken into account in calculating the debtor's projected disposable income, even though the spouses had a prenuptial agreement that allegedly provided for "complete separation of property."

In re Ortiz Negron, 2015 WL 3634234 (Bankr. D. Puerto Rico, June 10, 2015)

(case no. 2:09-bk-6350) (Bankruptcy Judge Edward A. Godoy) Text of opinion

- **Proof of claim—Amendment:** Applying the test articulated in *In re Alonso*, 525 B.R. 195 (Bankr. D. Puerto Rico, June 10, 2015), the court disallowed the mortgage creditor's amended proof of claim, which increased the amount of the claim from $15,844 to $21,938, where the creditor filed the amendment during the 60th month of the debtors' Chapter 13 plan. Concluding that the balance of equities weighed against allowing the amendment, the court said that, at this late date, the debtors had already committed all of their disposable income to funding the plan for 60 months. Since Chapter 13 plans—by statute—could not exceed 60 months, the debtors would be unable to cure any deficiency caused by allowing the amended claim. Therefore, the Chapter 13 trustee would be forced to attempt to recover the amounts already paid to the unsecured creditors in order to pay the amended claim, and this would unfairly prejudice the unsecured creditors.

In re Pratts, 2015 WL 3484286 (Bankr. D. Puerto Rico, June 1, 2015)

(case no. 3:11-bk-902) (Chief Bankruptcy Judge Enrique S. Lamoutte) Text of opinion

- **Property of the estate—Exemptions—Amendment of exemptions—Denial of amendment:** The Supreme Court's decision in *Law v. Siegel*, 134 S.Ct. 1188 (2014) precluded the Chapter 7 trustee's objection, based on the debtor's alleged bad faith, to the debtor's amended exemptions.

In re Sagendorph, 2015 WL 3867955 (Bankr. D. Mass., June 22, 2015), appeal pending

(case no. 4:14-bk-41675) (Chief Bankruptcy Judge Melvin S. Hoffman)

Text of opinion

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Transfer of collateral to creditor:** A Chapter 13 plan may provide for transferring title to mortgaged real estate to the mortgagee in full satisfaction of its claim subject to the mortgagee's right to object, in which case the court must determine if the plan has been proposed in good faith and is otherwise in compliance with the Code. The words "vesting of property" in Code § 1322(b)(9) and "surrender the property" in § 1325(a)(5)(C) are different and mean different things. Any argument that Congress intended § 1325(a)(5)(C) to trump § 1322(b)(9) and so "vest" must be read to mean "surrender" is implausible. These provisions are not in conflict. A plan that contains a provision for transferring or vesting in the secured creditor the property that is its collateral would be compliant with and confirmable under § 1325(a)(5)(C) because a transfer of property presupposes its surrender by the transferor. Surrendering or "ceding possessory rights" is a preliminary step in the process of transferring title. This interpretation of vesting in § 1322(b)(9) is consistent with and presents an avenue for effectuating § 1322(b)(8), which permits "the payment of part or all of a claim against the debtor from property of the estate or property of the debtor." While Massachusetts law does not permit a mortgagor to force a mortgagee to take title to mortgaged property, the Bankruptcy Code preempts state law with which it is in conflict.

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Transfer of collateral to creditor; Chapter 13—Confirmation of plan—Treatment of secured claims—Surrender of collateral:** If a Chapter 13 plan proposes to transfer to a mortgage creditor property that is heavily encumbered or worth significantly less than the mortgage debt without also affording the creditor a right to participate as an unsecured creditor for any deficiency claim, the plan may be subject to an objection based on bad faith under Code § 1322(a)(3). Here, however, the property that the Chapter 13 debtor's plan proposed to vest in the mortgage creditor, in full payment of its claim, was worth more than the claim, according to the debtor's schedules.

Second Circuit (4) R

Chua v. Robinson, 2015 WL 3833542 (S.D. N.Y., June 18, 2015)

(case no. 1:13-mc-346) (District Judge Richard M. Berman) Text of opinion

- **Chapter 7—Denial of discharge—Timeliness of complaint:** Affirming *In re Robinson*, 2013 WL 3993741 (Bankr. S.D. N.Y., August 1, 2013), the district court held that, where the creditors exhibited a "remarkable lack of diligence" in prosecuting their case, the bankruptcy court did not err in denying the creditors' motion for a second extension of the time in which to object to the Chapter 7 debtor's discharge.

In re Wilson, 532 B.R. 486 (S.D. N.Y., June 5, 2015)

(case no. 7:14-cv-9543) (District Judge Cathy Seibel) Text of opinion

- **Proof of claim—Secured claim—Filing by servicer:** Where the claimant is a mortgage servicer, it must provide evidence that it is the servicer of the relevant mortgage in order to establish that it has standing to assert a claim for that mortgage. *In re Minbatiwalla*, 424 B.R. 104 (Bankr. S.D. N.Y. 2010).

- **Proof of claim—Requirements for prima facie validity:** Under Bankruptcy Rule 3001(f), a proof of claim is "prima facie evidence of the validity and amount of the claim" if it is filed in accordance with Rule 3001. These rules include the requirements that the proof of claim must "conform substantially to the appropriate Official Form" (Rule 3001(a)); include "an itemized statement of the interest, fees, expenses, or charges" included within the claim total (Rule 3001(c)(2)(A)); attach a copy of the writing that secures the claim, if applicable (Rule 3001(c)(1)); include "the attachment prescribed by the appropriate Official Form" if the security interest is the debtor's principal residence (Rule 3001(c)(2)(C)); and provide "evidence that the security interest has been perfected" (Rule 3001(d)). Failure to attach the documentation required by Rule 3001 will result in the loss of the prima facie validity of the claim.

- **Proof of claim—Filing by debtor—Amendment of claim:** While the claims bar date precluded the creditor from filing a "superseding" claim (defined as one that "by its nature may include a broader spectrum of demands against the debtors"), it did not prevent the creditor from amending the existing claim that the Chapter 13 debtors had timely filed on its behalf. See *In re Kolstad*, 928 F.2d 171 (5th Cir. 1991) (the bankruptcy court has discretion to allow a creditor to file, after the claims bar date, an amendment to a proof of claim timely filed on its behalf by the debtor).

- **Proof of claim—Filing by debtor—Amendment of claim:** The bankruptcy court was well within its discretion to permit the Chapter 13 debtors' amended proof of claim for a creditor that had failed to file its own claim, although the amendment was filed after the claims bar date, as the court correctly found that the amendment merely supplemented the timely-filed original claim.

- **Chapter 13—Stripping unsecured lien:** In order for a Chapter 13 debtor to strip a wholly-unsecured junior lien, it is sufficient for the debtor to establish "the lien amount of the first mortgage, the proof of claim of the second mortgage and a valuation of the

debtor's principal residence." *In re Robert*, 313 B.R. 545 (Bankr. N.D. N.Y. 2004). It is not required that the holder of the first mortgage have an allowed claim.

- **Chapter 13—Stripping unsecured lien:** The recent Supreme Court decision on lien stripping, *Bank of America, N.A. v. Caulkett*, 135 S.Ct. 1995, 192 L.Ed.2d 52 (2015), applies only in the Chapter 7 context and has no effect on a Chapter 13 debtor's ability to strip a wholly-unsecured junior lien.

In re Ladieu, 2015 WL 3503941 (Bankr. D. Vt., June 1, 2015), **appeal filed**, Vobile, Inc. v. Ladieu, Case No. 2:15-cv-136 (D. Vt., filed June 16, 2015)

(case no. 5:14-bk-10551) (Bankruptcy Judge Colleen A. Brown) Text of opinion

- **Chapter 13—Dismissal of case under Code § 1307(c)—Bad faith filing:** Based on the Chapter 13 debtor's testimony, the court found that any misrepresentations the debtor made in his bankruptcy schedules were inadvertent and without an intention to mislead the court or deprive creditors their due. Although the debtor's best effort failed to produce flawlessly accurate schedules, the court found that the evidence as a whole did not support a finding of bad faith. The debtor, the court said, testified with obvious candor to a chaotic family life that made it very difficult for him to focus on his finances and prepare his bankruptcy petition and schedules. Accordingly, the court found that a creditor did not establish bad faith by the debtor such as would constitute cause under Code § 1307(c) to dismiss or convert the case.

- **Chapter 13—Dismissal of case under Code § 1307(c)—Bad faith filing:** The debtor's filing a Chapter 13 case that, if successful, would discharge a debt that was held nondischargeable under Code § 523(a)(6) in his prior Chapter 7 case did not demonstrate bad faith for the purpose of Code § 1307(c). The creditor had not asserted, nor did the facts demonstrate, any particular ill motive, malicious intent, or other special circumstance particular to the debtor's attempt to discharge the debt. The debtor wished to do that which Chapter 13 permitted him to do; this was not an unfair manipulation of the Bankruptcy Code, but rather the debtor's "[taking] advantage of a fundamental provision that Congress intentionally enacted." *In re Mandarino*, 312 B.R. 214 (Bankr. E.D. N.Y. 2002).

- **Chapter 13—Dismissal of case under Code § 1307(c)—Bad faith filing:** The Chapter 13 debtor's spending $6,800 on a family vacation, prior to his bankruptcy filing, did not demonstrate bad faith, where the debtor made the first installment payment for the Disneyworld trip in mid–2013, at a time when the debtor believed the family's finances supported the expenditure; the debtor made periodic installment payments, and planned the trip strategically to minimize airfare costs; and the debtor took the vacation approximately six months before he filed his bankruptcy petition and before he even contemplated filing for bankruptcy.

In re Scialdone, 533 B.R. 53 (Bankr. S.D. N.Y., June 18, 2015)

(case no. 4:12-bk-36086; adv. proc. no. 4:12-ap-9061) (Chief Bankruptcy Judge Cecelia G. Morris) Text of opinion

- **Dischargeability of debt—Elements under Code § 523(a)(2)(A):** To have a debt determined to be nondischargeable under Code § 523(a)(2)(A), the five elements

that must be established are (1) the debtor must make an express or implied false representation; (2) the representation must be made with knowledge that it was false at the time it was made; (3) the false representation must be made with the intent to deceive; (4) the creditor must have justifiably relied upon the debtor's misrepresentation(s); and (5) the creditor must establish that he was damaged.

- Dischargeability of debt—For misrepresentation under Code § 523(a)(2)(A): Although the debtor made misrepresentations to two creditors who invested in a business operated by a friend of the debtor, the creditors could not justifiably rely on the debtor's misrepresentations, for the purpose of Code § 523(a)(2)(A), because prior to making the investments the creditors had been shown a tax return for the business that had obvious discrepancies. Once the creditors became aware of the inaccuracies contained within the document, they could no longer blindly rely on the debtor's representations. After that point, they had a duty to investigate whether the tax return accurately reflected the profits and losses of the business. Had they asked for the final version of this return, or of prior years' returns, they would surely have discovered that the business did not make anywhere near the numbers contained in the fraudulent return. Having failed to undertake this investigation, the creditors could not now say that their reliance on the debtor's representations was justified.

Third Circuit (7) R

In re Bernard, 2015 WL 4028237 (D. N.J., June 30, 2015)

(case no. 3:14-cv-6484) (District Judge Michael A. Shipp) Text of opinion

- **Dischargeability of debt—For misrepresentation under Code § 523(a)(2)(A):** An attorney who represented the debtor in prepetition divorce proceedings did not establish that the debtor's promise to pay him were false, for the purpose of Code § 523(a)(2)(A), where the debtor made payments totaling $3,600, although this left a balance of about $15,000, and the debtor did not file for bankruptcy until December 4, 2012—over a year and a half after her deposition testimony in which she testified that she had spoken to a bankruptcy attorney, and over two years after she retained the attorney as her counsel in the divorce proceeding.

In re Deitch, 533 B.R. 138 (E.D. Pa., June 15, 2015), appeal filed, Case No. 15-2554 (3rd Cir., filed June 26, 2015)

(case no. 2:15-cv-204) (District Judge Wendy Beetlestone) Text of opinion

- **Jurisdiction—Effect of *Rooker-Feldman* doctrine; Proof of claim—Secured claim—Defense to liability:** The district court held that, under the *Rooker-Feldman* doctrine, the bankruptcy court lacked jurisdiction to consider the debtor's objection to the mortgage creditor's proof of claim. The proof of claim was based on a state court foreclosure judgment; the debtor's objection asserted that he had the right to rescind the mortgage. The debtor appealed, and the district court, vacating the bankruptcy court's decision, held that the *Rooker-Feldman* doctrine divested the bankruptcy court of jurisdiction to even consider the objection.

In re Klaas, 533 B.R. 482 (Bankr. W.D. Pa., June 4, 2015), aff'd, Shovlin v. Klaas, Case No. 2:15-cv-802 (W.D. Pa., August 28, 2015)

(case no. 2:09-bk-29574) (Bankruptcy Judge Gregory L. Taddonio) Text of opinion

- **Chapter 13—Dismissal of case under Code § 1307(c):** The court was not required to dismiss the Chapter 13 debtors' case under Code § 1307(c) although the debtors made their final payment 63 months after their petition date. The debtors made all of the monthly payments called for in their 60-month plan, tendering in excess of $170,000 to the Chapter 13 trustee. At the end of the plan term, they owed less than one-half of a plan payment to complete the plan base. To deprive the debtors of a discharge under these circumstances would be contrary to the spirit and intent of the Bankruptcy Code which offered a "fresh start" to the honest but unfortunate debtor.

- **Personal financial management course:** The Chapter 13 debtors' completion of a postpetition financial management course was not untimely, although the debtors apparently completed the course more than 60 months postpetition, where the court permitted the debtors to make their final plan payment about 63 months

postpetition, and the debtors completed the course prior to making the final payment, as called for under Bankruptcy Rule 1007(c).

In re Maitland, 531 B.R. 516 (Bankr. D. N.J., June 10, 2015)

(case no. 3:13-bk-10024; adv. proc. no. 3:14-ap-1704) (Chief Bankruptcy Judge Kathryn C. Ferguson) Text of opinion

- **Dischargeability of debt—Tax debt under Code § 523(a)(1)—Filing of "return":** Rejecting the *McCoy* rule, despite its adoption by three Courts of Appeals, the bankruptcy court held, in a strong, well-reasoned opinion, that the debtor's late-filed tax return was a "return" for the purpose of Code § 523(a)(1). The court reasoned that the "draconian result" occasioned by excluding from discharge the debt arising from a late-filed tax return was inconsistent with the principal purpose of the Bankruptcy Code, namely, to grant a fresh start to the honest but unfortunate debtor. The court said that it agreed with the dissent in *In re Fahey*, 779 F.3d 1 (1st Cir 2015) that the majority's position "defies common sense."

- **Dischargeability of debt—Tax debt under Code § 523(a)(1):** At least when a debtor's amended tax return reduces his or her tax liability, the two-year lookback period in Code § 523(a)(1)(B)(ii), which renders nondischargeable a tax debt arising from a tax return that was filed late and within two years of the bankruptcy petition date, runs from the date of the debtor's original tax return, not from the date of the debtor's subsequent amended return. See *In re Lamborn*, 204 B.R. 999 (Bankr. N.D. Okla. 1997); *In re Greenstein*, 95 B.R. 583 (Bankr. N.D. Ill. 1989).

- **Dischargeability of debt—Tax debt under Code § 523(a)(1):** Because the court had already found that the debtor's 2008 state income tax debt was a "tax of a kind specified in section 523(a)(1)(B)," Code § 507(a)(8)(A)(iii) was, by its own terms, inapplicable, as the introductory language of § 507(a)(8)(A)(iii) renders it applicable to taxes "other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title." Accordingly, the debtor's 2008 tax debt was not nondischargeable under Code § 523(a)(1)(A), which renders nondischargeable a debt for a tax "of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title."

In re Mauz, 532 B.R. 589 (Bankr. M.D. Pa., June 30, 2015), appeal filed, Mauz v. Link, Case No. 1:15-cv-1363 (M.D. Pa., filed July 13, 2015)

(case no. 1:12-bk-6672; adv. proc. no. 1:13-ap-53) (Bankruptcy Judge Robert N. Opel, II) Text of opinion

- **Dischargeability of debt—Existence of debt:** In a nondischargeability proceeding, the bankruptcy court must address two separate questions: first, whether the plaintiff/creditor holds an enforceable obligation against the debtor, and second, whether the debt is nondischargeable under a provision of the Bankruptcy Code.

- **Dischargeability of debt—For willful and malicious injury under Code § 523(a)(6):** The debtor's conduct with respect to the judgment creditors was both malicious and willful, and a state court judgment against the debtor for intentional infliction of emotional distress under Pennsylvania law was nondischargeable under Code § 523(a)(6), where the debtor sought to drive the creditors out of their shared neighborhood by filing ten spurious complaints in state court against the creditors and over 30 complaints with the police department that resulted in no charge or citations against the creditors.

In re Minor, 531 B.R. 564 (Bankr. E.D. Pa., June 9, 2015), **appeal filed**, Case No. 2:15-cv-3562 (E.D. Pa., filed June 25, 2015)

(case no. 2:13-bk-19278) (Bankruptcy Judge Magdeline D. Coleman) Text of opinion

- **Chapter 13—Confirmation of plan—Standing to object:** A city was not a party in interest with standing to object to confirmation of the debtor's proposed Chapter 13 plan (which redeemed the debtor's property from the city's tax sale by paying the tax sale purchaser over the term of the plan), where the city had not filed a proof of claim and was not a creditor of the debtor, and the plan contained no language directed at the city that could give rise to even a "trifling interest" in the adjudication of plan confirmation. The city's allegation that confirmation of the plan would chill the capital market for future tax sales was too speculative an injury.

In re Rones, 531 B.R. 526 (Bankr. D. N.J., June 11, 2015), **appeal filed**, Whispering Woods Condominium Association, Inc. v. Rones, Case No. 3:15-cv-4271 (D. N.J., filed June 24, 2015)

(case no. 3:14-bk-35899) (Bankruptcy Judge Christine M. Gravelle) Text of opinion

- **Nature of lien under Bankruptcy Code:** The Bankruptcy Code recognizes three types of liens: judicial, statutory, and consensual. While the Code does not explicitly state that the three types of liens are mutually exclusive, the legislative history of the Code makes clear that they are.

- **Nature of lien under Bankruptcy Code:** Courts are split regarding the classification of a condominium association's lien. Compare *In re Robinson*, 231 B.R. 30 (Bankr. D. N.J. 1997); *In re Beckley*, 210 B.R. 391 (Bankr. M.D. Fla. 1997); *In re Phillippy*, 178 B.R. 67 (Bankr. M.D. Pa. 1994); and *In re Bland*, 91 B.R. 421 (Bankr. N.D. Ohio 1988) (all holding that a condominium lien is a security interest) with *In re Green*, 793 F.3d 463 (5th Cir., July 13, 2015) (applying Louisiana law); *Young v. 1200 Buena Vista Condos.*, 477 B.R. 594 (W.D. Pa. 2012); and *In re Lopez*, 512 B.R. 663 (Bankr. D. Colo. 2014) (all concluding that a condominium association lien is statutory).

- **Nature of lien under Bankruptcy Code:** Concluding that the lien held by the Chapter 13 debtors' condominium association was a consensual lien, the court reasoned that, by bargaining for, voluntarily accepting, and subsequently recording a deed to a condominium unit that incorporated the Master Deed and Bylaws, the unit owner agreed to be bound by the rules and regulations of the deed and bylaws. While the condominium was subject to the New Jersey Condominium Association Act, the lien arose under the deed and bylaws.

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Permissibility of modification:** Because the lien held by the Chapter 13 debtors' condominium association was a consensual lien, the association held a security interest under the Bankruptcy Code, as Code § 101(51) defines "security interest" as a "lien created by an agreement." Accordingly, the association's claim came within the anti-modification provision in Code § 1322(b)(2).

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Permissibility of modification:** Because the debt due on the Chapter 13 debtors' first mortgage exhausted the equity in their condominium unit, the lien held by the condominium association was wholly unsecured and could be stripped under the debtors' plan,

except for the amount of the association's claim that was given statutory priority under New Jersey law over the first mortgage lien, namely "the aggregate customary condominium assessment against the unit owner for the six-month period prior to the recording of the lien." The debtors' plan properly provided to pay this amount on the association's claim, and this result did not constitute a bifurcation of the association's claim forbidden by *Nobelman v. American Savings Bank*, 508 U.S. 324, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993).

Fourth Circuit (10) R

In re Krumm, 534 B.R. 142 (W.D. N.C., June 30, 2015)

(case no. 5:14-cv-168) (District Judge Richard L. Vorhees) Text of opinion

- **Proof of claim—Secured claim—Postpetition interest:** When secured collateral has been sold, so long as the sale price is fair and is the result of an arm's-length transaction, courts should use the sale price, not some earlier hypothetical valuation, to determine whether a creditor is oversecured and thus entitled to postpetition interest under Code § 506(b). *Ford Motor Credit Co. v. Dobbins*, 35 F.3d 860 (4th Cir. 1994).

Sibert v. Wells Fargo Bank, N.A., 2015 WL 3946698 (E.D. Va., June 26, 2015)

(case no. 3:14-cv-737) (District Judge Henry E. Hudson) Text of opinion

- **Judicial estoppel—Application under circumstances:** The Chapter 7 debtor was not judicially estopped from prosecuting his prepetition cause of action for wrongful foreclosure under the Servicemembers' Civil Relief Act, although he failed to list it in his bankruptcy schedules, where the debtor testified that, when he filed for bankruptcy in 2011, he was unaware that he had a potential cause of action. It was not until sometime in 2012, after receiving a notification from the U.S. Department of Justice that the debtor's mortgage creditor, among other banks, may have wrongfully foreclosed upon service members in violation of the SCRA that the debtor suspected he might have a cause of action. The debtor testified that, following receipt of that mailing, he reached out to the creditor and the Department of Justice, and also performed Internet research, to try to determine if he actually had a claim against the creditor. It was not until 2013, after the debtor had spoken with an attorney on his military base who advised him to seek counsel, that he realized he had an actual cause of action.

- **Chapter 7—Prosecution of cause of action:** A prepetition cause of action that the Chapter 7 debtor failed to list in his bankruptcy schedules was property of his bankruptcy estate, and only the trustee in the debtor's bankruptcy case had standing to prosecute the claim. If the bankruptcy action was reopened, the trustee would have three options in exercising his or her discretion regarding the litigation the debtor had already commenced to prosecute the claim: (1) intervene and assume prosecution as trustee, (2) consent to prosecution by the debtor for the benefit of the estate, or (3) decline prosecution, in which case the debtor would standing in his individual capacity.

Tshiani v. Monahan, 533 B.R. 506 (D. Md., June 18, 2015)

(case no. 8:14-cv-3675) (District Judge George J. Hazel) Text of opinion

- **Jurisdiction—*Barton* doctrine:** Under the *Barton* doctrine, both the bankruptcy court and the district court lacked jurisdiction over the debtor's adversary proceeding, against a trustee who had been appointed by the state divorce court to sell marital property in order to satisfy a monetary judgment awarded to the debtor's former wife, alleging that postpetition contempt proceedings against the debtor violated the automatic stay, where the debtor failed to obtain leave from the state court before filing his adversary complaint against the trustee.

In re Crawford, 532 B.R. 645 (Bankr. D. S.C., June 8, 2015)

(case no. 3:09-bk-8171) (Bankruptcy Judge John E. Waites) Text of opinion

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Acceptance of plan by creditor; Chapter 13—Confirmation of plan—Treatment of secured claims—Permissibility of modification:** The debtors' Chapter 13 plan could permanently modify the interest rate on a secured claim, although the debtors were not eligible for a discharge, because the creditor's failure to object to confirmation of the plan amounted to acceptance of the plan under Code § 1325(a)(5)(A). As a result, § 1325(a)(5)(B)(i), requiring a plan to provide for a creditor's retention of its lien until the debtor received a discharge or the creditor's claim was paid in full, was inapplicable.

- **Chapter 13—Attorney's fees—Payment by creditor:** Where the secured motor vehicle creditor refused to release its lien after receiving full payment of its claim under the debtors' confirmed Chapter 13 plan, the court found the creditor's actions to be unreasonable and in bad faith and awarded attorney's fees to the debtors in the amount of $7,325. The plan paid the creditor interest at the *Till* rate, but the creditor contended that it was entitled to receive interest at the higher contractual rate because the debtors were ineligible for a discharge. Rejecting this assertion, the court said that the creditor had accepted the plan under Code § 1325(a)(5) by failing to object to its confirmation. The court said that it had previously recognized that Code § 105(a) and its inherent authority authorized the court to award attorney's fees when holding a party in contempt for failure to comply with a plan confirmation order. See *In re Ford*, 522 B.R. 842 (Bankr. D. S.C., Jan. 12, 2015) (requiring a creditor to pay debtor's attorney's fees where the creditor's conduct constituted a violation of the confirmation order); *In re Brown*, 270 B.R. 43 (Bankr. D. S.C. 2001) (ordering the payment of attorney's fees and costs pursuant to § 105 and the court's inherent authority to enforce its rules of practice). In this case, the creditor failed to comply with a requirement of the confirmed plan despite notification from both the debtors and the Chapter 13 trustee that it was obligated to satisfy its lien.

In re Labgold, 532 B.R. 276 (Bankr. E.D. Va., June 16, 2015)

(case no. 1:13-bk-13389; adv. proc. no. 1:14-ap-1043) (Bankruptcy Judge Brian F. Kenney)

Text of opinion

- **Dischargeability of debt—Effect of prior denial of discharge:** It is almost universally agreed that, when a debtor is denied a discharge, any action to determine the dischargeability of individual debts becomes moot. See, e.g., *In re Martinez*, 500 B.R. 608 (Bankr. N.D. Cal. 2013); *In re Adler*, 494 B.R. 43 (Bankr. E.D. N.Y. 2013). However, a number of courts have held that bankruptcy courts may have continuing jurisdiction in nondischargeability proceedings under Code § 523(a) notwithstanding a denial or a waiver of the debtor's discharge, under the three-factor test enunciated in *In re Morris*, 950 F.2d 1531 (11th Cir. 1992). See *In re Neves*, 2012 WL 1831717 (S.D. Fla., May 17, 2012); *In re Carter*, 2012 WL 3440431 (Bankr. M.D. Ga., August 15, 2012). The three factors are (1) judicial economy; (2) fairness and convenience to the litigants; and (3) the degree of difficulty of the related legal issues involved. While the Fourth Circuit had not adopted the *Morris* test, the court would apply it, and under that test, the court said it was compelled to dismiss the adversary

proceeding without prejudice after the court had denied the Chapter 7 debtor's discharge in a separate adversary proceeding.

In re McGrath, Case No. 2:15-bk-102, Adv. Proc. No. 2:15-ap-80030 (Bankr. D. S.C., June 3, 2015)

(Chief Bankruptcy Judge David R. Duncan) Text of opinion

- **Constitutional authority to enter final judgment—Consent:** The Supreme Court ruled in *Wellness International Network, Ltd. v. Sharif*, 135 S.Ct. 1932, 191 L.Ed.2d 911 (May 26, 2015) that bankruptcy judges may enter final orders in proceedings entitled to Article III adjudication if the parties knowingly and voluntarily consent, and a majority in *Wellness* recognized that consent may be implied. Because the summons issued in this case, the Chapter 7 trustee's adversary proceeding to avoid certain transfers, stated that a party's failure to respond would be deemed consent to the authority of the bankruptcy court, and the defendants failed to respond, the court concluded that the defendants had consented to the court's entry of a final judgment.

In re Norvell, 2015 WL 3648674 (Bankr. W.D. N.C., June 11, 2015)

(case no. 3:14-bk-31313; adv. proc. no. 3:14-ap-3146) (Bankruptcy Judge J. Craig Whitley)

Text of opinion

- **Dischargeability of debt—Elements under Code § 523(a)(2)(A):** A nondischargeability claim under Code § 523(a)(2)(A) requires the creditor to prove four elements: (1) a fraudulent misrepresentation; (2) that induces another to act or refrain from acting; (3) causing harm to the creditor; and (4) the creditor's justifiable reliance on the misrepresentation. *In re Biondo*, 180 F.3d 126 (4th Cir. 1999).

- **Dischargeability of debt—Effect of preclusion doctrines:** Because the issues decided in a prepetition North Carolina Superior Court judgment concluding that the debtor was liable for damages for breach of contract but not for fraud or unfair and deceptive practices were not identical to those to be determined in the creditor's proceeding under Code § 523(a)(2)(A), the state-court judgment did not collaterally estop the creditor's nondischargeability proceeding. Fraud under North Carolina law requires proof of an intent to deceive, but this is not required under § 523(a)(2)(A).

In re Ross, 2015 WL 3781074 (Bankr. D. S.C., June 16, 2015)

(case no. 7:11-bk-4792) (Bankruptcy Judge Helen E. Burris) Text of opinion

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Acceptance of plan by creditor:** A secured creditor that received notice of the Chapter 13 debtors' bankruptcy case and filed a proof of claim but did not object to plan confirmation, appeal the confirmation order, or otherwise raise any issue as to the treatment of its claim until the motorcycle was totaled in an accident accepted the debtors' plan for the purpose of Code § 1325(a)(5)(A) even though the plan bifurcated the creditor's claim in violation of the hanging paragraph of Code § 1325(a). See *In re Crawford*, 532 B.R. 645 (Bankr. D. S.C., June 8, 2015).

- **Chapter 13—Effect of plan confirmation:** A creditor holding a claim secured by a lien on a used motorcycle purchased by the Chapter 13 debtors less than one year prepetition was bound by the confirmation of the debtors' plan, which bifurcated the

creditor's claim in violation of the hanging paragraph of Code § 1325(a), where the creditor received notice of the debtors' bankruptcy case, filed a proof of claim but did not object to plan confirmation, and received payments under the debtors' plan for nearly four years, and there was no evidence of improper motive on the part of any party that sought or recommended confirmation of the plan. The parties apparently failed to recognize that the hanging paragraph applied because the motorcycle was a 2004 model and the debtors filed their case in 2011.

- **Chapter 13—Distribution of insurance proceeds:** Where the Chapter 13 debtors' motorcycle, which secured a creditor's claim, was totaled in an accident, and the debtors' confirmed plan bifurcated the creditor's claim, the creditor was entitled to receive only $563.79 of the $6,578 in insurance proceeds, as that was all the creditor was due under the plan. However, $2,461.08 of the proceeds needed to be held until the debtors had completed payments under the plan, since, if the case was dismissed or converted to Chapter 7, the bifurcation of the creditor's claim would no longer be effective, and the creditor would be entitled to receive the full amount of its claim, in that the creditor's lien attached to the insurance proceeds, giving the creditor a right to the proceeds to the extent of its allowed secured claim. See *In re Perry*, 2011 WL 5909065 (Bankr. E.D. N.C., Oct. 24, 2011). The balance of the proceeds could be distributed to the debtors and their attorney.

In re Salley, 2015 WL 3880384 (Bankr. M.D. N.C., June 4, 2015)

(case no. 1:13-bk-81532) (Bankruptcy Judge Lena Mansori James) Text of opinion

- **Chapter 7—Conversion by debtor—Permissibility of reconversion:** On an issue as to which the courts disagree, the court held that it is within the court's discretion to allow a reconversion of a case from Chapter 7 to Chapter 13. See *In re Offer*, 2006 WL 995858 (Bankr. M.D. N.C. 2006); *In re Anderson*, 354 B.R. 766 (Bankr. D. S.C. 2006).

- **Chapter 7—Conversion by debtor—Permissibility of reconversion:** A debtor has the burden of proof to show that reconversion from Chapter 7 to Chapter 13 is appropriate. *In re Johnson*, 376 B.R. 763 (Bankr. D. N.M. 2007). Here, reconversion would not be allowed, where the Chapter 7 debtors failed to demonstrate any facts that would persuade the court to exercise its discretion to allow reconversion to Chapter 13. The debtors articulated no specific reasoning in support of a reconversion.

In re Warren, 532 B.R. 655 (Bankr. D. S.C., June 29, 2015)

(case no. 3:14-bk-3600; adv. proc. no. 3:14-ap-80101) (Bankruptcy Judge John E. Waites)

Text of opinion

- **Violation of stay—Elements:** For a debtor to recover damages for a violation of the automatic stay, the debtor must establish five elements: (1) that a bankruptcy petition was filed, (2) that the debtor is an individual, (3) that the creditor received notice of the petition, (4) that the creditor's actions were in willful violation of the stay, and (5) that the debtor suffered damages. *In re Weatherford*, 413 B.R. 273 (Bankr. D. S.C. 2009).

- **Violation of stay—Standard of proof:** Receding from *In re Brockington*, 129 B.R. 68 (Bankr. D. S.C. 1991), which had adopted the clear and convincing evidence standard for proving a violation of the automatic stay, and instead adopting a preponderance of

the evidence standard, the court said that it found persuasive the reasoning set forth by the Tenth Circuit in *In re Johnson*, 501 F.3d 1163 (10th Cir. 2007).

- Violation of stay—Notice to creditor: A creditor that repossessed the Chapter 13 debtor's motor vehicle postpetition was presumed to have had notice of the debtor's bankruptcy filing, although the creditor contended that he did not receive notice of the case because the debtor's notice was mailed to his business street address and not to the post office box address that he maintained for receiving mail for his business. The creditor testified that mail sent to the business street address was frequently lost by the U.S. Postal Service, and therefore, he notified all of his clients, including the debtor, to mail all correspondence to his post office box address. However, courts have generally held that mailing creates a presumption of receipt, and, while this presumption may be overcome by evidence that the mailing was not actually accomplished, the mere denial of receipt is insufficient. Here, no evidence was presented to indicate that the debtor did not properly mail the notice to the creditor or that the mail was returned as undeliverable.

- Violation of stay—Damages: Where a creditor repossessed the Chapter 13 debtor's vehicle following her bankruptcy filing and intentionally retained the vehicle for four days after receiving notice of the filing and then required payment from the debtor as a condition for the return of the vehicle, the creditor willfully violated the stay, and the court awarded actual damages of $546.96, representing $435 the debtor was required to pay the creditor in order to recover the vehicle and $111.96 as the estimated cost for the rental of a similar vehicle for four days, even though the debtor did not actually rent a substitute vehicle. The court also awarded $500 for emotional distress resulting from delay in required medical treatment caused by the lack of a car, punitive damages of $2,000, and attorney's fees of $8,200.

- Violation of stay—Willfulness: A friend of the creditor who assisted in the repossession of the Chapter 13 debtor's vehicle postpetition was not liable for a willful violation of the automatic stay, as the debtor did not provide sufficient evidence to allow the court to impose liability upon the friend based upon principles of agency, partnership, or joint venture, and, in any event, the friend, who was not a creditor of the debtor's, was not shown to have received notice of the debtor's bankruptcy filing.

Fifth Circuit (13) R

Carroll v. Abide, 788 F.3d 502 (5th Cir., June 11, 2015)

(case no. 14-31230) Text of opinion

- **Jurisdiction—Effect of *Barton* doctrine:** In an "unbroken line of cases," the circuit courts have unanimously applied the *Barton* doctrine in bankruptcy cases. The circuit courts applying *Barton* in bankruptcy cases in which the plaintiffs brought or intended to bring suit in state courts have all required leave of the bankruptcy court before the plaintiffs could proceed in state courts. Additionally, the *Barton* doctrine has been applied consistently to require leave of the bankruptcy court even when the suit was filed in the federal district court of the same district.

- **Jurisdiction—Effect of *Barton* doctrine:** However, when a bankruptcy trustee acts pursuant to an order by the district court, and the trustee's actions pursuant to that order are the basis of a claim against the trustee in the district court, the *Barton* doctrine does not require the plaintiffs to obtain leave from the bankruptcy court, and the district court has jurisdiction to entertain a suit with respect to the trustee's conduct.

In re McWilliams, 610 Fed. Appx. 393 (5th Cir., June 26, 2015)

(case no. 15-10122) Text of opinion

- **Dischargeability of debt—Award of attorney's fees—To creditor:** A creditor that successfully contests the dischargeability of its claim in an adversary proceeding under Code § 523 is entitled to recover attorney's fees if it has a contractual right to the fees under state law. *In re Luce*, 960 F.2d 1277 (5th Cir. 1992).

In re Bentley, 531 B.R. 671 (Bankr. S.D. Tex., June 3, 2015)

(case no. 4:12-bk-36352; adv. proc. no. 4:13-ap-3012) (Bankruptcy Judge Karen K. Brown)

Text of opinion

- **Dischargeability of debt—Statement regarding debtor's financial condition under Code § 523(a)(2):** The debtors' failure to tell the creditor, when he invested $100,000 in their business in October 2006, that financial projections made in a November 2005 business plan had not been realized was not encompassed by either Code § 523(a)(2)(A) or (B). The nondisclosure did not come within § 523(a)(2)(A) because it was excluded as "a statement respecting the debtor's or an insider's financial condition," and it did not come within § 523(a)(2)(B) because it was not in writing.

In re Fielding, Case No. 4:13-bk-43212 (Bankr. N.D. Tex., June 30, 2015)

(Bankruptcy Judge D. Michael Lynn) Text of opinion

- **Motion for amendment of judgment:** Bankruptcy Rule 9023, implementing Fed. R. Civ. P. 59, provides that a motion to alter or amend a judgment must be filed no later than

14 days after the entry of the judgment. If a judgment is subsequently amended, parties are given an additional 14 days—from the date such amended judgment is issued—to file a motion to alter or amend the amended judgment. However, the issuance of an amended opinion does not, in and of itself, grant litigants an additional 14 days to submit Rule 9023 motions. Only if a court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered, will such amended judgment be construed as a new judgment in the case and the aggrieved party shall then be afforded a new 14-day period within which to file another Rule 9023 motion. See, e.g., *Dixie Sand & Gravel Co. v. Tennessee Valley Authority*, 631 F.2d 73 (1980); *Andrews v. Du Pont De Nemours and Co.*, 447 F.3d 510, 516 (7th Cir. 2006). Therefore, courts must determine whether an amendment to a judgment actually changed what the judgment did before deciding whether a litigant is afforded additional time to file second motion under Rule 9023. Here, where the IRS's first motion to alter or amend judgment merely challenged one sentence in the court's original opinion, and in response the court issued an amended opinion from which that sentence had been deleted, the IRS could not then file a second motion to alter or amend judgment, as the second motion was untimely.

- **Motion for amendment of judgment; Motion for relief from judgment:** The Fifth Circuit has long held that an untimely motion filed under Rule 59 may be treated as a Rule 60(b) motion for relief from judgment as the latter has a more lenient time limit. See, e.g., *Torres v. Booker*, 228 F.3d 408 (5th Cir. 2000). Rule 60(b) provides that a court may relieve a party from a final judgment if such a motion is made within a reasonable time, but not more than a year after the entry of judgment. Here, however, the court determined that the IRS's second motion to alter or amend judgment was not filed within a reasonable time and was therefore denied, even if the motion was treated as a Rule 60(b) motion, and even if Rule 60(b) was a proper vehicle for the relief sought.

In re Gaetje, 2015 WL 3825972 (Bankr. S.D. Tex., June 18, 2015)

(case no. 4:15-bk-30130) (Bankruptcy Judge Jeff Bohm) Text of opinion

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Modification of claim:** Changing a variable rate of interest to a fixed rate is a "modification" for the purpose of Code § 1322(b)(2). See *In re Coffey*, 52 B.R. 54 (Bankr. N.H. 1985). See also *In re Litton*, 330 F.3d 636 (4th Cir. 2003) (there is no dispute that Code § 1322(b)(2) "prohibit[s] any fundamental alteration in the debtor's obligation, e.g., lowering monthly payments, converting a variable interest rate to a fixed interest rate, or extending the repayment term of a note").

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Modification of claim:** The debtors' Chapter 13 plan, which proposed to pay off a residential mortgage creditor's entire claim by month 26, which was approximately 13 years prior to the underlying note's maturity date, did not modify the claim, within the meaning of Code § 1322(b)(2), since the note by its own terms permitted prepayment in full without penalty.

In re Garner, 2015 WL 3825979 (Bankr. N.D. Tex., June 18, 2015)

(case no. 4:13-bk-44563; adv. proc. no. 4:15-ap-4019) (Bankruptcy Judge D. Michael Lynn)

Text of opinion

- **Dischargeability of debt—Timeliness of complaint:** The "mailbox rule" does not apply to the filing of nondischargeability complaints under Code § 523(a). The Fifth Circuit has long held that "compliance with a filing requirement is not satisfied by mailing the necessary papers within the allotted time. The papers must be filed by the clerk within the filing period specified in the applicable rule or order." *Lee v. Dallas Cty. Bd. Of Ed.*, 578 F.2d 1177 (5th Cir. 1978). Even if a party deposits a filing with the postal service for delivery prior to the deadline, if the clerk does not receive the filing before the deadline passes, the filing is not timely and dismissal is appropriate.

- **Dischargeability of debt—Timeliness of complaint:** The time limit to file complaints to determine dischargeability of debts is strictly construed. The court has no discretion to extend the deadline after it expires, even for excusable neglect, including unreasonable and unexpected postal delays. Courts are not unanimous in rejecting postal service-related equitable tolling, but the cases in which courts grant equitable tolling are either heavily criticized or are otherwise unpersuasive. The strict construction of the deadline protects the debtor's fresh start and ensures the prompt administration of the case. Thus, equitable tolling did not apply to render timely a pro se creditor's nondischargeability complaint, which he mailed eight days prior to the deadline for delivery to the clerk's office no more than 20 miles away, and yet was not delivered for eleven days, three days after the deadline.

In re Hotop, 2015 WL 3793102 (Bankr. E.D. La., June 16, 2015)

(case no. 2:14-bk-12204; adv. proc.no. 2:14-ap-1062) (Bankruptcy Judge Jerry A. Brown)

Text of opinion

- **Property of the estate—Effect of conversion of case:** Addressing an issue as to which it could find no precedent, the court held that property abandoned by the Chapter 7 trustee prior to the debtors' conversion of the case to Chapter 13 becomes property of the estate under Code § 1306(a). The property was a claim against the debtors' mortgage creditor, and the court reasoned that, if the court were to hold otherwise, and the debtors subsequently recovered money in their suit against the creditor, it would be a windfall to the debtors if they were not required to use that money to pay their creditors.

In re Huriega, 2015 WL 4130866 (Bankr. W.D., Tex. June 1, 2015)

(case no. 5:12-bk-53080; adv. proc. no. 5:13-ap-5058) (Bankruptcy Judge Craig A. Gargotta)

Text of opinion

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Permissibility of modification:** To determine whether property is the debtor's principal residence for the purpose of Code § 1322(b)(2), courts in the Fifth Circuit look to the time the loan

was made. The relevant inquiry is not what the lender believed, but rather whether the property was in fact the debtor's principal residence.

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Permissibility of modification:** The anti-modification provision of Code § 1322(b)(2) applied where the Chapter 13 debtor's residence was located on two adjacent lots and the mortgage creditor's lien attached to only one of the two lots, as the claim was secured only by the debtor's principal residence.

In re Kessler, 2015 WL 4726794 (Bankr. N.D. Tex., June 9, 2015), **appeal filed**, Kessler v. Wilson, Case No. 6:15-cv-40 (N.D. Tex., filed June 19, 2015)

(case no. 6:09-bk-60247) (Bankruptcy Judge Robert L. Jones) Text of opinion

- **Chapter 13—Entitlement to discharge:** The Chapter 13 debtors did not complete "all payments under the plan," and therefore were not entitled to a discharge under Code §1328(a), where, although the debtors made all payments to the Chapter 13 trustee called for by the plan, the debtors did not maintain current payments to their mortgage creditor, which the debtors paid directly, as was also required under the plan. See *In re Foster*, 670 F.2d 478 (5th Cir. 1982) (if mortgage arrearages are being paid under a Chapter 13 plan, the maintenance of current monthly payments must also be under the plan).

In re Lightfoot, 2015 WL 3956211 (Bankr. S.D. Tex., June 22, 2015)

(case no. 4:13-bk-32970) (Bankruptcy Judge Jeff Bohm) Text of opinion

- **Chapter 13—Confirmation of plan—Treatment of unsecured claims—Payment of interest:** Amending *In re Lightfoot*, 2015 WL 3634098 (Bankr. S.D. Tex. June 10, 2015), and disagreeing with *In re Hernandez*, 2007 WL 3998301 (Bankr. E.D. Tex. 2007), the court reasoned that, because Code § 101(14A) defines a "domestic support obligation" as including postpetition interest, the interest is considered part of the underlying claim rather than interest on a claim; therefore, Code § 1322(b)(10), which provides that a Chapter 13 plan may not pay interest on nondischargeable claims unless the plan provides for full payment of all allowed claims, does not prohibit a plan that provides for the payment of postpetition interest on a prepetition DSO arrearage. Moreover, because § 101(14A) states that its definition of "domestic support obligation" applies "notwithstanding any other provision of this title," neither Code § 502(b)(2), which disallows claims for unmatured interest, nor § 502(b)(5), which disallows claims for unmatured DSOs, prohibits a Chapter 13 plan from providing for the payment of postpetition interest on a prepetition DSO arrearage. In fact, the debtors were not only allowed, but were required under Code § 1322(a)(2), which mandates full payment of most priority claims, to provide in their proposed plan for the payment of the 6% interest that accrued under Texas law on a DSO claim filed by the debtor husband's former wife.

In re Schexnayder, 532 B.R. 667 (Bankr. M.D. La., May 22, 2015)

(case no. 3:12-bk-10407) (Bankruptcy Judge Douglas D. Dodd) Text of opinion

- **Chapter 7—Sale of estate property by trustee—Distribution of proceeds:** Where the Chapter 7 trustee sold, to the debtor's non-filing husband under Code § 363(i), the bankruptcy estate's interest in the spouses' homestead, which was community

property, and the trustee calculated the sale price by deducting the Louisiana $35,000 homestead exemption from the spouses' equity in the property and dividing that amount in half, the debtor was not entitled to receive one-half of the $35,000 exemption amount from the proceeds of the sale, since the trustee's calculation of the sale price had already taken the exemption amount into account.

In re Scott, 531 B.R. 640 (Bankr. N.D. Miss., June 9, 2015)

(case no. 1:14-bk-13788) (Bankruptcy Judge Neil P. Olack) Text of opinion

- **Chapter 13—Employment of nonbankruptcy attorney:** Agreeing with *In re Jones*, 505 B.R. 229 (Bankr. E.D. Wis., Jan. 31, 2014) and disagreeing with *In re Goines*, 465 B.R. 704 (Bankr. N.D. Ga., Feb. 9, 2012), the court held that a Chapter 13 debtor is not required to obtain court approval of special counsel that the debtor has retained to litigate a claim, such as, here, counsel retained to litigate a prepetition workers' compensation claim. Code § 327(e) applies only to the bankruptcy trustee and persons charged with performing the duties of a trustee, and nothing in the Bankruptcy Code suggests that the term "trustee" used in § 327(e) is intended to include a Chapter 13 debtor. Moreover, Code § 328 only applies in scenarios where a professional person is employed under § 327 or § 1103, so it followed that § 328 was also inapplicable to the current situation. Likewise, Bankruptcy Rule 2014 only applies in scenarios where a professional person is employed under § 327, § 1103, or § 1114.

In re Ulmer, 2015 WL 3955258 (Bankr. W.D. La., June 26, 2015)

(case no. 3:15-bk-30220) (Bankruptcy Judge Henley A. Hunter) Text of opinion

- **Chapter 13—Disposition of funds held by trustee:** *Harris v. Viegelahn*, 135 S.Ct. 1829, 191 L.Ed.2d 783 (2015) applies only in the instance of conversion and does not abrogate Code § 1326(a)(2), which provides that, where a Chapter 13 case is dismissed prior to the confirmation of a plan, administrative expenses are to be paid out of undisbursed funds held by the Chapter 13, with the balance returned to the debtor.

Sixth Circuit (13) R

Harper-Cox v. Gateway-Detroit East, 2015 WL 3652750 (E.D. Mich., June 11, 2015)

(case no. 2:14-cv-13048) (District Judge Patrick J. Duggan) Text of opinion

- **Judicial estoppel—Application under circumstances:** Holding that judicial estoppel did not preclude the Chapter 13 debtor's prosecution of her employment discrimination claims, although the bankruptcy court confirmed the debtor's plan after she had filed three charges of discrimination with the EEOC, none of which she had yet disclosed, the court concluded that, since the debtor subsequently disclosed the potential causes of action to the bankruptcy court, and that court explicitly authorized the debtor to prosecute this action despite her nondisclosure, upon the debtor's agreeing not to exempt the claims, it could not be said "that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." Because the purpose of the doctrine of judicial estoppel is to protect the courts from the perversion of judicial machinery, and because the bankruptcy court had permitted the debtor to pursue these causes of action (implicitly acknowledging that such a course of action was preferable to the debtor's creditors), the court saw no basis for applying judicial estoppel.

In re Alan, 532 B.R. 701 (Bankr. W.D. Mich., June 23, 2015)

(case no. 1:15-bk-1567) (Bankruptcy Judge James W. Boyd) Text of opinion

- **Successive cases—Effect of Code § 109(g):** While affidavits of default filed by two secured creditors in the debtors' prior Chapter 12 case constituted "the filing of a request for relief from the automatic stay" under Code § 109(g)(2), stipulations the debtors previously entered into with the creditors, under which the debtors essentially agreed to an expedited process for future relief from stay upon a default, did not. Thus, the debtors did not obtain dismissal of their prior case "following the filing of a request for relief from the automatic stay," and § 109(g)(2) did not make the debtors ineligible for bankruptcy relief in their current Chapter 12 case, which the debtors filed 13 days after dismissing their prior case, where the debtors filed a motion to voluntarily dismiss their prior case after receiving notices of default from both creditors, pursuant to the terms of the stipulations, but prior to either creditor's filing an affidavit of default.

In re Botson, 531 B.R. 719 (Bankr. N.D. Ohio, June 1, 2015)

(case no. 3:11-bk-36509; adv. proc. no. 3:14-ap-3056) (Bankruptcy Judge John P. Gustafson)

Text of opinion

- **Discharge injunction—Effect of prepetition lien:** Under Code § 552(b)(1), a prepetition security interest in the "proceeds, products, offspring, or profits" of property acquired prepetition remains valid following a debtor's discharge. However, Code § 552(a) provides that any other property acquired by the debtor postpetition is free of any prepetition lien, even if a prepetition security agreement extends to

after-acquired property. See *In re Bumper Sales, Inc.*, 907 F.2d 1430 (4th Cir. 1990) ("[p]roceeds coverage, but not after-acquired property clauses, are valid under title 11"); *In re Skagit Pacific Corp.*, 316 B.R. 330 (9th Cir. B.A.P. 2004) ("[s]ection 552(a) cuts off security interests on property acquired by the debtor after the petition date even if there is an 'after-acquired' clause in the security agreement").

- **Violation of discharge injunction:** There are number of decisions that have specifically held that renewal of a prepetition lien, securing a debt where the underlying personal liability has been discharged, is not a violation of the discharge injunction. Thus, here, neither the creditor's failure to release a prepetition UCC-1 financing statement, nor the creditor's post-discharge filing of a UCC-3 continuation statement, violated the discharge injunction.

In re Broadrick, 532 B.R. 60 (Bankr. M.D. Tenn., June 19, 2015), **appeal filed**, Broadrick v. LVNV Funding, LLC, Case No. 3:15-cv-742 (M.D. Tenn., filed July 2, 2015)

(case. no. 3:14bk672; adv. proc. no. 3:14ap90357) (Bankruptcy Judge Randal S. Mashburn)

Text of opinion

- **Fair Debt Collection Practices Act:** The Fair Debt Collection Practices Act should not be implicated with regard to stale debts when (a) a creditor merely files an accurate proof of claim in a bankruptcy case, (b) the proof of claim includes all the required information including the timing of the debt, (c) the applicable statute of limitations is one that does not extinguish the right to collect the debt but merely limits the remedies, and (d) no legal impediment to collection or factual circumstances exist that would invoke the Act other than merely the applicability of a statute of limitations.

In re Conn, 2015 WL 3777958 (Bankr. N.D. Ohio, June 12, 2015)

(case no. 6:13-bk-62278) (Bankruptcy Judge Russ Kendig) Text of opinion

- **Chapter 13—Entitlement to hardship discharge—Deceased debtor:** Granting the deceased Chapter 13 debtor a hardship discharge, the court reasoned that the elements stated in Code § 1328(b) for a hardship discharge were satisfied, and granting the debtor a hardship discharge would be of benefit to the debtor's wife and would not disadvantage the debtor's creditors, as secured creditors would retain their liens while no creditors had filed claims in the debtor's probate proceedings.

In re Johnson, 532 B.R. 53 (Bankr. W.D. Mich., June 16, 2015)

(case no. 1:15-bk-2000) (Chief Bankruptcy Judge Scott W. Dales) Text of opinion

- **Chapter 13—Dismissal of case under Code § 1307(c):** Denying the U.S. Trustee's motion to dismiss a Chapter 13 case filed by a debtor who was a licensed marijuana grower under the Michigan Medical Marihuana Act (MMMA), the court said that to balance the court's (and the debtor's) obligations under federal law, the debtor's legitimate need for relief under Chapter 13, and Michigan's policy choices reflected in the MMMA, the court would refrain from dismissing the debtor's case at this time, but would enjoin him from conducting his medical marijuana business (and violating the federal Controlled Substances Act), while his case was pending. If, however, the debtor preferred to continue his illicit business activity (albeit subject to the

possibility of federal criminal prosecution), he needed only to file a motion to dismiss the case and the court's injunction would cease upon dismissal.

Comment: The debtor, a 66-year-old man who grew medical marijuana to sell to three patients who had declared him as their medical marijuana caregiver, decided to divest himself of the business and continue in Chapter 13, and the court subsequently confirmed his amended Chapter 13 plan.

In re Lewiston, 532 B.R. 36 (Bankr. E.D. Mich., June 24, 2015), appeal filed, Case No. 2:15-cv-12462 (E.D. Mich., filed July 10, 2015)

(case no. 2:12-bk-58599; adv. proc. no. 2:14-ap-5115) (Chief Bankruptcy Judge Phillip J. Shefferly) Text of opinion

- **Property of the estate—Exclusions:** An inquiry under Code § 541(c)(2) normally has three parts: First, does the debtor have a beneficial interest in a trust? Second, is there a restriction on the transfer of that interest? Third, is the restriction enforceable under nonbankruptcy law? *In re Wilcox*, 233 F.3d 899 (6th Cir. 2000).

- **Property of the estate—Exclusions—Spendthrift trust:** A spendthrift provision in a trust was unenforceable under Michigan law, so that the trust was not excluded from the bankruptcy estate under Code § 541(c)(2), where the debtor was a settlor, a trustee, and a beneficiary of the trust. Although the debtor's wife was also a beneficiary, this did not alter the fact that the debtor was a settlor who contributed his own assets to the trust and named himself as a beneficiary. Similarly, the fact that the trust documents prohibited the debtor from receiving any distribution from the trust unless his wife jointly requested such a distribution did not change the result. And, while the debtor lacked the authority to revoke the trust unless his wife concurred, whether or not a trust was revocable did not affect the invalidity of a self-settled spendthrift trust under Michigan law.

In re McBride, 534 B.R. 326 (Bankr. S.D. Ohio, April 9, 2015)

(case no. 3:11-bk-30672; adv. proc. no. 3:13-ap-3215) (Bankruptcy Judge Lawrence S. Walter)

Text of opinion

- **Dischargeability of debt—Tax debt under Code § 523(a)(1)—Filing of "return":** Rejecting the *McCoy* rule with regard to late-filed tax returns, the court held that, instead, the hanging paragraph of Code § 523(a) requires a court to look to relevant nonbankruptcy law to determine what qualifies as an acceptable return under that law. This approach is consistent with the plain language of the hanging paragraph, preserves the viability of the nondischargeability provisions for taxes found in Code §§ 523(a)(1)(B)(ii) and (a)(1)(C), and is consistent with the long-standing principle that § 523(a) exceptions to discharge are to be strictly construed in favor of the debtor. It also takes into account that tax codes do not generally require a perfectly-prepared tax document, compliant with all aspects of the tax code and its filing requirements, in order for that document to qualify as a return. See *Badaracco v. Commissioner*, 464 U.S. 386, 104 S.Ct. 756, 78 L.Ed.2d 549 (1984) ("a document which on its face plausibly purports to be in compliance, and which is signed by the taxpayer, is a return despite its inaccuracies").

- **Dischargeability of debt—Tax debt under Code § 523(a)(1)—Filing of "return":** Looking to the tax code of the City of Kettering, Ohio, as the "applicable nonbankruptcy law" under the hanging paragraph of Code § 523(a) because the dischargeability of the debtors' city income tax debt was at issue, the court observed that, while the city's Tax Code included various reporting requirements and a deadline, the city pointed to no formal definition of what qualified as an acceptable "return" in the Tax Code, nor was one found in its definitional section. Furthermore, the Tax Code contained no explanation of how accurate, thorough, or complete a form needed to be to qualify as a return, nor did it specify when a late form would no longer qualify as a return under the tax law. Accordingly, the court would apply the *Beard* test, as adopted in *In re Hindenlang*, 164 F.3d 1029 (6th Cir. 1999) for federal tax returns, to determined whether the debtors' city income tax returns, which greatly understated the debtors' income, and one of which was filed late, to determine whether they qualified as "returns" for the purpose of Code § 523(a)(1).

In re McHugh, 2015 WL 3475520 (Bankr. N.D. Ohio, June 1, 2015)

(case no. 3:14-bk-31071; adv. proc. no. 3:14-ap-3140) (Bankruptcy Judge Mary Ann Whipple)

Text of opinion

- **Proof of claim—Secured claim—Right to enforce note—Validity of transfer:** Courts have consistently found that borrowers lack standing to challenge compliance with the provisions of a Pooling and Servicing Agreement for a mortgage securitization trust. See, e.g., *In re Correia*, 452 B.R. 319 (1st Cir. B.A.P. 2011); *Rajamin v. Deutsche Bank Nat. Trust Co.*, 757 F.3d 79 (2d Cir. 2014); *Livonia Prop. Holdings, L.L.C. v. 12840–12976 Farmington Rd. Holdings, LLC*, 399 Fed. Appx. 97 (6th Cir. 2010); *Dauenhauer v. Bank of N.Y. Mellon*, 562 Fed. Appx. 473 (6th Cir. 2014).

In re Moore, Case No. 2:15-bk-90015 (Bankr. W.D. Mich., June 17, 2015)

(Chief Bankruptcy Judge Scott W. Dales) Text of opinion

- **Chapter 13—Confirmation of plan—Direct payment to creditor:** While the bankruptcy court has discretion in deciding who should pay claims (as between a Chapter 13 debtor and the Chapter 13 trustee), the discretion is not unbridled, but is instead informed by considerable deference to the standing trustee's views. *In re Jutila*, 111 B.R. 621 (W.D. Mich. 1989); *In re Case*, 11 B.R. 843 (Bankr. D. Utah 1981). Considering the factors articulated in *In re Perez*, 339 B.R. 385 (Bankr. S.D. Tex. 2006), aff'd *Perez v. Peake*, 373 B.R. 468 (S.D. Tex. 2007), the court concluded that, on balance, these factors favored the presumption that the Chapter 13 trustee serve as disbursing agent for the debtor's postpetition mortgage payments. The debtor had not rebutted the presumption or persuaded the court to exercise its discretion in his favor on this point. Moreover, Congress set the means by which standing Chapter 13 trustees get paid and has elected to have the individuals that avail themselves of the system pay for the service based upon the "payments received" by the trustee. See 28 U.S.C. § 586(e)(2) and 11 U.S.C. § 1326(c). By diverting payments away from the trustee, there are fewer "payments received" and less money available for her to perform her statutory duties in this and other assigned cases.

In re Phillips, 2015 WL 3612875 (Bankr. M.D. Tenn., June 9, 2015)

(case no. 3:14-bk-5711; adv. proc. no. 3:14-ap-90534) (Bankruptcy Judge Marian F. Harrison)

Text of opinion

- **Authority of the court—Imposition of sanctions—On creditor:** Where the Chapter 7 debtors' mortgage creditor failed to provide the Chapter 7 trustee with proof of the creditor's possession of the debtors' mortgage note until eight months after the trustee requested this information, and four months after the trustee filed an adversary proceeding against the creditor to compel its provision of this information, the court would sanction the creditor by awarding the trustee the reasonable attorney's fees and costs incurred in prosecuting the adversary proceeding.

In re Roberts, 532 B.R. 906 (Bankr. N.D. Ohio, June 30, 2015)

(case no. 1:15-bk-10859) (Bankruptcy Judge Arthur I. Harris) Text of opinion

- **Property of the estate:** Bankruptcy courts look to the applicable state law to determine whether a child support arrearage is a property right of the parent or of the child. *In re Green*, 423 B.R. 867 (Bankr. W.D. Ark. 2010). Ohio state courts generally presume that, since the custodial parent already bore the expense of feeding, clothing and raising the child, the parent has the superior claim to the arrearage. Therefore, here, a child support arrearage owed the debtor by her former husband was property of the debtor's bankruptcy estate.

- **Property of the estate—Exemptions—Under state law:** Under Ohio Rev. Code Ann. § 2329.66(A)(11), permitting the exemption of "[t]he person's right to receive spousal support, child support, an allowance, or other maintenance to the extent reasonably necessary for the support of the person and any of the person's dependents," the debtor was permitted to exempt a child support arrearage owned her by her former husband, even though her children were now adults and were no longer dependents of the debtor, as the exemption under the statute was not limited to the amount reasonably necessary for the support of dependent children, but also encompassed amounts reasonably necessary for the support of the debtor. Moreover, the "right to receive" language encompassed not only the right to receive future payments, but also the right to receive past payments, such as a child support arrearage. *In re Edwards*, 255 B.R. 726 (Bankr. S.D. Ohio 2000).

In re Wolfe, 534 B.R. 158 (Bankr. S.D. Ohio, June 19, 2015), **appeal filed**, Bank of New York Mellon v. Wolfe, Case No. 2:15-cv-2662 (S.D. Ohio, filed July 28, 2015)

(case no. 2:14-bk-54523) (Bankruptcy Judge Chares M. Caldwell) Text of opinion

- **Automatic stay—Protection of possessory interest:** Although a prepetition state court judgment had declared that the Chapter 13 debtors held no legal or equitable interests in their residence that could impede a creditor's foreclosure rights, and that finding was binding on the parties in the bankruptcy case under the *Rooker-Feldman* doctrine, the debtors obtained rights under the automatic stay when they filed their bankruptcy case, as their possessory interest in the residence was protected.

- **Relief from stay—Under Code § 362(d)(1):** In an unusual case in which a creditor with an equitable lien on the Chapter 13 debtors' residence, imposed by a prepetition state court judgment, sought relief from stay for cause under Code § 362(d)(1) based on a lack of adequate protection, and in which the debtors asserted that they had been living in the residence for eight years after finding it "abandoned," and had received a quitclaim deed for the residence from a party claiming to be its former owner, the court gave the debtors three alternatives: (1) If the debtors filed a proposed modified Chapter 13 plan, premised upon and accompanied by a signed loan commitment to finance the home at the bankruptcy appraisal value of $191,000, the stay would continue in place until the court ruled on confirmation of the proposed plan. (2) If the debtors filed an itemized and fully-documented statement of real estate taxes and insurance premiums paid and improvements made to the home since occupancy, the court would enter a judgment order in favor of the debtors for the amount they had paid, upon proof of payment of which the creditor would be granted relief from stay to complete the foreclosure process. (3) Finally, if the debtors did not comply with the other alternatives, the creditor would be granted relief from stay to complete the foreclosure process. The creditor received a judgment in prepetition foreclosure proceedings, but the filing of the debtors' bankruptcy case precluded the foreclosure sale from being confirmed, which was required to incontestably transfer the property free of any preexisting interests under Ohio law. After the creditor withdrew its objection to confirmation of the debtors' original plan, the court confirmed the plan, which provided no payment to the creditor, but "audaciously" purported to vest the property solely in the debtors, free of the creditor's equitable lien. The court issued its present opinion after the creditor moved from relief from stay.

- **Chapter 13—Effect of plan confirmation:** Although a prepetition state court judgment had declared that the Chapter 13 debtors held no legal or equitable interests in their residence that could impede a creditor's foreclosure rights, and that finding was binding on the parties in the bankruptcy case under the *Rooker-Feldman* doctrine, the creditor was a "creditor" under the Bankruptcy Code and could be bound by the confirmation of the debtors' Chapter 13 plan.

Seventh Circuit (10) R

Stoughton Lumber Co. v. Sveum, 787 F.3d 1174 (7th Cir., June 4, 2015)

(case no. 14-3339) Text of opinion

- **Dischargeability of debt—For fraud or defalcation by fiduciary under Code § 523(a)(4):** Affirming *Sveum v. Stoughton Lumber Co., Inc.*, 2014 WL 4748555 (W.D. Wis., Sept. 23, 2014), the Court of Appeals held that the debt owed by the debtor, an owner of a home-building company, to a materials supplier was nondischargeable under Code § 523(a)(4) as both fraud and defalcation by a fiduciary, where the debtor violated the Wisconsin contractor trust fund statute by failing to pay the materials supplier from funds paid by the owners of the houses built by the company. Under the statute, the company was required to hold its revenues from sales of the homes in trust until the firm's subcontractors, such as the materials supplier, were paid, but the company failed to do so. While the debtor contended that he committed an innocent mistake by failing to pay the materials supplier, the Court of Appeals said that evidence of the debtor's recklessness abounded.

Ehiorobo v. Talmer Bank and Trust, 2015 WL 3936936 (E.D. Wis., June 26, 2015)

(case no. 2:15-cv-169) (District Judge Lynn Adelman) Text of opinion

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Requirement of equal monthly payments:** Affirming *In re Ehiorobo*, 2015 WL 394363 (Bankr. E.D. Wis., Jan. 29, 2015), the district court held that the meaning of "payment" in Code § 1325(a)(5)(B)(iii)(I), requiring payments to secured creditors under a Chapter 13 plan to be in "equal monthly amounts," is broad enough to encompass a Chapter 13 debtor's proposed monthly deposits into an escrow account. Accordingly, the debtor's proposed plan, under which the debtor would make monthly deposits into escrow accounts for two secured creditors until the debtor was able to pay the debts in full via balloon payments, violated § 1325(a)(5)(B)(iii)(I).

Fifth Third Mortgage Co. v. Blouin, 2015 WL 3623630 (N.D. Ill., June 9, 2015)

(case no. 1:15-cv-366) (District Judge Amy J. St. Eve) Text of opinion

- **Constitutional authority to enter final judgment:** A bankruptcy court may adjudicate the merits of a creditor's claim, and issue a money judgment in favor of the creditor, after finding that a debt is nondischargeable. *In re Hallahan*, 936 F.2d 1496 (7th Cir. 1991) (stating that it was "preferable to allow bankruptcy courts ruling on the dischargeability of a debt to adjudicate the issues of liability and damages also") held that a bankruptcy court has statutory authority, and a bankruptcy court does not lack constitutional authority under *Stern v. Marshall*. See *In re Deitz*, 760 F.3d 1038 (9th Cir. 2014); *In re Hart*, 564 Fed. Appx. 773 (6th Cir. 2014); *In re Carroll*, 464 B.R. 293 (Bankr. N.D. Tex. 2011); *Adas v. Rutkowski*, 2013 WL 6865417 (N.D. Ill., Dec. 30, 2013); *In re Boricich*, 464 B.R. 335 (Bankr. N.D. Ill. 2011).

In re Kuttner, 2015 WL 3578966 (N.D. Ill., June 8, 2015)

(case no. 1:15-cv-980) (District Judge Edmond E. Chang) Text of opinion

- **Appellate procedure—Notice of appeal:** Where it is an attorney rather than a party who wishes to appeal an order, there is a split in authority on just what the notice of appeal must say. *Matter of Case*, 937 F.2d 1014 (5th Cir. 1991) held that Bankruptcy Rule 8001(a) only requires that the notice include the name of the appellant-attorney somewhere, even if it does not explicitly designate the attorney, as opposed to his or her client, as the appealing party. However, at least one court in this district has rejected that reasoning, holding that the Fifth Circuit's reading of Rule 8001(a) departed from the rule's text. See *In re Pettibone Corp.*, 145 B.R. 570 (N.D. Ill. 1992), which held that the attorney's name must be specified as the appellant in either the caption or the body of the notice of appeal to make the notice of appeal valid. Here, however, the court did not need to decide the issue, as the notice of appeal filed by the debtor's attorney passed muster under either standard.

Taylor v. Galaxy Asset Purchasing, LLC, --- F.Supp.3d ----, 2015 WL 3645668 (N.D. Ill., June 11, 2015)

(case no. 1:14-cv-9276) (District Judge John W. Darrah) Text of opinion

- **Fair Debt Collection Practices Act:** A creditor's filing a proof of claim for a time-barred debt may be a deceptive act in connection with the collection of a debt in violation of the Fair Debt Collection Practices Act.

In re Avalos, 531 B.R. 748 (Bankr. N.D. Ill., June 12, 2015)

(case no. 1:13-bk-40865; adv. proc. no. 1:15-ap-91) (Bankruptcy Judge Jack B. Schmetterer)

Text of opinion

- **Fair Debt Collection Practices Act:** A creditor's filing a proof of claim for a time-barred debt may be a deceptive act in connection with the collection of a debt in violation of the Fair Debt Collection Practices Act.

In re Clay, 2015 WL 3878454 (Bankr. E.D. Wis., June 22, 2015)

(case no. 2:14-bk-27268; adv. proc. no. 2:14-ap-2315) (Bankruptcy Judge G. Michael Halfenger)

Text of opinion

- **Avoidable transfers—Receipt of "reasonably equivalent value"; Avoidable transfers—Avoidance by debtor:** The transfer of the debtor's home pursuant to a prepetition tax foreclosure sale was constructively fraudulent under Code § 548(a)(1)(B), and the debtor could avoid the transfer under Code § 522(h), where the home was worth $40,700 at the time of the sale, the home was subject to a mortgage of about $25,000, and the debtor's tax debt was $11,259. While the foreclosure sale eliminated the mortgage lien, the debtor did not receive any benefit from this because she remained personally liable under the mortgage note. And, while this

personal liability might be dischargeable in the debtor's bankruptcy case, the determination of whether the debtor received "reasonably equivalent value" in the transfer for the purpose of § 548(a)(1)(B)(i) was made as of the time of the transfer.

In re Krueger, 534 B.R. 163 (Bankr. W.D. Wis., April 7, 2015)

(case no. 3:14-bk-14757) (Bankruptcy Judge Robert D. Martin) Text of opinion

- **Chapter 13—Eligibility—Debt limits:** Under *Matter of Day*, 747 F.2d 405 (7th Cir. 1984), a debt secured by a valueless lien is treated as unsecured debt for the purpose of the Chapter 13 debt limits, and the law has not changed since that decision.

In re Murff, 2015 WL 3690994 (Bankr. N.D. Ill. June 15, 2015), **subsequent opinion**, 2015 WL 4585167 (July 28, 2015)

(case no. 1:13-bk-44431; adv. proc. no. 1:14-ap-790) (Bankruptcy Judge A. Benjamin Goldgar)

Text of opinion

- **Fair Debt Collection Practices Act:** While the filing of a proof of claim in a bankruptcy case is an effort to collect a consumer debt, and *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076 (7th Cir. 2013) held that the filing of a civil action against a consumer to recover a time-barred debt violates the Fair Debt Collection Practices Act, a creditor's filing a proof of claim for a time-barred debt does not suffer from the deception and unfairness of untimely lawsuits and does not violate the Act. First, the risk that an unsophisticated consumer will fail to recognize a limitations defense is substantially lower in a bankruptcy case because a debtor is not the only participant in the case charged with recognizing and defending against a time-barred claim. Second, a consumer debtor in a bankruptcy case usually has far less at stake in the allowance of a proof of claim than a defendant who faces a possible adverse judgment in a civil action. And, third, a consumer debtor in a bankruptcy case is more likely to have the benefit of counsel than a defendant sued in a collection action because the debtor in all probability has been represented from the outset of the case, whereas the defendant sued in a collection action would be forced to retain counsel specifically to defend the action.

In re Smith, 2015 WL 3961422 (Bankr. E.D. Wis., June 29, 2015), **appeal filed**, Kohn Law Firm SC v. Smith, Case No. 2:15-cv-851 (E.D. Wis., filed July 14, 2015)

(case no. 2:11-bk-31782; adv. proc. no. 2:15-ap-2066) (Chief Bankruptcy Judge Susan V. Kelley)

Text of opinion

- **Chapter 13—Co-debtor stay:** A credit card debt on which only the Chapter 13 debtor's non-filing spouse was personally liable was a debt "of the debtor" within Code § 1301, which enjoins a creditor from taking legal action to "collect all or part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor." Because Wis. Stat. § 766.55 provides that marital property assets held by either spouse are available to satisfy family-purpose obligations, and the parties stipulated that the debt was incurred during the marriage for consumer goods, the creditor had a claim against the debtor's marital property, which meant that, under the Bankruptcy Code, the creditor had a claim against the debtor. Thus, the

creditor's suing the debtor's spouse after the debtor's bankruptcy filing in order to collect the debt violated the Chapter 13 co-debtor stay.

Eighth Circuit (6) R

In re Hardy, 787 F.3d 1189 (8th Cir., June 2, 2015)

(case no. 14-1181) Text of opinion

- **Property of the estate—Exemptions—Under state law:** Reversing *In re Hardy*, 503 B.R. 722 (8th Cir. B.A.P., Dec. 23, 2013), which had affirmed *In re Hardy*, 495 B.R. 440 (Bankr. W.D. Mo., May 16, 2013), the Court of Appeals held that the debtor could exempt, as a "public assistance benefit" under Mo. Rev. Stat. § 513.430.1(10)(a), the portion of her federal income tax refund that was attributable to an additional child tax credit. The various amendments to the additional child tax credit statute since its initial enactment demonstrated Congress's intent to help low-income families.

In re Young, 789 F.3d 872 (8th Cir., June 17, 2015), reh'g and reh'g en banc denied (July 20, 2015)

(case no. 14-1665) Text of opinion

- **Authority of the court—Imposition of sanctions—On debtor's attorney:** Affirming *In re Young*, 507 B.R. 286 (8th Cir. B.A.P., March 12, 2014), which had affirmed in part and reversed in part *In re Young*, 497 B.R. 922 (Bankr. W.D. Ark., Sept. 11, 2013), the Court of Appeals held that the bankruptcy court did not abuse its discretion in sanctioning the Chapter 13 debtor's attorney under Bankruptcy Rule 9011 and suspending the attorney from practice for six months, where the bankruptcy court found that the attorney repeatedly mischaracterized past-due postpetition alimony obligations as prepetition obligations, falsely asserted that the debtor was current on his alimony payments, and represented to the bankruptcy court that the debtor would "continue" to make his alimony payments even though, up to that point, he had not been making any such payments. Ultimately, the bankruptcy court found that the attorney "manipulated the Code, the court, and the bankruptcy system."

In re Wigley, 533 B.R. 267 (8th Cir. B.A.P., June 19, 2015), corrected (June 23, 2015)

(case no. 14-6043) Text of opinion

- **Proof of claim—Unsecured claim—Limitation under Code § 502(b)(6):** The portion of a proof of claim filed by the lessor of commercial real property that sought unpaid rent, common area maintenance, and late fees through the date of the debtor's eviction was not subject to the cap in Code § 502(b)(6) because those amounts accrued prior to the termination of the lease and therefore could not be said to have resulted from the termination of the lease. Additionally, the portion of the lessor's claim for pre- and post-judgment interest on those amounts was derivative of the underlying debt and also could not be said to have resulted from termination of the lease. Moreover, the attorney's fees, costs, and disbursements—and the pre-petition interest thereon—awarded by the state court in connection with these elements of the lessor's claim also could not be said to have resulted from the termination of the lease.

- **Proof of claim—Unsecured claim—Limitation under Code § 502(b)(6):** The lessor's claim for interest on its future rents resulted from termination of the lease and therefore was subject to the cap established in Code § 502(b)(6)(A).

- **Proof of claim—Unsecured claim—Allowance of claim:** A state-court judgment in favor of the creditor based on the debtor's fraudulent transfers was duplicative of an earlier state-court judgment awarding the creditor damages for a breach of a lease by the debtor's business, so that the creditor could not include both judgment amounts in its proof of claim. The Uniform Fraudulent Transfer Act, as adopted by the Minnesota legislature, does not create a "new" claim; rather, the act confers an alternate remedy for protecting preexisting creditor rights.

In re O'Sullivan, 2015 WL 3526996 (Bankr. W.D. Mo., June 4, 2015), **appeal filed**, Case No. 15-6020 (8th Cir. B.A.P., filed June 16, 2015)

(case no. 3:15-bk-30173) (Bankruptcy Judge Cynthia A. Norton) Text of opinion

- **Property of the estate—Avoidance of lien impairing exemption:** The lien held by a creditor with a judgment against the debtor attached to the debtor's residence, even though the lien was not presently enforceable because the property was owned by the debtor and his wife as tenants by the entirety but the judgment was only against the debtor. Accordingly, the debtor could avoid the lien under Code § 522(f).

In re Segraves, Case No. 4:12-bk-49433 (Bankr. E.D. Mo., June 9, 2015), **appeal filed**, Case No. 15-6021 (8th Cir. B.A.P., filed July 2, 2015)

(Bankruptcy Judge Barry S. Schermer) Text of opinion

- **Prepetition credit counseling:** A debtor's statement of compliance with the prepetition credit counseling requirement in Code § 109(h)(1) does not have to be signed under penalty of perjury.

In re Turman, 2015 WL 3745304 (Bankr. D. Neb., June 12, 2015)

(case no. 8:14-bk-80062; adv. proc. no. 8:14-ap-8035) (Chief Bankruptcy Judge Thomas L. Saladino) Text of opinion

- **Chapter 13—Stripping unsecured lien:** A Chapter 13 debtor's ability to strip a wholly-unsecured junior lien is unaffected by the recent Supreme Court decision in *Bank of America, N.A. v. Caulkett*, 135 S.Ct. 1995, 192 L.Ed.2d 52 (2015), which applies only to Chapter 7 cases.

Ninth Circuit (21) R

In re Cloobeck, 788 F.3d 1243 (9th Cir., June 12, 2015)

(case no. 13-15432) Text of opinion

- **Chapter 7—Duties of trustee:** The plain language of Code § 503(b)(1)(B) establishes conclusively that "notice and a hearing" are required before a Chapter 7 trustee may pay an administrative expense, even if the administrative expense is a federal income tax liability of the bankruptcy estate that, under 28 U.S.C. § 960(b), the trustee is obligated to pay. The hearing requirement insures that interested parties have an opportunity to contest the amount of tax paid before the estate's funds are diminished, perhaps irretrievably.

Northbay Wellness Group, Inc. v. Beyries, 789 F.3d 956 (9th Cir., June 5, 2015)

(case no. 13-17381) Text of opinion

- **Dischargeability of debt:** Reversing *Northbay Wellness Group, Inc. v. Beyries*, 2012 WL 4120409 (N.D. Cal., Sept. 18, 2012), which had affirmed *In re Beyries*, 2011 WL 5975445 (Bankr. N.D. Cal., Nov. 29, 2011), the Court of Appeals held that the wrongdoing of the debtor, an attorney who stole $25,000 from a judgment creditor that was a California medical marijuana dispensary, outweighed that of the creditor, such that the doctrine of unclean hands did not preclude a determination that the creditor's state-court judgment against the debtor of nearly $350,000 was nondischargeable under Code § 523(a)(4).

In re Betancourt, 2015 WL 3500322 (9th Cir. B.A.P., June 3, 2015)

(case no. 14-1010) Text of opinion

- **Dischargeability of debt—For willful and malicious injury under Code § 523(a)(6):** Vacating *In re Betancourt*, 2013 WL 6798942 (Bankr. C.D. Cal., Dec. 20, 2013), the Bankruptcy Appellate Panel held that the bankruptcy court erred in ruling that the debtor inflicted a willful and malicious injury, within the meaning of Code § 523(a)(6), on a creditor of the debtor's wholly-owned corporation by causing the corporation to transfer three parcels of real property to third parties while the creditor's litigation for breach of contract by the corporation, in which the creditor ultimately received a default judgment, was pending, with the debtor's alleged purpose being to deprive the creditor of real property against which he could record judgment liens. The BAP reasoned that (1) it was unclear whether the bankruptcy court applied the required subjective standard in finding a willful injury; (2) in order to cause "injury ... to another entity" under § 523(a)(6), the court must make a finding that the debtor's transfers of property inflicted a willful and malicious injury that could give rise to a legal right to payment from the debtor, but, under California law, a creditor's remedies for fraudulent transfer were generally non-monetary in nature; (3) in order to support the ruling on the basis that there had been an injury to the creditor's property, the bankruptcy court needed to make a finding that the creditor had an established property interest in the transferred parcels; and (4) it

was unclear whether the bankruptcy court reasoned that the debtor's property transfers created a new independent debt or whether the transfers transmuted the otherwise dischargeable breach of contract judgment debt into a nondischargeable debt arising from willful and malicious injury.

In re Cline, 2015 WL 3988992 (9th Cir. B.A.P., June 30, 2015)

(case no. 14-1503) Text of opinion

- **Property of the estate—Exemptions—Availability to debtor under savings clause of Code § 522(b)(3):** The bankruptcy court did not err in ruling that the debtors, who had moved from Missouri to Arizona in 2013, were required by Code § 522(b)(3)(A) to apply Missouri exemption law, and they could claim exemptions under Missouri law because Missouri exemptions are not limited to residents. Accordingly, the debtors were not ineligible for any exemption for the purpose of the savings paragraph of § 522(b)(3), and they therefore could not claim federal exemptions under that paragraph.

In re Grenier, 2015 WL 3622712 (9th Cir. B.A.P., June 10, 2015)

(case no. 141396) Text of opinion

- **Dischargeability of debt—For willful and malicious injury under Code § 523(a)(6); Issue preclusion—Application under circumstances:** A state-court judgment against debtor for financial abuse of an elder did not necessarily establish willful and malicious injury for purpose of Code § 523(a)(6).

In re Moon Joo Lee, 2015 WL 3960897 (9th Cir. B.A.P., June 29, 2015)

(case no. 14-1423) Text of opinion

- **Violation of discharge injunction—Willfulness:** Where the creditor and his attorney knew of the debtor's bankruptcy discharge, the subjective belief of the creditor and attorney that the discharge did not apply to the creditor's claim against the debtor did not preclude a determination that their violation of the discharge injunction was willful.

- **Violation of discharge injunction—Standard of proof:** A willful violation of the discharge injunction must be proven by clear and convincing evidence.

In re Sangha, 2015 WL 3655113 (9th Cir. B.A.P., June 11, 2015), **appeal filed**, Case No. 15-60057 (9th Cir., filed August 4, 2015)

(case no. 141397) Text of opinion

- **Dischargeability of debt—For willful and malicious injury under Code § 523(a)(6); Issue preclusion—Application under circumstances:** An award of punitive damages in a state-court defamation action did not establish the debtor's malice for purpose of Code § 523(a)(6).

Haugen v. Murray, 2015 WL 3864879 (N.D. Cal., June 22, 2015)

(case no. 3:14-cv-3638) (District Judge Vince Chhabria) Text of opinion

- **Violation of stay—Damages:** The bankruptcy court did not err in awarding the Chapter 11 debtors $31,500 in damages for a creditor's willful violation of the automatic stay, consisting of $8,000 in damages for medical expenses, $15,000 in emotional distress damages, $7,500 in punitive damages, and $1000 in attorney's fees, despite the lack of expert medical evidence. The debtors testified that, while the debtor husband had pre-existing high blood pressure, after the creditor filed a postpetition lawsuit against them, the husband began to notice physical symptoms that he had not previously experienced, was subsequently diagnosed with atrial fibrillation, and incurred more than $9,000 in medical bills in connection with this heart problem. While the fact that the husband developed atrial fibrillation after learning of the lawsuit was only circumstantial evidence that the lawsuit caused the heart condition, circumstantial evidence is as probative as direct evidence, and the creditor did not identify a single case holding that a plaintiff is required to provide expert medical testimony to establish causation. This provided a basis for the award of damages for medical expenses, and the debtors' testimony was likewise sufficient to support an award of emotional distress damages.

In re Olsson, 532 B.R. 810 (D. Or., June 17, 2015)

(case no. 6:14-cv-1686) (Chief District Judge Ann L. Aiken) Text of opinion

- **Dischargeability of debt—Status as domestic support obligation:** An attorney's fee award entered against the Chapter 7 debtor for filing a meritless motion to show cause in state-court child custody litigation with her former husband, with no finding of her former husband's need for support or the debtor's ability to pay it, was imposed to punish the debtor for her meritless filing and to deter similar conduct by others, and not to provide support for the spouses' child. Accordingly, the attorney's fee award was not a domestic support obligation.

In re Adlawan, 2015 WL 3934900 (Bankr. N.D. Cal., June 25, 2015)

(case no. 5:14-bk-53190) (Bankruptcy Judge Arthur S. Weissbrodt) Text of opinion

- **Chapter 7—Conversion by debtor—Permissibility of reconversion:** Where the debtors had originally filed under Chapter 13, converted to Chapter 7, and now sought to reconvert to Chapter 13, reconversion would not be permitted where the debtors failed to demonstrate that their proposed Chapter 13 plan was feasible.

- **Chapter 13—Confirmation of plan—Plan term:** Where the debtors had originally filed under Chapter 13, converted to Chapter 7, and now sought to reconvert to Chapter 13, reconversion would not restart the maximum 60-month term of the debtors' Chapter 13 plan.

In re Broadbent, 531 B.R. 840 (Bankr. D. Idaho, June 8, 2015)

(case no. 4:14-bk-41269) (Bankruptcy Judge Jim D. Pappas) Text of opinion

- **Chapter 13—Confirmation of plan—Good faith under Code § 1325(a)(3):** The below-median Chapter 13 debtor's plan was proposed in good faith for the purpose of Code § 1325(a)(3), even though the debtor failed to income the income of his live-in girlfriend on Schedule I and in computing his plan payments. First and foremost, nowhere does the Bankruptcy Code require that a live-in significant other's income be counted in analyzing a Chapter 13 plan, as was the case for a non-filing spouse. In addition, the Chapter 13 trustee had not shown that the debtor's girlfriend was otherwise legally obligated to financially contribute to the joint household, nor were any of the assets in play community property. Moreover, courts had held that, absent a formal agreement to contribute, a significant other's income should not be counted in determining whether a debtor had "regular income" so as to be eligible for Chapter 13 relief under Code § 109(e), and it seemed to the court that, if a non-spouse's contribution was not stable and regular enough to be counted toward a debtor's eligibility for Chapter 13, logic and consistency dictated that it was also not worthy of inclusion in the debtor's schedule I or the computation of required plan payments.

In re Castellanos, 2015 WL 3856368 (Bankr. D. Ariz., June 18, 2015)

(case no. 2:14-bk-8206; adv. proc. no. 2:14-ap-726) (Chief Bankruptcy Judge Daniel P. Collins)

Text of opinion

- **Dischargeability of debt—Marital debt under Code § 523(a)(15):** Because an annulment relates back to make a marriage void ab initio, the debtor's former husband was not her "former spouse" under Code § 523(a)(15), and the debtor's obligations under a Consent Decree of Annulment entered in the parties' prepetition marital dissolution proceeding were not nondischargeable under § 523(a)(15). See *In re Ellsworth*, 2014 WL 172414 (Bankr. D. Utah 2014); *In re Talbot*, 1999 WL 33485634 (Bankr. D. S.C. 1999).

In re Decker, --- B.R. ----, 2015 WL 5027558 (Bankr. D. Alaska, March 31, 2015), **appeal filed**, Decker v. U.S. Trustee, Case No. 3:15-cv-59 (D. Alaska, filed April 13, 2015)

(case no. 3:14-bk-65) (Chief Bankruptcy Judge Gary A. Spraker) Text of opinion

- **Chapter 7—Conversion on motion of nondebtor—To Chapter 11:** Agreeing with *In re Lenartz*, 263 B.R. 331 (Bankr. D. Idaho 2001) and disagreeing with *In re Graham*, 21 B.R. 235 (Bankr. N.D. Iowa 1982), the court held that the plain language of Code § 706(b) permits the involuntary conversion of any Chapter 7 case to Chapter 11 in the exercise of the court's discretion. While the language of § 706(b) does not require a balancing of interests in making the decision of whether to order conversion of the case, courts have historically considered these competing interests in furtherance of responsibly exercising their discretion.

- **Chapter 7—Conversion on motion of nondebtor—To Chapter 11:** Here, the court granted the U.S. Trustee's motion to convert the individual debtors' Chapter 7 case to Chapter 11, where the debtors (who were not subject to the means test because their debts were primarily business debts) clearly had the ability to pay between

$4,500 and $11,200 per month into a Chapter 11 plan, the debtors had no non-exempt assets to liquidate for the benefit of creditors in a Chapter 7 case, and conversion to Chapter 11 benefitted the debtors because it gave them an opportunity to pay a $100,000 federal income tax debt that appeared to be nondischargeable, even though the debtors strongly opposed conversion. The court found the case similar to *In re Gordon*, 465 B.R. 683 (Bankr. N.D. Ga. 2012) and *In re Baker*, 503 B.R. 751 (Bankr. M.D. Fla. 2013), in both of which conversion had been ordered.

In re Lugo, 2015 WL 3932108 (Bankr. D. Idaho, June 25, 2015)

(case no. 8:15-bk-40121) (Bankruptcy Judge Jim D. Pappas) Text of opinion

- **Property of the estate—Exemptions—Under state law—Of homestead:** The debtor could not claim a homestead exemption in certain property under Idaho law, even though he had recorded a declaration of homestead with respect to the property, because he could not establish an intent to live on the property. While he previously resided on the property, he had moved out from the property after he and his wife had experienced marital difficulties, and in their subsequent marital dissolution proceedings, the wife was given possession of the property and required to either refinance the property or sell it. As envisioned in the stipulated divorce decree, there was no scenario that contemplated the debtor's resuming residency at the property.

In re Montellano, 2015 WL 3878412 (Bankr. C.D. Cal., June 19, 2015)

(case no. 2:15-bk-11049) (Bankruptcy Judge Robert Kwan) Text of opinion

- **Avoidable transfers—Avoidance by debtor:** A debtor exercising a trustee's avoidance powers under Code § 522(h) must proceed by adversary proceeding, as this was "a proceeding to recover money or property" under Bankruptcy Rule 7001(1).

In re Mooney, 532 B.R. 313 (Bankr. D. Idaho, June 23, 2015)

(case no. 1:12-bk-1243) (Chief Bankruptcy Judge Terry L. Myers) Text of opinion

- **Claim—Status as prepetition or postpetition:** Though the nature of a claim is dictated by state law, when the claim arises is a matter of federal law. *Siegel v. Fed. Home Loan Mortg. Corp.*, 143 F.3d 525 (9th Cir. 1998).

- **Claim—Status as prepetition or postpetition:** The Ninth Circuit employs the "fair contemplation test" in order to determine if a claim is prepetition in nature. See, e.g., *In re Jensen*, 995 F.2d 925 (9th Cir. 1993). Under the fair contemplation test, a claim arises when a claimant can fairly or reasonably contemplate the claim's existence even if a cause of action has not yet accrued under nonbankruptcy law.

- **Claim—Status as prepetition or postpetition:** Under the "fair contemplation test," the assertion in a prepetition divorce complaint by the debtor's former wife of a right to a monetary award under Virginia law for her interest in marital property constituted a "claim" that arose prepetition, even though her right to or the amount of any such award was not yet established or liquidated, as the claim was "fairly contemplated" despite its disputed and unliquidated nature. This conclusion was supported not only by Ninth Circuit authority regarding the timing of claims, but also by the decisions of bankruptcy courts in Virginia.

In re Nomellini, 534 B.R. 166 (Bankr. N.D. Cal., June 25, 2015), **appeal filed**, Nomellini v. United States, Case No. 5:15-cv-4122 (N.D. Cal., filed Sept. 10, 2015)

(case no. 5:11-bk-61177; adv. proc. no. 5:14-ap-5083) (Bankruptcy Judge Arthur S. Weissbrodt) Text of opinion

- **Chapter 13—Confirmation of plan—Effect on secured claim:** Confirmation of the debtor's Chapter 13 plan, which provided that only $10,000 of the IRS's $215,000 claim was secured, in conformance with the IRS's proof of claim, did not eliminate the IRS's lien rights in the debtor's real property, which was subject to a prepetition tax lien, where the plan did not explicitly declare that it would modify the IRS's lien rights. See *In re Brawders*, 503 F.3d 856 (9th Cir. 2007) (a confirmed plan has no preclusive effect on issues that were not sufficiently evidenced in the plan to provide adequate notice to the creditor). Accordingly, when the debtor sold the property, the IRS was entitled to assert its lien rights in the proceeds.

In re Pashenee, 531 B.R. 834 (Bankr. E.D. Cal., June 8, 2015)

(case no. 2:14-bk-30386) (Bankruptcy Judge Christopher D. Jaime) Text of opinion

- **Property of the estate—Exemptions—Objection to exemption—Burden of proof:** Under *Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15, 120 S.Ct. 1951, 147 L.Ed.2d 13 (2000), the burden of proof in bankruptcy remains where the substantive nonbankruptcy law places it, unless the Bankruptcy Code itself modifies the burden of proof. Thus, where a debtor claims exemptions under California law, Cal. Civ. Proc. Code § 703.580(b), which provides that, except with respect to homestead exemptions, the person claiming an exemption has the burden of proof, prevails over Bankruptcy Rule 4003(c), which provides that the objecting party has the burden of proving that a debtor's exemptions are not properly claimed.

In re Tallerico, 532 B.R. 774 (Bankr. E.D. Cal., June 30, 2015)

(case no. 2:15-bk-22117) (Chief Bankruptcy Judge Christopher Klein) Text of opinion

- **Property of the estate—Exemptions—Objection to exemption—Burden of proof:** Bankruptcy Rule 4003(c), which provides that the objecting party has the burden of proving that a debtor's exemptions are not properly claimed, is invalid to the extent it assigns the burden of proof on an objection to a state-law claim of exemption in a manner contrary to state law. The Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075, forbids rules that alter substantive rights. The Supreme Court clarified in *Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15, 120 S.Ct. 1951, 147 L.Ed.2d 13 (2000), that burden of proof is substantive, not procedural. It follows that Rule 4003(c), which was first adopted in 1973 on the assumption that burden of proof was procedural, offends § 2075. Thus, here, where the debtor claimed exemptions under California law, and Cal. Civ. Proc. Code § 703.580(b) provided that, except with respect to homestead exemptions, the person claiming an exemption has the burden of proof, the California statute prevailed over Rule 4003(c). It followed under Fed. R. Evid. 302 (which states that "[i]n a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision") that California law regarding evidentiary presumptions also applied.

- **Property of the estate—Exemptions—Objection to exemption:** Here, where the debtor claimed exemptions under California law in personal property seized from the premises of his bicycle repair shop before he filed his bankruptcy petition, and the levying creditor objected to the exemptions on the ground that the debtor's LLC, rather than the debtor personally, owed the property, so that the debtor could not claim exemptions in the property, California law regarding the burden of proof governed and required the debtor to establish his ownership of the property. Since the evidence was conflicting, he failed to do so with respect to property other than his tools, and the creditor's objection would be sustained.

- **Property of the estate—Turnover—Propriety under circumstances:** Where, six hours before the debtor's Chapter 7 filing, the county sheriff levied on all personal property at the premises of the debtor's bicycle repair business to enforce a money judgment that a creditor had obtained against the debtor, and the debtor filed a motion for turnover under Code § 543 against the sheriff as a custodian, the debtor needed to establish a right to exempt the property and a right under Code § 522(f) to avoid the creditor's judicial lien on the property in order to recover the property.

In re Vu, Case No. 3:15-bk-41405 (Bankr. W.D. Wash., June 16, 2015)

(Bankruptcy Judge Brian D. Lynch) Text of opinion

- **Chapter 13—Calculation of projected disposable income:** Disagreeing with *In re Parks*, 475 B.R. 703 (9th Cir. B.A.P. 2012), and extending *In re Bruce*, 484 B.R. 387 (Bankr. W.D. Wash. 2012) to above-median debtors, the court held that, for all Chapter 13 debtors, voluntary retirement contributions may be excluded from the calculation of disposable income, to the extent that those contributions were being made pre-petition during the six-month look-back period used to determine current monthly income. The court noted that *Collier on Bankruptcy* concludes that the hanging paragraph to Code § 541(b)(7)(A)(i) "removes any doubt" that qualifying voluntary retirement contributions "are to be excluded from the disposable income calculation."

In re Wirshing, 2015 WL 3525061 (Bankr. D. Mont., June 3, 2015)

(case no. 2:13-bk-60990) (Bankruptcy Judge Ralph B. Kirscher) Text of opinion

- **Property of the estate—In Chapter 13 case:** Agreeing with *In re Dale*, 505 B.R. 8 (9th Cir. B.A.P. 2014), the court held that an inheritance received more than 180 days postpetition by a Chapter 13 debtor is property of the estate.

- **Chapter 13—Modification of confirmed plan:** Where the Chapter 13 debtor wife received a postpetition inheritance that was sufficient to pay all the allowed claims in full, and the inheritance was property of the estate, the court granted the Chapter 13 trustee's motion to modify the debtors' confirmed plan so as to require the debtors to turn over the inheritance.

Tenth Circuit (12) R

In re Gordon, 791 F.3d 1182 (10th Cir., June 26, 2015)

(case no. 14-1257) Text of opinion

- **Property of the estate—Exemptions—Under state law:** Affirming *In re Gordon*, 2014 WL 2442519 (D. Colo., May 30, 2014), which had affirmed *In re Gordon*, 2013 WL 5763314 (Bankr. D. Colo., Oct. 24, 2013), the Court of Appeals held that Colo. Rev. Stat. § 13–54–102(1)(s), which permits an exemption for "[p]roperty, including funds, held in or payable from any pension or retirement plan or deferred compensation plan," does not provide an exemption for funds that have been paid out from a retirement plan, even when the funds are in a segregated bank account.

Porter v. Am. Family Mut. Ins. Co., 2015 WL 3896759 (D. Colo., June 23, 2015)

(case no. 1:13-cv-3446) (Senior District Judge Wiley Y. Daniel) Text of opinion

- **Judicial estoppel—Application under circumstances:** The Chapter 7 debtor was not judicially estopped from pursuing litigation against his automobile insurer for failure to provide underinsured motorist (UIM) benefits for a prepetition accident in which the debtor had been injured, where the debtor disclosed a possible cause of action for a personal injury in an unknown amount in his Schedule B, and at the meeting of creditors the debtor's wife disclosed that they were still pursuing UIM benefits for an automobile accident, although the debtor failed to disclose that the insurer had made a $20,000 settlement offer to him, or that he was seeking $400,000.

In re Brannan, 532 B.R. 834 (Bankr. D. Kan., June 25, 2015)

(case no. 6:13-bk-12834; adv. proc. no. 6:14-ap-5068) (Chief Bankruptcy Judge Robert E. Nugent)

Text of opinion

- **Chapter 13—Confirmation of plan—Effect on trustee:** Confirmation of the Chapter 13 debtor's plan, which treated a creditor's two claims as secured, precluded the Chapter 13 trustee's subsequent adversary proceeding to avoid the creditor's liens as unperfected, even though the creditor did not file its proofs of claim until after the confirmation of the plan, particularly since, prior to confirmation of the plan, the trustee signed an Agreed Order resolving the creditor's objection to the plan and providing for the creditor's claims to be treated as secured. But see *In re Johnson*, 279 B.R. 218 (Bankr. M.D. Tenn. 2002) (confirmation of "base" plan that did not allow or disallow claims, in district that confirmed Chapter 13 plans before claims bar date, did not preclude the Chapter 13 trustee's objection to a claim filed after plan confirmation that revealed an avoidable lien).

In re Gonzales, 532 B.R. 828 (Bankr. D. Colo., June 9, 2015)

(case no. 1:09-bk-27194) (Bankruptcy Judge Howard R. Tallman) Text of opinion

- **Chapter 13—Entitlement to discharge:** Vacating the Chapter 13 debtors' discharge as improvidently granted, the court held that the debtors were not entitled to a discharge under Code § 1328(a), which provides for the issuance of a discharge "after completion by the debtor of all payments under the plan," where the debtors' confirmed plan provided for the maintenance of regular monthly payments on the first mortgage loan in the amount of $1,280 monthly, which the debtors were to pay directly to the creditor, in addition to curing a prepetition arrearage through payments to the Chapter 13 trustee, and, while the debtors made all the monthly plan payments to the trustee, the debtors did not make all of the regular monthly payments to the creditor. The mortgage creditor's Statement in Response to Notice of Final Cure Payment stated that, while the prepetition arrearage had been fully paid, postpetition payments totaling $49,377.71 remained unpaid, and the debtors did not contest the accuracy of this information. The court noted that the debtors had filed a new bankruptcy case to deal with the postpetition arrearage. The court commented that, while it found the debtors' certification that they had made all required payments to be "somewhat understandable" because they were proceeding "without the guidance of counsel," the court found the Chapter 13 trustee's conduct, in filing her request for the court to enter the debtors' discharge, "more troubling." The Court said it had not located any cases in which a court had accepted the argument that payments made directly to a creditor under a confirmed Chapter 13 plan are not "under the plan" and are not required to be completed in order for a Chapter 13 debtor to be entitled to discharge under Code § 1328(a).

In re Inyard, 532 B.R. 364 (Bankr. D. Kan., June 17, 2015)

(case no. 5:12-bk-40260) (Bankruptcy Judge Janice Miller Karlin) Text of opinion

- **Chapter 13—Effect of debtor's death:** The administrator of the deceased Chapter 13 debtor's state-court probate estate was a proper party to file a motion seeking a hardship discharge for the debtor. See *In re Kosinski*, 2015 WL 1177691 (Bankr. N.D. Ill., March 5, 2015) ("Rule 1016 permits a case to continue despite the death of the debtor without the formal substitution of another party for the debtor").

- **Chapter 13—Effect of debtor's death:** A deceased Chapter 13 debtor may receive a hardship discharge under Code § 1328(b), and, here, the best interests of all the parties warranted granting the debtor a discharge. The debtor had paid $20,148 towards completion of his Chapter 13 plan, with only $575 unpaid. The prepetition priority creditors have already been paid in full; there were no secured creditors; and unsecured creditors had already received payments in a larger amount than they would have received if debtor had filed his case under Chapter 7. Significantly, no creditor objected to the debtor's discharge; only the Chapter 13 trustee did. Postpetition creditors would clearly benefit from a hardship discharge because they would not have to share pro rata (in the assets of the probate estate) with prepetition unsecured nonpriority creditors, as their claims were provided for in the debtor's plan and would be discharged. Lastly, equity favored giving this deceased debtor the benefit of a hardship discharge.

In re Martinez, 2015 WL 3814935 (Bankr. D. N.M., June 18, 2015)

(case no. 1:10-bk-11101) (Chief Judge Robert H. Jacobvitz) Text of opinion

- **Property of the estate—Avoidance of lien impairing exemption—Determination of impairment:** The date of the filing of the petition is the operative date to make lien avoidance determinations under Code § 522(f), including the amount of the liens and the value of the exempt property, and this does not change if the case is converted from Chapter 13 to Chapter 7.

- **Property of the estate—Avoidance of lien impairing exemption—Determination of impairment; Stipulation—Effect; Valuation of property—Effect of conversion of case:** Code § 348(f)(1)(B), providing that "valuations of property ... in the chapter 13 case" do not apply "in a case converted to a case under chapter 7," applied to a stipulation of the value of the debtor's residence entered into by the debtor and the creditor whose lien the debtor sought to avoid under Code § 522(f). And, while the stipulation provided that the valuation applied "for all purposes in this bankruptcy case," this did not amount to an effective waiver of the debtor's right to invoke Code § 348(f)(1)(B).

In re Mosby, 532 B.R. 167 (Bankr. D. Kan., June 17, 2015), **appeal filed**, Mosby v. Clark, Case No. 2:15-cv-9153 (D. Kan., filed July 1, 2015)

(case no. 2:14-bk-22981) (Bankruptcy Judge Dale L. Somers) Text of opinion

- **Property of the estate—Exemptions—Under state law:** Concluding that an inherited IRA is not exempt under Kan. Stat. Ann. § 60–2308(b), which provides an exemption for "any money or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement plan which is qualified under Sections 401(a), 403(a), 403(b), 408, 408A or 409 of the federal internal revenue code of 1986, and amendments thereto," the court said it found the reasoning of the unanimous decision in *Clark v. Rameker*, 134 S. Ct. 2242, 189 L. Ed. 2d 157 (2014) (holding an inherited IRA not exempt under exemptions provided in the Bankruptcy Code) to be compelling, as the court found no material difference between the federal and Kansas exemptions.

In re Murray, 2015 WL 3929582 (Bankr. D. Kan., June 24, 2015)

(case no. 2:14-bk-22253; adv. proc. no. 2:15-ap-6016) (Bankruptcy Judge Dale L. Somers)

Text of opinion

- **Dischargeability of debt—Student loan debt under Code § 523(a)(8)—Prematurity of proceeding:** The Chapter 13 debtors' adversary proceeding seeking a determination that their student loan debt should be included in the debtors' discharge was not yet ripe, where the debtors filed the proceeding six months into a 60-month plan term. The discharge exception of Code § 523(a)(8) required the court to project the hardship to the debtor if the student loan was not discharged, the court reasoned, and, in a Chapter 13 case, Code § 1328(a) provided that a discharge did not occur until the completion of plan payments. The Code thereby contemplated that the undue hardship finding would be based upon a projection of the debtor's anticipated post-bankruptcy financial circumstances. Generally, this projection was best made when all of the debtor's pre-discharge financial circumstances were known and the post-bankruptcy period was

imminent. Projecting whether the payment of student loans after discharge would cause an undue hardship was at best a difficult process; hearing the matter years before the beginning of the projection period would only compound the difficulty.

In re Ogden, Case No. 1:11-bk-19841 (Bankr. D. Colo., June 1, 2015), appeal filed, Case No. 1:15-cv-1274 (D. Colo., filed June 16, 2015)

(Bankruptcy Judge Elizabeth E. Brown) Text of opinion

- **Violation of stay—Damages:** Where the Chapter 13 debtor's testimony demonstrated that she suffered "significant emotional distress" as a result of her mortgage servicer's sending her two letters threatening foreclosure following the debtor's bankruptcy filing, the court awarded the debtor $69,405 in damages for the servicer's violation of the automatic stay, consisting of $10,000 in emotional distress damages, $35,000 in punitive damages, and $24,405 in attorney's fees. Although the debtor offered no medical evidence corroborating her emotional distress, and the court had "always had a somewhat knee jerk reaction against awarding emotional distress damages without corroborating medical testimony or other evidence," the court said it found the debtor's testimony regarding her emotional distress to be very compelling. She testified that the stress and fear she suffered was enormous. When she received these letters from the servicer, she flew into a panic. She saw the servicer's agents coming by her home taking "inspection" photographs. As a very private person, she started spending all of her time in her bedroom, where they would not be able to photograph her. Within a couple of months with no resolution or communication from the servicer in response to her inquiries and only the receipt of the letters threatening foreclosure, she began losing weight, as she was having great difficulty eating and sleeping. Eventually, her hair began falling out in clumps, and she was grinding her teeth when she was able to sleep. As for punitive damages, the court determined that an amount roughly equal to the amount of compensatory damages was appropriate, where the servicer, a bank, was a sophisticated institution that had over $316 million in assets and a net worth of over $89 million, and the servicer had asserted frivolous defenses to an obvious stay violation.

In re Romero, 533 B.R. 807 (Bankr. D. Colo., June 23, 2015), appeal filed, Case No. 1:15-cv-1484 (D. Colo., filed July 14, 2015)

(case no. 1:15-bk-11254) (Bankruptcy Judge Thomas B. McNamara) Text of opinion

- **Property of the estate—Exemptions—Under state law—Of homestead:** The Chapter 7 debtor, a long-haul truck drive, could not claim a homestead exemption, under Colorado law, in a Peterbilt commercial truck in the cab of which the debtor had been living continuously since approximately 1998, and that the debtor considered to be his home, where the truck was not permanently or semi-permanently installed on real property, so that the truck was not associated with the land and did not qualify as a homestead. The cab has a bed, microwave oven, toaster, coffee pot, refrigerator, laser printer, television, light, and vacuum. In addition to food and water, the debtor stores his clothes, laundry, and sundry items in a dozen plastic boxes mainly located in a small loft above the bed. A self-contained portable toilet rounds out the cab's equipment. The debtor's dog lives with him in a small kennel near the bed. The truck has a 12–volt generator to provide electricity, heat, and air-conditioning when the vehicle is parked.

In re Trobiano, 532 B.R. 355 (Bankr. D. Colo., June 23, 2015)

(case no. 1:14-bk-24635) (Bankruptcy Judge Thomas B. McNamara) Text of opinion

- **Chapter 13—Confirmation of plan—Calculation of projected disposable income:** Where the Chapter 13 debtor husband lost his job shortly after the debtors filed their bankruptcy petition, it was sufficient, to comply with the projected disposable income requirement in Code § 1325(b), for the plan to provide, as proposed by the debtors, that "[w]ithin 30 days of Debtor-husband obtaining employment, Debtors shall amend Schedule I and modify their plan, as necessary, to pay all disposable income into the plan." The debtors' plan was not required to provide, as proposed by the Chapter 13 trustee, that "Debtors will turnover 1/3 of gross income in excess of $65,652 during the duration of the plan," as this failed to take into account the possible changes in expenses the debtors might experience along with any increased income once the husband was able to find new employment.

Older case:

In re Ogden, 532 B.R. 329 (Bankr. D. Colo., April 3, 2014)

(case no. 1:11-bk-19841; adv. proc. no. 1:13-ap-1054) (Bankruptcy Judge Elizabeth E. Brown)

Text of opinion

- **Violation of stay—By mortgage creditor; Chapter 13—Violation of plan confirmation order:** Given the "limited scope" of a bankruptcy court's role in supervising mortgage lenders, the court concluded that the Chapter 13 debtor's mortgage servicer's conduct in maintaining two sets of books, one reflecting accounting for the debtor's account as dictated by the Bankruptcy Code, and a second one reflecting accounting under the parties' contract without reference to bankruptcy, did not violate the automatic stay or the court's Chapter 13 plan confirmation order, where the servicer said that it would adhere to the bankruptcy accounting if the debtor successfully completed her plan and obtained a discharge.

Eleventh Circuit (21) R

In re McFarland, 790 F.3d 1182 (11th Cir., June 22, 2015)

(case no. 14-14514) Text of opinion

- **Property of the estate—Exemptions—Under state law—Constitutionality:** Affirming *McFarland v. Wallace*, 516 B.R. 665 (S.D. Ga., Sept. 10, 2014), which had affirmed *In re McFarland*, 500 B.R. 279 (Bankr. S.D. Ga., Sept. 30, 2013) and *In re McFarland*, 481 B.R. 242 (Bankr. S.D. Ga., Sept. 29, 2012), the Court of Appeals held that Ga. Code Ann. § 44-13-100(a)(9), a provision of Georgia's bankruptcy-specific exemption statute limiting the exemption of the cash value of a life insurance policy to $2,000, while general debtors had an unlimited exemption under a different statute, does not violate the uniformity provision of the Bankruptcy Clause of the U.S. Constitution or the equal protection clause of the Georgia Constitution. The Bankruptcy Clause, which vests Congress with the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States," does not require states to treat bankruptcy and non-bankruptcy debtors exactly alike. And, although the statute provides a lower exemption to bankruptcy debtors than to general debtors, the Georgia legislature had at least rationally balanced the needs of creditors and bankruptcy debtors and therefore had not transgressed equal protection.

- **Property of the estate—Exemptions—Under state law:** While Ga. Code Ann. § 33–25–11(c)—a non-bankruptcy provision—permits the exemption of the entire cash value of a whole life insurance policy, Ga. Code Ann. § 44–13–100(a)(9), which explicitly limits—to $2,000—a bankruptcy debtor's ability to exempt the "cash value" of his "unmatured life insurance contract," takes precedence as the more specific statute.

- **Property of the estate—Exemptions—Under state law:** An annuity that the Chapter 7 debtor purchased in an effort to provide for his wife after his death was not exempt under Ga. Code Ann. § 44-13-100(a)(2)(E), which provides an exemption for the debtor's right to payment under a pension, annuity, or similar plan or contract. *Silliman v. Cassell*, 292 Ga. 464, 738 S.E.2d 606 (2013) held that an "annuity" under the statute is one that "provides income as a substitute for wages," and, here, the debtor had never drawn money from the annuity, nor did he intend to withdraw any funds during his lifetime.

In re Walston, 606 Fed. Appx. 543 (11th Cir., June 2, 2015)

(case no. 14-14593) Text of opinion

- **Proof of claim—Unsecured claim—Allowance of claim:** Affirming *In re Walston*, 2014 WL 2086834 (Bankr. N.D. Ga., March 17, 2014), the Court of Appeals held that, when a proof of claim includes all of the information required under Bankruptcy Rule 3001, it constitutes prima facie evidence of the validity of the claim, regardless of whether the evidence on which the creditor relies would be considered inadmissible hearsay under state law. Moreover, the reliance of a proof of claim on evidence that would be considered hearsay outside of bankruptcy does not show that the "claim is unenforceable against the debtor ... under any agreement or applicable law" and should be disallowed under Code § 502(b)(1).

Goodin v. Bank of America, N.A., --- F.Supp.3d ----, 2015 WL 3866872 (M.D. Fla., June 23, 2015)

(case no. 3:13-cv-102) (District Judge Timothy J. Corrigan) Text of opinion

- **Fair Debt Collection Practices Act:** Asking "[w]hat do you do when your bank repeatedly tries to collect a debt that is not due, you repeatedly try to tell them that they are making a mistake but they just won't listen, and then they file a foreclosure action on your home?," the court awarded the Chapter 13 debtors, who cured their mortgage arrearage under their Chapter 13 plan, $204,000 in damages under the Fair Debt Collection Practices Act, consisting primarily of $100,000 in punitive damages and $100,000 in emotional distress damages, $50,000 for each debtor.

Hansen v. Resurgent Capital Servs., L.P., 2015 WL 3652838 (M.D. Fla., June 11, 2015)

(case no. 8:15-cv-426) (District Judge James D. Whittemore) Text of opinion

- **Fair Debt Collection Practices Act—Timeliness of action:** Where the creditors violated the Fair Debt Collection Practices Act by filing proofs of claim for time-barred debts, the violations of the FDCPA occurred when the proofs of claim were filed, not when the bankruptcy court later sustained the debtors' objections to the proofs of claim, and the one-year FDCPA limitations period began to run on the day after the proofs of claim were filed. Accordingly, the debtors' action to recover for the creditors' violations of the Act was untimely.

Marshall v. Sandersville R.R. Co., 2015 WL 3648603 (M.D. Ga., June 10, 2015)

(case no. 5:12-cv-425) (District Judge Marc T. Treadwell) Text of opinion

- **Judicial estoppel—Application under circumstances:** The Chapter 13 debtor's failure to disclose a potential cause of action against his employer for an injury suffered at work that arose after the debtor and his wife had made the final payment under their Chapter 13 plan, but before the case was closed, was not necessarily intentional, and the court could not render summary judgment for the employer on the ground of judicial estoppel in the debtor's subsequent litigation against the employer.

Waterhouse v. Wells Fargo Home Mortgage, 2015 WL 3867005 (M.D. Fla., June 23, 2015)

(case no. 8:14-cv-2794) (District Judge Elizabeth A. Kovachevich) Text of opinion

- **Violation of stay—By mortgage creditor:** A letter from the Chapter 7 debtor's mortgage creditor, sent while the case was still open, stating that her loan modification request was still under review and that "all normal collection/foreclosure/bankruptcy processes may continue uninterrupted during this time period," and encouraging the debtor to "continue to make monthly mortgage payments," did not violate the automatic stay. The language of the letter did not show a willful attempt to collect a debt from the debtor; rather, the letter was a response to the debtor's loan modification request, and the language quoted by the debtor was merely boilerplate language stating that the status quo continued. See *Redmond v. Fifth Third Bank*, 624 F.3d 793 (7th Cir. 2010) (a creditor's sending the debtor a letter in response to an inquiry from the debtor was not an attempt to collect payment and, therefore, did not violate the automatic stay).

- **Violation of discharge injunction—By mortgage creditor:** The form letters sent to the Chapter 7 debtor following her discharge by her mortgage creditor, the creditor's filing of a foreclosure complaint, and the creditor's issuance of a summons for the foreclosure proceeding were within the ordinary course of business between the debtor and the creditor and therefore came within Code § 524(j) and did not violate the discharge injunction. Moreover, a creditor's pursuing its lien rights does not violate the debtor's discharge.

In re Calzadilla, 534 B.R. 216 (Bankr. S.D. Fla., June 17, 2015)

(case no. 1:14-bk-11318) (Bankruptcy Judge Robert A. Mark) Text of opinion

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Surrender of collateral:** Agreeing with *In re Metzler*, 530 B.R. 894 (Bankr. M.D. Fla., May 13, 2015), the court held, in a Chapter 13 case in which the debtors' compliance with the court's Mortgage Modification Mediation Program Procedures required them to modify their Chapter 13 plan so as to provide for the surrender of their real property to the secured creditor, that "surrender" meant that the debtors could not thereafter take any overt action to defend or impede the creditor's foreclosure proceedings.

In re Curtis, 2015 WL 4065260 (Bankr. M.D. Fla., June 30, 2015)

(case no. 6:13-bk-8201) (Chief Bankruptcy Judge Karen S. Jennemann) Text of opinion

- **Property of the estate—Effect of conversion of case:** Under Code § 348(f)(1)(A), which provides that, when a Chapter 13 case is converted to another chapter, "property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion," tools that were in the debtors' possession when they filed their Chapter 13 petition, and that remained in their possession when they subsequently voluntarily converted to Chapter 7, were property of the Chapter 7 bankruptcy estate, and this result was not changed by the fact that, while the debtors' case was progressing under Chapter 13, the court confirmed the debtors' plan, and Code § 1327(b) provides that the confirmation of a Chapter 13 plan vests all of the property of the estate in the debtor. Section 348(f) pulls property vested in the debtors by a Chapter 13 confirmation order back into the bankruptcy estate upon conversion of the case to another chapter. *In re John*, 352 B.R. 895 (Bankr. N.D. Fla. 2006).

In re DeMasi, 2015 WL 3956135 (Bankr. M.D. Fla., June 26, 2015), **appeal filed**, DeMasi v. Kondapalli, Case No. 8:15-cv-1744 (M.D. Fla., filed July 28, 2015)

(case no. 8:13-bk-8406; adv. proc. no. 8:13-ap-889) (Bankruptcy Judge Michael G. Williamson) Text of opinion

- **Issue preclusion—Elements under state law:** Florida's collateral estoppel doctrine forecloses relitigation when (1) the parties are identical with those from the prior case, (2) the issues are identical, (3) there was a full and fair opportunity to litigate the issues and they were actually litigated, and (4) those issues were necessary to

the prior adjudication. For estoppel purposes, the finality of the state court judgment is not affected by the pendency of the state court appeals.

- **Issue preclusion—Application under circumstances; Dischargeability of debt—For misrepresentation under Code § 523(a)(2)(A):** Fraud under Florida law and the requirements of Code § 523(a)(2)(A) are so closely mirrored that they are "sufficiently identical" for collateral estoppel purposes. *In re St. Laurent*, 991 F.2d 672 (11th Cir. 1993).

- **Dischargeability of debt—For misrepresentation under Code § 523(a)(2)(A):** Amending and superseding *In re DeMasi*, 522 B.R. 696 (Bankr. M.D. Fla., Dec. 9, 2014), the bankruptcy court held that the "receipt of benefits" test is the proper way to determine the application of Code § 523(a)(2)(A), which applies "to the extent" money, property, services, or credit were "obtained by ... false pretenses, a false representation, or actual fraud." Under this test, Code § 523(a)(2)(A) applies when the debtor "gains a benefit" from the money, property, services, or credit that was obtained by fraudulent means, even if the debtor does not personally receive the money, property, services, or credit; this benefit can be either direct or indirect. *In re Ashley*, 903 F.2d 599 (9th Cir. 1990); *In re Bilzerian*, 100 F.3d 886 (11th Cir. 1996). See also *In re Luce*, 960 F.2d 1277 (5th Cir. 1992) (one partner's fraud was imputed to second partner, who did not know of fraud, because second partner benefitted from first partner's fraud); *In re Ledford*, 970 F.2d 1556 (6th Cir. 1992) (same). Here, the debtor received the benefit of his fraud in several ways, so a state-court judgment debt for fraud under Florida common law was nondischargeable under § 523(a)(2)(A).

In re Dukes, 2015 WL 3856335 (Bankr. M.D. Fla., June 19, 2015), appeal filed, Dukes v. Suncoast Credit Union, Case No. 2:15-cv-420 (M.D. Fla., filed July 13, 2015)

(case no. 9:09-bk-2778; adv. proc. no. 9:14-ap-569) (Bankruptcy Judge Caryl E. Delano)

Text of opinion

- **Discharge injunction—Debt "provided for" in Chapter 13 plan:** The Chapter 13 debtors' personal liability on a mortgage debt was not discharged under Code § 1328(a) where the only mention of the debt in the debtors' plan stated that the debtors would make the payments "outside the plan." Such a debt is not "provided for by the plan," the court concluded, and under § 1328(a) a discharge extends only to debts "provided for by the plan." Moreover, if the debt was provided for by the plan, it would come within the discharge exception in § 1328(a)(1) for a debt "provided for under section 1322(b)(5)," even if there were no arrearages paid under the plan.

In re Dumay, 2015 WL 3505233 (Bankr. S.D. Fla. June 2, 2015)

(case no. 1:15-bk-10472) (Bankruptcy Judge Robert A. Mark) Text of opinion

- **Property of the estate—Exemptions—Of entireties property under Code § 522(b)(3)(B):** The debtor could exempt real property as held in a tenancy by the entireties with her non-filing husband, although the debtor's husband first acquired ownership of the property in his name alone and then transferred title to himself and the debtor later that same day, as Fla. Stat § 689.11(1)(b) explicitly states that "[a]n estate by the entirety may be created by the action of the spouse holding title

... [c]onveying to both spouses," and this statute was enacted prior to the date of the transfers of the debtor's property.

In re Grey, 2015 WL 3535410 (Bankr. S.D. Fla., June 4, 2015)

(case no. 1:14-bk-27803) (Bankruptcy Judge Laurel M. Isicoff) Text of opinion

- **Chapter 13—Modification of confirmed plan:** Issues that were necessarily determined by confirmation of the Chapter 13 debtor's plan were no longer subject to challenge when the debtor proposed a modified plan, and a creditor could object only to any new issues raised by the proposed modification. *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 191 L. Ed. 2d 621 (2015) (confirmation of a Chapter 13 plan has preclusive effect, foreclosing relitigation of "any issue actually litigated by the parties and any issue necessarily determined by the confirmation order"); *In re Bateman*, 331 F.3d 821 (11th Cir. 2003) (a confirmed plan binds the debtor and creditor "to any issue ... necessarily determined by the confirmation order, including whether the plan complies with sections 1322 and 1325 of the Bankruptcy Code"). Thus, here, the secured creditor could not object to a proposed plan modification on the ground that the plan did not provide for payment of the creditor's claim in equal monthly amounts, where the debtor's confirmed plan provided the same treatment of the creditor's claim.

In re Lemming, 532 B.R. 398 (Bankr. N.D. Ga., June 18, 2015)

(case no. 4:14-bk-43080) (Bankruptcy Judge Mary Grace Diehl) Text of opinion

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Surrender of collateral:** The court could not confirm a Chapter 13 plan that proposed to surrender one of three parcels of real property securing a creditor's claim to the creditor, and to pay any deficiency through payments over the term of the plan. Partial surrender (i.e., surrender of some but not all of the creditor's collateral) is not allowed under Code § 1325(a)(5)(C). *In re Kerwin*, 996 F.2d 552 (2d Cir. 1993); *In re Williams*, 168 F.3d 845 (5th Cir. 1999); *In re Covington*, 176 B.R. 152 (Bankr. E.D. Tenn. 1994). Contra, *In re McCommons*, 288 B.R. 594 (Bankr. M.D. Ga. 2002).

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Surrender of collateral:** Nor could the surrender provision be confirmed as a method of payment of the creditor's claim under § 1325(a)(5)(B), which provides that a court shall confirm a Chapter 13 plan, if, in addition to other requirements, "the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim." By testing whether "the value ... of property to be distributed" under a plan equals or exceeds the amount of the allowed secured claim, § 1325 permits a plan to be confirmed prior to reducing the property to acceptable form, such as in the case of a plan that provides for the sale of property and the distribution of the proceeds to the secured creditor. While Code § 1322(b)(8) states that a plan may "provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor," the meaning of "payment" in the context of § 1322(b)(8) is ambiguous, and the court concluded that "payment" in § 1322(a)(8) should be interpreted as the delivery of money or of some non-monetary property to a creditor, provided that delivery of any such non-monetary property either (a) was consented to at confirmation, (b) had been previously accepted in satisfaction of the debt in the parties' course of dealings, or (c) in the case of commercial debt, was customarily accepted in satisfaction of that type of debt. While there were Chapter 12 cases

allowing for payment in kind, those cases involved agricultural lenders in a specialized industry. If trade custom or course of dealings entailed routine settlement of debt with something other than money, it was possible that a plan in a Chapter 12 case or a Chapter 13 business case could provide for such a payment in kind.

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Transfer of collateral to creditor:** A Chapter 13 plan cannot require a secured creditor to accept a surrender of property or to take possession of or title to the property through repossession or foreclosure. *Bank of New York Mellon v. Watt*, 2015 WL 1879680 (D. Or., April 22, 2015); *In re Rose*, 512 B.R. 790 (Bankr. W.D. N.C. 2014); *In re Moore*, 477 B.R. 918 (Bankr. S.D. Ga. 2012); *In re Brown*, 477 B.R. 915 (Bankr. S.D. Ga. 2012); *In re Ogunfiditimi*, 2011 WL 2652371 (Bankr. D. Md. 2011); *In re White*, 282 B.R. 418 (Bankr. N.D. Ohio 2002); *In re Service*, 155 B.R. 512 (Bankr. E.D. Mo. 1993).

In re Mingledorff, 2015 WL 3897374 (Bankr. S.D. Ga., June 23, 2015)

(case no. 4:12-bk-41543) (Bankruptcy Judge Edward J. Coleman, III) Text of opinion

- **Chapter 7—Allowance of trustee's fee:** Because Code § 326(a) fixes the maximum compensation a court may award a Chapter 7 trustee, and bases that compensation on "all moneys disbursed or turned over in the case by the trustee to parties in interest," courts have struggled to find a legal basis for compensating a Chapter 7 trustee who has expended considerable effort in the performance of his or her statutory duties in an asset case that is converted to another chapter before the trustee has the opportunity to administer the assets. Because the Bankruptcy Code does not have a rule for how to calculate a Chapter 7 trustee's compensation in these circumstances, courts have developed six distinct theories for how to treat these situations. See *In re Philips*, 507 B.R. 2 (Bankr. N.D. Ga. 2014) ("More simply, these cases tend to fall into three main categories: some cases hold that the amount payable is zero when the trustee has made no disbursements; others hold that the cap simply does not apply to a case that is no longer a case under Chapter 7; still others hold that the cap applies but it is calculated based on funds distributed by any trustee after conversion to Chapter 13"). Here, the court concluded that, under § 326(a), the Chapter 7 trustee was not entitled to any compensation, even though the debtor consented to the trustee's $3,000 administrative allowance claim.

In re Park, 532 B.R. 392 (Bankr. M.D. Fla., June 19, 2015), **appeal filed**, Park v. Multibank 2009-1 RES-ADC Venture, LLC, Case No. 2:15-cv-414 (M.D. Fla., filed July 8, 2015)

(case no. 9:08-bk-2806) (Bankruptcy Judge Caryl E. Delano) Text of opinion

- **Discharge injunction—Debt "provided for" in Chapter 13 plan:** The Chapter 13 debtors' personal liability on a mortgage debt was not discharged under Code § 1328(a) where the only mention of the debt in the debtors' plan stated that the debtors would make the payments "outside the plan." Such a debt is not "provided for by the plan," the court concluded, and under § 1328(a) a discharge extends only to debts "provided for by the plan." Moreover, if the debt was provided for by the plan, it would come within the discharge exception in § 1328(a)(1) for a debt "provided for under section 1322(b)(5)," even if there were no arrearages paid under the plan.

In re Poole, 2015 WL 4039167 (Bankr. S.D. Ga., June 30, 2015)

(case no. 5:14-bk-50954) (Bankruptcy Judge John S. Dalis) Text of opinion

- **Property of the estate—Effect of prepetition foreclosure:** Under Georgia law, a security deed transfers legal title to the property conveyed to the grantee, leaving the grantor with equitable title including an equitable right of redemption by payment of the debt, and a debtor's equitable right of redemption is property of the bankruptcy estate. Whether a debtor's equitable right of redemption is terminated by a foreclosure sale is a question of state law, and, under Georgia law, a debtor's equitable right of redemption is terminated by a foreclosure sale held prior to the commencement of the debtor's bankruptcy case. See *In re Davis*, 1998 WL 34066146 (Bankr. S.D. Ga. 1998); *In re Grissom*, 1989 WL 1113450 (Bankr. S.D. Ga. 1989). See also *In re Williams*, 393 B.R. 813 (Bankr. M.D. Ga. 2008) (valid foreclosure sale divests all of the debtor's rights and title in the property); *In re Pearson*, 75 B.R. 254 (Bankr. N.D. Ga. 1985) (equity of redemption expires when the high bid is received at the foreclosure sale).

In re Powers, 534 B.R. 207 (Bankr. N.D. Fla., May 1, 2015)

(case no. 4:14-bk-40433) (Bankruptcy Judge Karen K. Specie) Text of opinion

- **Means test—Expenses—Secured debt expense:** A Chapter 7 debtor who is not actually making a secured debt payment on the petition date is not entitled to a secured debt expense deduction under the means test. The Supreme Court's reasoning in *Lanning* and *Ransom*, that the means test is designed to "ensure that [debtors] pay creditors the maximum they can afford," should apply with equal force in Chapter 7 cases. Congress intended the means test to approximate the debtor's reasonable expenditures on essential items. This can occur if a debtor is allowed a secured debt deduction only if he or she actually has an expense in that category. This interpretation employs the "snapshot approach" while using actual facts, not fiction; it also encompasses strengths of rulings on all sides of the issue. This reading of the statute does not rely on the debtor's statement of intentions, which is subject to change; nor does it require looking into a crystal ball to try to determine what the debtor's financial circumstances may be going forward. Reading the statute the way Congress drafted it amounts to looking at the debtor's true picture, or "snapshot" as of the petition date. Allowing a debtor to deduct payments she is not making is like looking at a "snapshot" of the debtor's finances that has been photoshopped to include the fictitious payments.

  Since *Lanning* and *Ransom* were decided, eight bankruptcy courts have allowed a Chapter 7 debtor to deduct a mortgage expense despite the debtor's intent to surrender the property. See *In re Navin*, 526 B.R. 81 (Bankr. N.D. Ga. 2015); *In re Johnson*, 503 B.R. 447 (Bankr. N.D. Ind. 2013); *In re Hardigan*, 2012 WL 9703097 (Bankr. S.D. Ga., Dec. 20, 2012); *In re Rivers*, 466 B.R. 558 (Bankr. M.D. Fla. 2012); *In re Behague*, 497 B.R. 340 (Bankr. M.D. Fla. 2012); *In re Sonntag*, 2011 WL 3902999 (Bankr. N.D. W.Va., Sept. 6, 2011); *In re Grinkmeyer*, 456 B.R. 385 (Bankr. S.D. Ind. 2011); *In re Ng*, 2011 WL 576067 (Bankr. D. Haw., Feb. 9, 2011). Six courts have not allowed the deduction, although for varying reasons. See *In re White*, 512 B.R. 822 (Bankr. N.D. Miss. 2014); *In re Hamilton*, 513 B.R. 292 (Bankr. M.D. N.C. 2014); *In re Krawczyk*, 2012 WL 3069437 (Bankr. E.D. N.C., July 27, 2012); *In*

re Fredman, 471 B.R. 540 (Bankr. S.D. Ill. 2012); *In re Sterrenberg*, 471 B.R. 131 (Bankr. E.D. N.C. 2012); *In re Thompson*, 457 B.R. 872 (Bankr. M.D. Fla. 2011).

In re Warren, 2015 WL 3505251 (Bankr. S.D. Fla., June 2, 2015)

(case no. 1:15-bk-11878) (Bankruptcy Judge A. Jay Cristol) Text of opinion

- **Chapter 13—Confirmation of plan—Calculation of projected disposable income:** Basing its analysis on Code § 707(b)(2)(A)(iii), the court held that, in calculating projected disposable income, an above-median Chapter 13 debtor may deduct amounts necessary to pay a secured debt only if the collateral for the debt is necessary for the support of the debtor and the debtor's dependents. If all secured debts were included in subsection (I) of § 707(b)(2)(A)(iii), which allows the deduction of "the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the filing of the petition," then there would be no need for subsection (II), which discusses additional payments that may be allowable expense deductions but limits them to payments on debts secured by collateral that is necessary for the support of the debtor and the debtor's dependents. It was clear to the court that both subsection (I) and (II) related to each other and were each limiting in their own respects with regard to permissible expenses. Thus, here, a luxury boat was not necessary for the support of the Chapter 13 debtor or his dependents, and the monthly expense to retain the boat was not an allowable expense for purposes of calculating disposable income.

- **Chapter 13—Confirmation of plan—Good faith under Code § 1325(a)(3):** Agreeing with *In re Hicks*, 2011 WL 2414419 (Bankr. N.D. Ala., June 15, 2011), the court held that an above-median Chapter 13 debtor's plan was not proposed in good faith for the purpose of Code § 1325(a)(3) where the debtor proposed to pay $255 monthly to retain a luxury boat that was not necessary for the support of the Chapter 13 debtor or his dependents. The debtor proposed to pay $15,330 over the pendency of the case towards his recreational boat while paying only $1,956 to his unsecured creditors. As the debtor listed a total of $145,353.84 in unsecured nonpriority claims, this equated to a total repayment of 1.34%.

In re Wells, 2015 WL 3862969 (Bankr. N.D. Ala., June 22, 2015)

(case no. 8:15-bk-80056; adv. proc. no. 8:15-ap-80015) (Bankruptcy Judge Clifton R. Jessup, Jr.) Text of opinion

- **Status of agreement as lease or security agreement:** The Alabama Motor Vehicle Lease Agreement entered into by the debtor was a true lease under Tenn. Code § 47–1–203(b). The debtor failed to establish that the lease agreement was a security interest because, regardless of whether the early termination provision was effective, the debtor failed to establish any one of the four conditions stated in § 47–1–203(b)(1)–(4).

In re White, 2015 WL 5011022 (Bankr. M.D. Ala., June 26, 2015)

(case no. 1:05-bk-12545; adv. proc. no. 1:13-ap-1119) (Chief Bankruptcy Judge William R. Sawyer) Text of opinion

- **Violation of discharge injunction:** Creditors are not permitted to circumvent the reaffirmation protections of Code § 524(c) by re-obligating the debtor post-discharge

or by disguising a reaffirmation as a novation. That a promissory note is dated after a discharge in bankruptcy is not determinative of whether its collection violates the discharge injunction. Rather, courts look at the consideration for the note. If any part of the consideration for a promissory note is a debt which was previously discharged in bankruptcy, collection of the note violates the discharge injunction. Even if a portion of the consideration for a new note is fresh consideration, collection of the note nevertheless violates the discharge injunction. The fresh consideration may have an impact on the remedy to be provided, but it does not excuse the violation of the discharge injunction.

Older case:

In re Kain, 2014 WL 10250731 (Bankr. N.D. Fla., Feb. 14, 2014)

(case no. 3:12-bk-31492) (Bankruptcy Judge Karen K. Specie) Text of opinion

- **Property of the estate—Exemptions—Under state law—Of homestead:** Where the debtor was residing in a building that she also used to conduct her medical practice, the debtor could claim a homestead exemption only in the portion of the property that functioned solely as the debtor's residence on the petition date. *In re Wilson*, 393 B.R. 778 (Bankr. S.D. Fla. 2008). Under this standard, the court found that only the bathroom and a portion of the "kitchen" in the property were exempt homestead.

District of Columbia Circuit (1) R

In re Wilkerson, 2015 WL 3935259 (Bankr. D. D.C., June 25, 2015), **appeal filed**, Case No. 1:15-cv-1199 (D. D.C., filed July 24, 2015)

(case no. 1:14-bk-582) (Bankruptcy Judge S. Martin Teel, Jr.) Text of opinion

- **Means test—Expenses:** When calculating an above-median-income Chapter 13 debtor's disposable monthly income, the debtor is only permitted to claim his or her actual expense, rather than the full amount of the deduction for home and transportation ownership expenses listed in the IRS Standards, if the debtor's actual expense is less than the amount listed in the IRS Standard. Comparing *In re Harris*, 522 B.R. 804 (Bankr. E.D. N.C. 2014) (debtor may deduct only actual expense) and *In re Daniel*, 2012 WL 3322438 (Bankr. M.D. Ala., May 30, 2012) (same) with *In re Miranda*, 449 B.R. 182 (Bankr. D. Puerto Rico 2011) (debtor may claim the full amount specified in the standard) and *In re Scott*, 457 B.R. 740 (Bankr. S.D. Ill. 2011) (same), the court said that it found *Harris* to be better-reasoned. *Harris* concluded that an expense amount is only "applicable" to a debtor to the extent it is actually incurred, with the IRS Standard serving merely as a cap on the amount of the deduction a debtor may claim, and the court agreed that this was a logical extension of the Supreme Court's decision in *Ransom v. FIA Card Services*, 562 U.S. 61, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011), which held that a debtor with no contractual expense could not take a vehicle ownership deduction in the means test. While the case involved a Chapter 13 debtor, the court's holding would seem to also apply in Chapter 7 cases.

This Issue's New Cases: Full Abstracts

Section One:
Nonchapter-Specific Materials

Part A

Automatic Stay

Existence of Stay

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Tax-collection notice did not come within stay exception at Code § 369(b)(9)(D):

Distinguishing *In re Centeno Sanchez*, 2013 WL 140453 (Bankr. D. Puerto Rico 2013), the court held that a notice sent to the debtor postpetition by the Puerto Rico Treasury Department was a threatened seizure that did not come within the exception to the automatic stay found at Code § 369(b)(9)(D) for "the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment." The notice stated that "We remind you that the law empowers the Secretary of the Treasury to use for the collection steps, mechanisms such as the embargo of personal property (including banking account; garnish of 25% of the wages of the taxpayer or real estate property with their auction afterward." See also *In re Otero–Lopez*, 492 B.R. 595 (Bankr. D. Puerto Rico 2013) ("post-petition notices that involve threats by a taxing authority to collect, garnish, lien and/or levy the debtor's property to secure pre-petition tax debts do not fall under the exception provided in Section 369(b)(9)(D)").

In re Carrasquillo Gonzalez, 532 B.R. 1 (Bankr. D. Puerto Rico, June 19, 2015)

(case no. 3:14-bk-1400; adv. proc. no. 3:14-ap-250) (Chief Bankruptcy Judge Enrique S. Lamoutte)

Text of opinion

Automatic stay protected debtors' possessory interest in residence despite prepetition state court judgment declaring debtors to hold no interest in residence:

Although a prepetition state court judgment had declared that the Chapter 13 debtors held no legal or equitable interests in their residence that could impede a creditor's foreclosure rights, and that finding was binding on the parties in the bankruptcy case under the *Rooker-Feldman* doctrine, the debtors obtained rights under the automatic stay when they filed their bankruptcy case, as their possessory interest in the residence was protected.

In re Wolfe, 534 B.R. 158 (Bankr. S.D. Ohio, June 19, 2015), appeal filed, Bank of New York Mellon v. Wolfe, Case No. 2:15-cv-2662 (S.D. Ohio, filed July 28, 2015)

(case no. 2:14-bk-54523) (Bankruptcy Judge Chares M. Caldwell)

Text of opinion


R

Relief from Stay

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Court conditionally denies relief from stay as to residence occupied by Chapter 13 debtors who claimed to have found residence "abandoned":

In an unusual case in which a creditor with an equitable lien on the Chapter 13 debtors' residence, imposed by a prepetition state court judgment, sought relief from stay for cause under Code § 362(d)(1) based on a lack of adequate protection, and in which the debtors asserted that they had been living in the residence for eight years after finding it "abandoned," and had received a quitclaim deed for the residence from a party claiming to be its former owner, the court gave the debtors three alternatives: (1) If the debtors filed a proposed modified Chapter 13 plan, premised upon and accompanied by a signed loan commitment to finance the home at the bankruptcy appraisal value of $191,000, the stay would continue in place until the court ruled on confirmation of the proposed plan. (2) If the debtors filed an itemized and fully-documented statement of real estate taxes and insurance premiums paid and improvements made to the home since occupancy, the court would enter a judgment order in favor of the debtors for the amount they had paid, upon proof of payment of which the creditor would be granted relief from stay to complete the foreclosure process. (3) Finally, if the debtors did not comply with the other alternatives, the creditor would be granted relief from stay to complete the foreclosure process. The creditor received a judgment in prepetition foreclosure proceedings, but the filing of the debtors' bankruptcy case precluded the foreclosure sale from being confirmed, which was required to incontestably transfer the property free of any preexisting interests under Ohio law. After the creditor withdrew its objection to confirmation of the debtors' original plan, the court confirmed the plan, which provided no payment to the creditor, but "audaciously" purported to vest the property solely in the debtors, free of the creditor's equitable lien. The court issued its present opinion after the creditor moved from relief from stay.

In re Wolfe, 534 B.R. 158 (Bankr. S.D. Ohio, June 19, 2015), **appeal filed**, Bank of New York Mellon v. Wolfe, Case No. 2:15-cv-2662 (S.D. Ohio, filed July 28, 2015)

(case no. 2:14-bk-54523) (Bankruptcy Judge Chares M. Caldwell)

Text of opinion

R

Violation of Stay

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Court awards $69,400 in compensatory and punitive damages for mortgage servicer's stay violation in sending Chapter 13 debtor two letters threatening foreclosure:

Where the Chapter 13 debtor's testimony demonstrated that she suffered "significant emotional distress" as a result of her mortgage servicer's sending her two letters threatening foreclosure following the debtor's bankruptcy filing, the court awarded the debtor $69,405 in damages for the servicer's violation of the automatic stay, consisting of $10,000 in emotional distress damages, $35,000 in punitive damages, and $24,405 in attorney's fees. Although the debtor offered no medical evidence corroborating her emotional distress, and the court had "always had a somewhat knee jerk reaction against awarding emotional distress damages without corroborating medical testimony or other evidence," the court said it found the debtor's testimony regarding her emotional distress to be very compelling. She testified that the stress and fear she suffered was enormous. When she received these letters from the servicer, she flew into a panic. She saw the servicer's agents coming by her home taking "inspection" photographs. As a very private person, she started spending all of her time in her bedroom, where they would not be able to photograph her. Within a couple of months with no resolution or communication from the servicer in response to her inquiries and only the receipt of the letters threatening foreclosure, she began losing weight, as she was having great difficulty eating and sleeping. Eventually, her hair began falling out in clumps, and she was grinding her teeth when she was able to sleep. As for punitive damages, the court determined that an amount roughly equal to the amount of compensatory damages was appropriate, where the servicer, a bank, was a sophisticated institution that had over $316 million in assets and a net worth of over $89 million, and the servicer had asserted frivolous defenses to an obvious stay violation.

In re Ogden, Case No. 1:11-bk-19841 (Bankr. D. Colo., June 1, 2015), appeal filed, Case No. 1:15-cv-1274 (D. Colo., filed June 16, 2015)

(Bankruptcy Judge Elizabeth E. Brown)

Text of opinion

Elements of violation of automatic stay:

For a debtor to recover damages for a violation of the automatic stay, the debtor must establish five elements: (1) that a bankruptcy petition was filed, (2) that the debtor is an individual, (3) that the creditor received notice of the petition, (4) that the creditor's actions were in willful violation of the stay, and (5) that the debtor suffered damages.

Preponderance of evidence standard applies in proving violation of stay:

Receding from *In re Brockington*, 129 B.R. 68 (Bankr. D. S.C. 1991), which had adopted the clear and convincing evidence standard for proving a violation of the automatic stay, and instead adopting a preponderance of the evidence standard, the court said that it found persuasive the reasoning set forth by the Tenth Circuit in *In re Johnson*, 501 F.3d 1163 (10th Cir. 2007).

Creditor received notice of debtor's bankruptcy filing:

A creditor that repossessed the Chapter 13 debtor's motor vehicle postpetition was presumed to have had notice of the debtor's bankruptcy filing, although the creditor contended that he did not receive notice of the case because the debtor's notice was mailed to his business street address and not to the post office box address that he maintained for receiving mail for his business. The creditor testified that mail sent to the business street address was frequently lost by the U.S. Postal Service, and therefore, he notified all of his clients, including the debtor, to mail all correspondence to his post office box address. However, courts have generally held that mailing creates a presumption of receipt, and, while this presumption may be overcome by evidence that the mailing was not actually accomplished, the mere denial of receipt is insufficient. Here, no evidence was presented to indicate that the debtor did not properly mail the notice to the creditor or that the mail was returned as undeliverable.

Court awards damages for creditor's repossession of debtor's vehicle:

Where a creditor repossessed the Chapter 13 debtor's vehicle following her bankruptcy filing and intentionally retained the vehicle for four days after receiving notice of the filing and then required payment from the debtor as a condition for the return of the vehicle, the creditor willfully violated the stay, and the court awarded actual damages of $546.96, representing $435 the debtor was required to pay the creditor in order to recover the vehicle and $111.96 as the estimated cost for the rental of a similar vehicle for four days, even though the debtor did not actually rent a substitute vehicle. The court also awarded $500 for emotional distress resulting from delay in required medical treatment caused by the lack of a car, punitive damages of $2,000, and attorney's fees of $8,200.

Creditor's friend who assisted in vehicle repossession was not liable for stay violation:

A friend of the creditor who assisted in the repossession of the Chapter 13 debtor's vehicle postpetition was not liable for a willful violation of the automatic stay, as the debtor did not provide sufficient evidence to allow the court to impose liability upon the friend based upon principles of agency, partnership, or joint venture, and, in any event, the friend, who was not a creditor of the debtor's, was not shown to have received notice of the debtor's bankruptcy filing.

In re Warren, 532 B.R. 655 (Bankr. D. S.C., June 29, 2015)

(case no. 3:14-bk-3600; adv. proc. no. 3:14-ap-80101) (Bankruptcy Judge John E. Waites)

Text of opinion

Postpetition letter informing debtor that account had been sold did not violate stay:

An unsecured creditor did not violate the automatic stay by mailing a letter to the Chapter 13 debtor, about five weeks after his bankruptcy filing, that simply informed the debtor that his account had been sold to another entity and that payments should be made to the second entity at the address specified in the letter. Concluding that the letter was not an attempt to collect a prepetition debt, but was merely an informative letter from a predecessor creditor disclosing the name and address of a successor creditor, the court said that Code § 362 should not be misinterpreted to prohibit all contact between creditors and debtors after a bankruptcy petition has been filed.

In re Crespo Torres, 532 B.R. 195 (Bankr. D. Puerto Rico, June 22, 2015)

(case no. 3:14-bk-1611; adv. proc. no. 3:14-ap-127) (Chief Bankruptcy Judge Enrique S. Lamoutte)

Text of opinion

Mortgage servicer's maintenance of two sets of books for Chapter 13 debtor's account did not violate automatic stay:

Given the "limited scope" of a bankruptcy court's role in supervising mortgage lenders, the court concluded that the Chapter 13 debtor's mortgage servicer's conduct in maintaining two sets of books, one reflecting accounting for the debtor's account as dictated by the Bankruptcy Code, and a second one reflecting accounting under the parties' contract without reference to bankruptcy, did not violate the automatic stay or the court's Chapter 13 plan confirmation order, where the servicer said that it would adhere to the bankruptcy accounting if the debtor successfully completed her plan and obtained a discharge.

In re Ogden, 532 B.R. 329 (Bankr. D. Colo., April 3, 2014)

(case no. 1:11-bk-19841; adv. proc. no. 1:13-ap-1054) (Bankruptcy Judge Elizabeth E. Brown)

Text of opinion

Comment: This is an older decision that has only recently become available.

Debtors' testimony was sufficient to support award of emotional distress damages and damages for medical expenses caused by stay violation:

The bankruptcy court did not err in awarding the Chapter 11 debtors $31,500 in damages for a creditor's willful violation of the automatic stay, consisting of $8,000 in damages for medical expenses, $15,000 in emotional distress damages, $7,500 in punitive damages, and $1000 in attorney's fees, despite the lack of expert medical evidence. The debtors testified that, while the debtor husband had pre-existing high blood pressure, after the creditor filed a postpetition lawsuit against them, the husband began to notice physical symptoms that he had not previously experienced, was subsequently diagnosed with atrial fibrillation, and incurred more than $9,000 in medical bills in connection with this heart problem. While the fact that the husband developed atrial fibrillation after learning of the lawsuit was only circumstantial evidence that the lawsuit caused the heart condition, circumstantial evidence is as probative as direct evidence, and the creditor did not identify a single case holding that a plaintiff is required to provide expert medical testimony to establish causation. This provided a basis for the award of damages for medical expenses, and the debtors' testimony was likewise sufficient to support an award of emotional distress damages.

Haugen v. Murray, 2015 WL 3864879 (N.D. Cal., June 22, 2015)

(case no. 3:14-cv-3638) (District Judge Vince Chhabria)

Text of opinion

Mortgage creditor's letter in response to debtor's inquiry concerning loan modification did not violate automatic stay:

A letter from the Chapter 7 debtor's mortgage creditor, sent while the case was still open, stating that her loan modification request was still under review and that "all normal collection/foreclosure/bankruptcy processes may continue uninterrupted during this time period," and encouraging the debtor to "continue to make monthly mortgage payments," did not violate the automatic stay. The language of the letter did not show a willful attempt to collect a debt from the debtor; rather, the letter was a response to the debtor's loan modification request, and the language quoted by the debtor was merely boilerplate language stating that the status quo continued. See *Redmond v. Fifth Third Bank*, 624 F.3d 793 (7th Cir. 2010) (a creditor's sending the debtor a letter in response to an inquiry from the debtor was not an attempt to collect payment and, therefore, did not violate the automatic stay).

Waterhouse v. Wells Fargo Home Mortgage, 2015 WL 3867005 (M.D. Fla., June 23, 2015)

(case no. 8:14-cv-2794) (District Judge Elizabeth A. Kovachevich)

Text of opinion

R

Part B

Dischargeability

Domestic Support Obligations; Other Marital Debts

Topical compilation:
PDF Word
All topical compilations
All circuit compilations

Attorney's fee award in child custody litigation was not domestic support obligation:

An attorney's fee award entered against the Chapter 7 debtor for filing a meritless motion to show cause in state-court child custody litigation with her former husband, with no finding of her former husband's need for support or the debtor's ability to pay it, was imposed to punish the debtor for her meritless filing and to deter similar conduct by others, and not to provide support for the spouses' child. Accordingly, the attorney's fee award was not a domestic support obligation.

In re Olsson, 532 B.R. 810 (D. Or., June 17, 2015)

(case no. 6:14-cv-1686) (Chief District Judge Ann L. Aiken)

Text of opinion

Annulment of marriage rendered Code § 523(a)(15) inapplicable to debt to former spouse:

Because an annulment relates back to make a marriage void ab initio, the debtor's former husband was not her "former spouse" under Code § 523(a)(15), and the debtor's obligations under a Consent Decree of Annulment entered in the parties' prepetition marital dissolution proceeding were not nondischargeable under § 523(a)(15). See *In re Ellsworth*, 2014 WL 172414 (Bankr. D. Utah 2014); *In re Talbot*, 1999 WL 33485634 (Bankr. D. S.C. 1999).

In re Castellanos, 2015 WL 3856368 (Bankr. D. Ariz., June 18, 2015)

(case no. 2:14-bk-8206; adv. proc. no. 2:14-ap-726) (Chief Bankruptcy Judge Daniel P. Collins)

Text of opinion

R

Student Loan Debts

Topical compilation: All topical compilations

PDF Word All circuit compilations

Student loan dischargeability proceeding filed six months into Chapter 13 case with 60-month plan term was not yet ripe:

The Chapter 13 debtors' adversary proceeding seeking a determination that their student loan debt should be included in the debtors' discharge was not yet ripe, where the debtors filed the proceeding six months into a 60-month plan term. The discharge exception of Code § 523(a)(8) required the court to project the hardship to the debtor if the student loan was not discharged, the court reasoned, and, in a Chapter 13 case, Code § 1328(a) provided that a discharge did not occur until the completion of plan payments. The Code thereby contemplated that the undue hardship finding would be based upon a projection of the debtor's anticipated post-bankruptcy financial circumstances. Generally, this projection was best made when all of the debtor's pre-discharge financial circumstances were known and the post-bankruptcy period was imminent. Projecting whether the payment of student loans after discharge would cause an undue hardship was at best a difficult process; hearing the matter years before the beginning of the projection period would only compound the difficulty.

In re Murray, 2015 WL 3929582 (Bankr. D. Kan., June 24, 2015)

(case no. 2:14-bk-22253; adv. proc. no. 2:15-ap-6016) (Bankruptcy Judge Dale L. Somers)

Text of opinion

R

Other Debts

Scope note: Coverage is quite selective.

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Elements of nondischargeability under Code § 523(a)(2)(A):

To have a debt determined to be nondischargeable under Code § 523(a)(2)(A), the five elements that must be established are (1) the debtor must make an express or implied false representation; (2) the representation must be made with knowledge that it was false at the time it was made; (3) the false representation must be made with the intent to deceive; (4) the creditor must have justifiably relied upon the debtor's misrepresentation(s); and (5) the creditor must establish that he was damaged.

Creditors could not justifiably rely on debtor's misrepresentations after viewing tax return with obvious discrepancies:

Although the debtor made misrepresentations to two creditors who invested in a business operated by a friend of the debtor, the creditors could not justifiably rely on the debtor's misrepresentations, for the purpose of Code § 523(a)(2)(A), because prior to making the investments the creditors had been shown a tax return for the business that had obvious discrepancies. Once the creditors became aware of the inaccuracies contained within the document, they could no longer blindly rely on the debtor's representations. After that point, they had a duty to investigate whether the tax return accurately reflected the profits and losses of the business. Had they asked for the final version of this return, or of prior years' returns, they would surely have discovered that the business did not make anywhere near the numbers contained in the fraudulent return. Having failed to undertake this investigation, the creditors could not now say that their reliance on the debtor's representations was justified.

In re Scialdone, 533 B.R. 53 (Bankr. S.D. N.Y., June 18, 2015)

(case no. 4:12-bk-36086; adv. proc. no. 4:12-ap-9061) (Chief Bankruptcy Judge Cecelia G. Morris)

Text of opinion

State-court judgment debt was not necessarily nondischargeable under Code § 523(a)(6):

In two cases, the Ninth Circuit Bankruptcy Appellate Panel held that the bankruptcy court erred in ruling that a state-court judgment debt was nondischargeable under Code § 523(a)(6) on the basis of collateral estoppel:

In re Sangha, 2015 WL 3655113 (9th Cir. B.A.P., June 11, 2015), appeal filed, Case No. 15-60057 (9th Cir., filed August 4, 2015) (award of punitive damages in state-court defamation action did not establish debtor's malice for purpose of Code § 523(a)(6))

(case no. 141397)

Text of opinion

In re Grenier, 2015 WL 3622712 (9th Cir. B.A.P., June 10, 2015) (state-court judgment against debtor for financial abuse of an elder did not establish willful and malicious injury for purpose of Code § 523(a)(6))

(case no. 141396)

Text of opinion

Creditor in nondischargeability proceeding must establish existence of debt:

In a nondischargeability proceeding, the bankruptcy court must address two separate questions: first, whether the plaintiff/creditor holds an enforceable obligation against the debtor, and second, whether the debt is nondischargeable under a provision of the Bankruptcy Code.

Judgment debt for intentional infliction of emotional distress was nondischargeable under Code § 523(a)(6):

The debtor's conduct with respect to the judgment creditors was both malicious and willful, and a state court judgment against the debtor for intentional infliction of emotional distress under Pennsylvania law was nondischargeable under Code § 523(a)(6), where the debtor sought to drive the creditors out of their shared neighborhood by filing ten spurious complaints in state court against the creditors and over 30 complaints with the police department that resulted in no charge or citations against the creditors.

In re Mauz, 532 B.R. 589 (Bankr. M.D. Pa., June 30, 2015), appeal filed, Mauz v. Link, Case No. 1:15-cv-1363 (M.D. Pa., filed July 13, 2015)

(case no. 1:12-bk-6672; adv. proc. no. 1:13-ap-53) (Bankruptcy Judge Robert N. Opel, II)

Text of opinion

Bankruptcy court rejects *McCoy* rule regarding status of late-filed tax returns:

Rejecting the *McCoy* rule, despite its adoption by three Courts of Appeals, the bankruptcy court held, in a strong, well-reasoned opinion, that the debtor's late-filed tax return was a "return" for the purpose of Code § 523(a)(1). The court reasoned that the "draconian result" occasioned by excluding from discharge the debt arising from a late-filed tax return was inconsistent with the principal purpose of the Bankruptcy Code, namely, to grant a fresh start to the honest but unfortunate debtor. The court said that it agreed with the dissent in *In re Fahey*, 779 F.3d 1 (1st Cir 2015) that the majority's position "defies common sense."

Two-year lookback period in Code § 523(a)(1)(B)(ii) runs from date of original, rather than amended, tax return when amended return reduces debtor's liability:

At least when a debtor's amended tax return reduces his or her tax liability, the two-year lookback period in Code § 523(a)(1)(B)(ii), which renders nondischargeable a tax debt arising from a tax return that was filed late and within two years of the bankruptcy petition date, runs from the date of the debtor's original tax return, not from the date of the debtor's subsequent amended return. See *In re Lamborn*, 204 B.R. 999 (Bankr. N.D. Okla. 1997); *In re Greenstein*, 95 B.R. 583 (Bankr. N.D. Ill. 1989).

Tax debt did not come within Code § 507(a)(8)(A)(iii):

Because the court had already found that the debtor's 2008 state income tax debt was a "tax of a kind specified in section 523(a)(1)(B)," Code § 507(a)(8)(A)(iii) was, by its own terms, inapplicable, as the introductory language of § 507(a)(8)(A)(iii) renders it applicable to taxes "other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title." Accordingly, the debtor's 2008 tax debt was not nondischargeable under Code § 523(a)(1)(A), which renders nondischargeable a debt for a tax "of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title."

In re Maitland, 531 B.R. 516 (Bankr. D. N.J., June 10, 2015)

(case no. 3:13-bk-10024; adv. proc. no. 3:14-ap-1704) (Chief Bankruptcy Judge Kathryn C. Ferguson)

Text of opinion

Elements of nondischargeability claim under Code § 523(a)(2)(A):

A nondischargeability claim under Code § 523(a)(2)(A) requires the creditor to prove four elements: (1) a fraudulent misrepresentation; (2) that induces another to act or refrain from acting; (3) causing harm to the creditor; and (4) the creditor's justifiable reliance on the misrepresentation. *In re Biondo*, 180 F.3d 126 (4th Cir. 1999).

Judgment for debtor on state-court fraud claim did not collaterally estop creditor from asserting that debt was nondischargeable under Code § 523(a)(2)(A):

Because the issues decided in a prepetition North Carolina Superior Court judgment concluding that the debtor was liable for damages for breach of contract but not for fraud or unfair and deceptive practices were not identical to those to be determined in the creditor's proceeding under Code § 523(a)(2)(A), the state-court judgment did not collaterally estop the creditor's nondischargeability proceeding. Fraud under North Carolina law requires proof of an intent to deceive, but this is not required under § 523(a)(2)(A).

In re Norvell, 2015 WL 3648674 (Bankr. W.D. N.C., June 11, 2015)

(case no. 3:14-bk-31313; adv. proc. no. 3:14-ap-3146) (Bankruptcy Judge J. Craig Whitley)

Text of opinion

Failure to tell creditor that financial projections had not been realized did not come within Code § 523(a)(2):

The debtors' failure to tell the creditor, when he invested $100,000 in their business in October 2006, that financial projections made in a November 2005 business plan had not been realized was not encompassed by either Code § 523(a)(2)(A) or (B). The nondisclosure did not come within § 523(a)(2)(A) because it was excluded as "a statement respecting the debtor's or an insider's financial condition," and it did not come within § 523(a)(2)(B) because it was not in writing.

In re Bentley, 531 B.R. 671 (Bankr. S.D. Tex., June 3, 2015)

(case no. 4:12-bk-36352; adv. proc. no. 4:13-ap-3012) (Bankruptcy Judge Karen K. Brown)

Text of opinion

Court rejects *McCoy* rule with regard to late-filed tax returns:

Rejecting the *McCoy* rule with regard to late-filed tax returns, the court held that, instead, the hanging paragraph of Code § 523(a) requires a court to look to relevant nonbankruptcy law to determine what qualifies as an acceptable return under that law. This approach is consistent with the plain language of the hanging paragraph, preserves the viability of the nondischargeability provisions for taxes found in Code §§ 523(a)(1)(B)(ii) and (a)(1)(C), and is consistent with the long-standing principle that § 523(a) exceptions to discharge are to be strictly construed in favor of the debtor. It also takes into account that tax codes do not generally require a perfectly-prepared tax document, compliant with all aspects of the tax code and its filing requirements, in order for that document to qualify as a return. See *Badaracco v. Commissioner*, 464 U.S. 386, 104 S.Ct. 756, 78 L.Ed.2d 549 (1984) ("a document which on its face plausibly purports to be in compliance, and which is signed by the taxpayer, is a return despite its inaccuracies").

Court applies *Beard* test as "applicable nonbankruptcy law" under hanging paragraph of Code § 523(a):

Looking to the tax code of the City of Kettering, Ohio, as the "applicable nonbankruptcy law" under the hanging paragraph of Code § 523(a) because the dischargeability of the debtors' city income tax debt was at issue, the court observed that, while the city's Tax Code included various reporting requirements and a deadline, the city pointed to no formal definition of what qualified as an acceptable "return" in the Tax Code, nor was one found in its definitional section. Furthermore, the Tax Code contained no explanation of how accurate, thorough, or complete a form needed to be to qualify as a return, nor did it specify when a late form would no longer qualify as a return under the tax law. Accordingly, the court would apply the *Beard* test, as adopted in *In re Hindenlang*, 164 F.3d 1029 (6th Cir. 1999) for federal tax returns, to determined whether the debtors' city income tax returns, which greatly understated the debtors' income, and one of which was filed late, to determine whether they qualified as "returns" for the purpose of Code § 523(a)(1).

In re McBride, 534 B.R. 326 (Bankr. S.D. Ohio, April 9, 2015)

(case no. 3:11-bk-30672; adv. proc. no. 3:13-ap-3215) (Bankruptcy Judge Lawrence S. Walter)

Text of opinion

Contractor's debt under Wisconsin contractor trust fund statute was nondischargeable under Code § 523(a)(4) as both fraud and defalcation by a fiduciary:

Affirming *Sveum v. Stoughton Lumber Co., Inc.*, 2014 WL 4748555 (W.D. Wis., Sept. 23, 2014), the Court of Appeals held that the debt owed by the debtor, an owner of a home-building company, to a materials supplier was nondischargeable under Code § 523(a)(4) as both fraud and defalcation by a fiduciary, where the debtor violated the Wisconsin contractor trust fund statute by failing to pay the materials supplier from funds paid by the owners of the houses built by the company. Under the statute, the company was required to hold its revenues from sales of the homes in trust until the firm's subcontractors, such as the materials supplier, were paid, but the company failed to do so. While the debtor contended that he committed an innocent mistake by failing to pay the materials supplier, the Court of Appeals said that evidence of the debtor's recklessness abounded.

Stoughton Lumber Co. v. Sveum, 787 F.3d 1174 (7th Cir., June 4, 2015)

(case no. 14-3339)

Text of opinion

Doctrine of unclean hands did not preclude determination that debt was nondischargeable:

Reversing *Northbay Wellness Group, Inc. v. Beyries*, 2012 WL 4120409 (N.D. Cal., Sept. 18, 2012), which had affirmed *In re Beyries*, 2011 WL 5975445 (Bankr. N.D. Cal., Nov. 29, 2011), the Court of Appeals held that the wrongdoing of the debtor, an attorney who stole $25,000 from a judgment creditor that was a California medical marijuana dispensary, outweighed that of the creditor, such that the doctrine of unclean hands did not preclude a determination that the creditor's state-court judgment against the debtor of nearly $350,000 was nondischargeable under Code § 523(a)(4).

Northbay Wellness Group, Inc. v. Beyries, 789 F.3d 956 (9th Cir., June 5, 2015)

(case no. 13-17381)

Text of opinion

Bankruptcy court erred in finding that debtor's property transfers created debt that was nondischargeable under Code § 523(a)(6):

Vacating *In re Betancourt*, 2013 WL 6798942 (Bankr. C.D. Cal., Dec. 20, 2013), the Bankruptcy Appellate Panel held that the bankruptcy court erred in ruling that the debtor inflicted a willful and malicious injury, within the meaning of Code § 523(a)(6), on a creditor of the debtor's wholly-owned corporation by causing the corporation to transfer three parcels of real property to third parties while the creditor's litigation for breach of contract by the corporation, in which the creditor ultimately received a default judgment, was pending, with the debtor's alleged purpose being to deprive the creditor of real property against which he could record judgment liens. The BAP reasoned that (1) it was unclear whether the bankruptcy court applied the required subjective standard in finding a willful injury; (2) in order to cause "injury ... to another entity" under § 523(a)(6), the court must make a finding that the debtor's transfers of property inflicted a willful and malicious injury that could give rise to a legal right to payment from the debtor, but, under California law, a creditor's remedies for fraudulent transfer were generally non-monetary in nature; (3) in order to support the ruling on the basis that there had been an injury to the creditor's property, the bankruptcy court needed to make a finding that the creditor had an established property interest in the transferred parcels; and (4) it was unclear whether the bankruptcy court reasoned that the debtor's property transfers created a new independent debt or whether the transfers transmuted the otherwise dischargeable breach of contract judgment debt into a nondischargeable debt arising from willful and malicious injury.

In re Betancourt, 2015 WL 3500322 (9th Cir. B.A.P., June 3, 2015)

(case no. 14-1010)

Text of opinion

Debtor's promise to pay divorce attorney was not fraudulent under Code § 523(a)(2)(A):

An attorney who represented the debtor in prepetition divorce proceedings did not establish that the debtor's promise to pay him were false, for the purpose of Code § 523(a)(2)(A), where the debtor made payments totaling $3,600, although this left a balance of about $15,000, and the debtor did not file for bankruptcy until December 4, 2012—over a year and a half after her deposition testimony in which she testified that she had spoken to a bankruptcy attorney, and over two years after she retained the attorney as her counsel in the divorce proceeding.

In re Bernard, 2015 WL 4028237 (D. N.J., June 30, 2015)

(case no. 3:14-cv-6484) (District Judge Michael A. Shipp)

Text of opinion

State-court judgment for fraud under Florida common law supports nondischargeability under Code § 523(a)(2)(A):

Fraud under Florida law and the requirements of Code § 523(a)(2)(A) are so closely mirrored that they are "sufficiently identical" for collateral estoppel purposes. *In re St. Laurent*, 991 F.2d 672 (11th Cir. 1993).

"Receipt of benefits" test determines nondischargeability under Code § 523(a)(2)(A) where debtor did not personally receive money or property obtained by fraud:

Amending and superseding *In re DeMasi*, 522 B.R. 696 (Bankr. M.D. Fla., Dec. 9, 2014), the bankruptcy court held that the "receipt of benefits" test is the proper way to determine the application of Code § 523(a)(2)(A), which applies "to the extent" money, property, services, or credit were "obtained by ... false pretenses, a false representation, or actual fraud." Under this test, Code § 523(a)(2)(A) applies when the debtor "gains a benefit" from the money, property, services, or credit that was obtained by fraudulent means, even if the debtor does not personally receive the money, property, services, or credit; this benefit can be either direct or indirect. *In re Ashley*, 903 F.2d 599 (9th Cir. 1990); *In re Bilzerian*, 100 F.3d 886 (11th Cir. 1996). See also *In re Luce*, 960 F.2d 1277 (5th Cir. 1992) (one partner's fraud was imputed to second partner, who did not know of fraud, because second partner benefitted from first partner's fraud); *In re Ledford*, 970 F.2d 1556 (6th Cir. 1992) (same). Here, the debtor received the benefit of his fraud in several ways, so a state-court judgment debt for fraud under Florida common law was nondischargeable under § 523(a)(2)(A).

In re DeMasi, 2015 WL 3956135 (Bankr. M.D. Fla., June 26, 2015), **appeal filed**, DeMasi v. Kondapalli, Case No. 8:15-cv-1744 (M.D. Fla., filed July 28, 2015)

(case no. 8:13-bk-8406; adv. proc. no. 8:13-ap-889) (Bankruptcy Judge Michael G. Williamson)

Text of opinion

R

Other Issues

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Court would dismiss nondischargeability proceeding after denying Chapter 7 debtor's discharge:

It is almost universally agreed that, when a debtor is denied a discharge, any action to determine the dischargeability of individual debts becomes moot. See, e.g, *In re Martinez*, 500 B.R. 608 (Bankr. N.D. Cal. 2013); *In re Adler*, 494 B.R. 43 (Bankr. E.D. N.Y. 2013). However, a number of courts have held that bankruptcy courts may have continuing jurisdiction in nondischargeability proceedings under Code § 523(a) notwithstanding a denial or a waiver of the debtor's discharge, under the three-factor test enunciated in *In re Morris*, 950 F.2d 1531 (11th Cir. 1992). See *In re Neves*, 2012 WL 1831717 (S.D. Fla., May 17, 2012); *In re Carter*, 2012 WL 3440431 (Bankr. M.D. Ga., August 15, 2012). The three factors are (1) judicial economy; (2) fairness and convenience to the litigants; and (3) the degree of difficulty of the related legal issues involved. While the Fourth Circuit had not adopted the *Morris* test, the court would apply it, and under that test, the court said it was compelled to dismiss the adversary proceeding without prejudice after the court had denied the Chapter 7 debtor's discharge in a separate adversary proceeding.

In re Labgold, 532 B.R. 276 (Bankr. E.D. Va., June 16, 2015)

(case no. 1:13-bk-13389; adv. proc. no. 1:14-ap-1043) (Bankruptcy Judge Brian F. Kenney)

Text of opinion

Creditor's entitlement to attorney's fees in nondischargeability proceeding, generally:

A creditor that successfully contests the dischargeability of its claim in an adversary proceeding under Code § 523 is entitled to recover attorney's fees if it has a contractual right to the fees under state law. *In re Luce*, 960 F.2d 1277 (5th Cir. 1992).

In re McWilliams, 610 Fed. Appx. 393 (5th Cir., June 26, 2015)

(case no. 15-10122)

Text of opinion

"Mailbox rule" does not apply to filing of nondischargeability complaint:

The "mailbox rule" does not apply to the filing of nondischargeability complaints under Code § 523(a). The Fifth Circuit has long held that "compliance with a filing requirement is not satisfied by mailing the necessary papers within the allotted time. The papers must be filed by the clerk within the filing period specified in the applicable rule or order." *Lee v. Dallas Cty. Bd. Of Ed.*, 578 F.2d 1177 (5th Cir. 1978). Even if a party deposits a filing with the postal service for delivery prior to the deadline, if the clerk does not receive the filing before the deadline passes, the filing is not timely and dismissal is appropriate.

Court lacked discretion to apply equitable tolling to timeliness of nondischargeability complaint:

The time limit to file complaints to determine dischargeability of debts is strictly construed. The court has no discretion to extend the deadline after it expires, even for excusable neglect, including unreasonable and unexpected postal delays. Courts are not unanimous in rejecting postal service-related equitable tolling, but the cases in which courts grant equitable tolling are either heavily criticized or are otherwise unpersuasive. The strict construction of the deadline protects the debtor's fresh start and ensures the prompt administration of the case. Thus, equitable tolling did not apply to render timely a pro se creditor's nondischargeability complaint, which he mailed eight days prior to the deadline for delivery to the clerk's office no more than 20 miles away, and yet was not delivered for eleven days, three days after the deadline.

In re Garner, 2015 WL 3825979 (Bankr. N.D. Tex., June 18, 2015)

(case no. 4:13-bk-44563; adv. proc. no. 4:15-ap-4019) (Bankruptcy Judge D. Michael Lynn)

Text of opinion

R

Part C

Jurisdiction and Procedure

Adversary Procedure

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

There are no cases in this issue.

R

Appellate Procedure

Appeal from order on reconsideration as encompassing underlying order:

An appeal from an order denying reconsideration is generally not considered to be an appeal from the underlying judgment. *Chamorro v. Puerto Rican Cars, Inc.*, 304 F.3d 1 (1st Cir. 2002). However, there are two exceptions to this rule. One is when it is clear that the appellant intended to appeal both orders, and where both parties brief issues relating to the underlying judgment. The second is where the case involves an appeal of an order resolving a motion under Fed. R. Civ. Pro. 59, the timely filing of which tolls the appeal period for the underlying order by operation of Bankruptcy Rule 8002(b)(1)(B) or (C). This result may not occur on an appeal from an order disposing of a Rule 60(b) motion unless that motion is filed within 14 days of the underlying judgment.

Appeal encompassed only order denying motion for reconsideration, and not underlying order:

Here, where the appellant did not file his Motion for Reconsideration until 22 days after the order of which he sought reconsideration, the filing of the motion did not toll the appeal period for the underlying order. Thus, even if the appellant had included the underlying order in his notice of appeal, it would have been untimely. Accordingly, the panel's review was limited to the order denying reconsideration.

Valuation of estate property is question of fact reviewed for clear error:

Valuation of an asset of the bankruptcy estate is a question of fact reviewed for clear error.

Clearly erroneous standard, generally:

A factual finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *In re IDC Clambakes, Inc.*, 727 F.3d 58 (1st Cir. 2013).

In re Garcia, 532 B.R. 173 (1st Cir. B.A.P., June 24, 2015)

(case nos. 14-64, 14-71)

Text of opinion

Courts disagree as to how party's attorney must be specified in notice of appeal where appeal is by attorney rather than by party:

Where it is an attorney rather than a party who wishes to appeal an order, there is a split in authority on just what the notice of appeal must say. *Matter of Case*, 937 F.2d 1014 (5th Cir. 1991) held that Bankruptcy Rule 8001(a) only requires that the notice include the name of the appellant-attorney somewhere, even if it does not explicitly designate the attorney, as opposed to his or her client, as the appealing party. However, at least one court in this district has rejected that reasoning, holding that the Fifth Circuit's reading of Rule 8001(a) departed from the rule's text. See *In re Pettibone Corp.*, 145 B.R. 570 (N.D. Ill. 1992), which held that the attorney's name must be specified as the appellant in either the caption or the body of the notice of appeal to make the notice of appeal valid. Here, however, the court did not need to decide the issue, as the notice of appeal filed by the debtor's attorney passed muster under either standard.

In re Kuttner, 2015 WL 3578966 (N.D. Ill., June 8, 2015)

(case no. 1:15-cv-980) (District Judge Edmond E. Chang)

Text of opinion

R

Other Procedural Issues

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Debtor was not judicially estopped from prosecuting unlisted prepetition cause of action that had been unknown to debtor:

The Chapter 7 debtor was not judicially estopped from prosecuting his prepetition cause of action for wrongful foreclosure under the Servicemembers' Civil Relief Act, although he failed to list it in his bankruptcy schedules, where the debtor testified that, when he filed for bankruptcy in 2011, he was unaware that he had a potential cause of action. It was not until sometime in 2012, after receiving a notification from the U.S. Department of Justice that the debtor's mortgage creditor, among other banks, may have wrongfully foreclosed upon service members in violation of the SCRA that the debtor suspected he might have a cause of action. The debtor testified that, following receipt of that mailing, he reached out to the creditor and the Department of Justice, and also performed Internet research, to try to determine if he actually had a claim against the creditor. It was not until 2013, after the debtor had spoken with an attorney on his military base who advised him to seek counsel, that he realized he had an actual cause of action.

Sibert v. Wells Fargo Bank, N.A., 2015 WL 3946698 (E.D. Va., June 26, 2015)

(case no. 3:14-cv-737) (District Judge Henry E. Hudson)

Text of opinion

Debtor's disclosures in bankruptcy case were sufficient to avoid judicial estoppel:

The Chapter 7 debtor was not judicially estopped from pursuing litigation against his automobile insurer for failure to provide underinsured motorist (UIM) benefits for a prepetition accident in which the debtor had been injured, where the debtor disclosed a possible cause of action for a personal injury in an unknown amount in his Schedule B, and at the meeting of creditors the debtor's wife disclosed that they were still pursuing UIM benefits for an automobile accident, although the debtor failed to disclose that the insurer had made a $20,000 settlement offer to him, or that he was seeking $400,000.

Porter v. Am. Family Mut. Ins. Co., 2015 WL 3896759 (D. Colo., June 23, 2015)

(case no. 1:13-cv-3446) (Senior District Judge Wiley Y. Daniel)

Text of opinion

Reconsideration under Rule 60(b)(6) requires exceptional circumstances:

Rule 60(b)(6) motions should be granted only where exceptional circumstances justifying extraordinary relief exist. Additionally, a 60(b)(6) movant must make a suitable showing that the movant has a meritorious claim. *Ahmed v. Rosenblatt*, 118 F.3d 886 (1st Cir. 1997).

Court did not err in denying reconsideration without holding evidentiary hearing:

The bankruptcy court has the discretion to decide an issue without holding an evidentiary hearing, and, here, the bankruptcy court did not abuse its discretion in denying the creditor's motion for reconsideration without holding an evidentiary hearing, where the creditor made a bare request for such a hearing and the matter involved the debtor's amending his schedules, to which Bankruptcy Rule 1009 adopts a permissive approach.

In re Garcia, 532 B.R. 173 (1st Cir. B.A.P., June 24, 2015)

(case nos. 14-64, 14-71)

Text of opinion

Creditor received notice of debtor's bankruptcy filing:

A creditor that repossessed the Chapter 13 debtor's motor vehicle postpetition was presumed to have had notice of the debtor's bankruptcy filing, although the creditor contended that he did not receive notice of the case because the debtor's mailed notice was sent to his business street address and not to the post office box address that he maintained for receiving mail for his business. The creditor testified that mail sent to the business street address was frequently lost by the U.S. Postal Service, and therefore, he notified all of his clients, including the debtor, to mail all correspondence to his post office box address. However, courts have generally held that mailing creates a presumption of receipt, and, while this presumption may be overcome by evidence that the mailing was not actually accomplished, the mere denial of receipt was insufficient. Here, no evidence was presented to indicate that the debtor did not properly mail the notice to the creditor or that the mail was returned as undeliverable.

In re Warren, 532 B.R. 655 (Bankr. D. S.C., June 29, 2015)

(case no. 3:14-bk-3600; adv. proc. no. 3:14-ap-80101) (Bankruptcy Judge John E. Waites)

Text of opinion

Judicial estoppel did not bar Chapter 13 debtor's prosecution of tardily-disclosed prepetition claims where bankruptcy court authorized debtor's prosecution of action:

Holding that judicial estoppel did not preclude the Chapter 13 debtor's prosecution of her employment discrimination claims, although the bankruptcy court confirmed the debtor's plan after she had filed three charges of discrimination with the EEOC, none of which she had yet disclosed, the court concluded that, since the debtor subsequently disclosed the potential causes of action to the bankruptcy court, and that court explicitly authorized the debtor to prosecute this action despite her nondisclosure, upon the debtor's agreeing not to exempt the claims, it could not be said "that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." Because the purpose of the doctrine of judicial estoppel is to protect the courts from the perversion of judicial machinery, and because the bankruptcy court had permitted the debtor to pursue these causes of action (implicitly acknowledging that such a course of action was preferable to the debtor's creditors), the court saw no basis for applying judicial estoppel.

Harper-Cox v. Gateway-Detroit East, 2015 WL 3652750 (E.D. Mich., June 11, 2015)

(case no. 2:14-cv-13048) (District Judge Patrick J. Duggan)

Text of opinion

Debtors' stipulations with creditors regarding relief from stay, and notices of default under stipulations, did not constitute "request for relief from the automatic stay," so that Code § 109(g)(2) did not render debtors ineligible to file current bankruptcy case:

While affidavits of default filed by two secured creditors in the debtors' prior Chapter 12 case constituted "the filing of a request for relief from the automatic stay" under Code § 109(g)(2), stipulations the debtors previously entered into with the creditors, under which the debtors essentially agreed to an expedited process for future relief from stay upon a default, did not. Thus, the debtors did not obtain dismissal of their prior case "following the filing of a request for relief from the automatic stay," and § 109(g)(2) did not make the debtors ineligible for bankruptcy relief in their current Chapter 12 case, which the debtors filed 13 days after dismissing their prior case, where the debtors filed a motion to voluntarily dismiss their prior case after receiving notices of default from both creditors, pursuant to the terms of the stipulations, but prior to either creditor's filing an affidavit of default.

In re Alan, 532 B.R. 701 (Bankr. W.D. Mich., June 23, 2015)

(case no. 1:15-bk-1567) (Bankruptcy Judge James W. Boyd)

Text of opinion

Stipulation of value of debtor's residence did not apply after conversion from Chapter 13 to Chapter 7:

Code § 348(f)(1)(B), providing that "valuations of property ... in the chapter 13 case" do not apply "in a case converted to a case under chapter 7," applied to a stipulation of the value of the debtor's residence entered into by the debtor and the creditor whose lien the debtor sought to avoid under Code § 522(f). And, while the stipulation provided that the valuation applied "for all purposes in this bankruptcy case," this did not amount to an effective waiver of the debtor's right to invoke Code § 348(f)(1)(B).

In re Martinez, 2015 WL 3814935 (Bankr. D. N.M., June 18, 2015)

(case no. 1:10-bk-11101) (Chief Judge Robert H. Jacobvitz)

Text of opinion

Debtor's failure to disclose potential cause of action was not necessarily intentional:

The Chapter 13 debtor's failure to disclose a potential cause of action against his employer for an injury suffered at work that arose after the debtor and his wife had made the final payment under their Chapter 13 plan, but before the case was closed, was not necessarily intentional, and the court could not render summary judgment for the employer on the ground of judicial estoppel in the debtor's subsequent litigation against the employer.

Marshall v. Sandersville R.R. Co., 2015 WL 3648603 (M.D. Ga., June 10, 2015)

(case no. 5:12-cv-425) (District Judge Marc T. Treadwell)

Text of opinion

Elements of collateral estoppel under Florida law:

Florida's collateral estoppel doctrine forecloses relitigation when (1) the parties are identical with those from the prior case, (2) the issues are identical, (3) there was a full and fair opportunity to litigate the issues and they were actually litigated, and (4) those issues were necessary to the prior adjudication. For estoppel purposes, the finality of the state court judgment is not affected by the pendency of the state court appeals.

In re DeMasi, 2015 WL 3956135 (Bankr. M.D. Fla., June 26, 2015), appeal filed, DeMasi v. Kondapalli, Case No. 8:15-cv-1744 (M.D. Fla., filed July 28, 2015)

(case no. 8:13-bk-8406; adv. proc. no. 8:13-ap-889) (Bankruptcy Judge Michael G. Williamson)

Text of opinion

Availability of successive motions under Bankruptcy Rule 9023:

Bankruptcy Rule 9023, implementing Fed. R. Civ. P. 59, provides that a motion to alter or amend a judgment must be filed no later than 14 days after the entry of the judgment. If a judgment is subsequently amended, parties are given an additional 14 days—from the date such amended judgment is issued—to file a motion to alter or amend the amended judgment. However, the issuance of an amended opinion does not, in and of itself, grant litigants an additional 14 days to submit Rule 9023 motions. Only if a court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered, will such amended judgment be construed as a new judgment in the case and the aggrieved party shall then be afforded a new 14-day period within which to file another Rule 9023 motion. See, e.g., *Dixie Sand & Gravel Co. v. Tennessee Valley Authority*, 631 F.2d 73 (1980); *Andrews v. Du Pont De Nemours and Co.*, 447 F.3d 510, 516 (7th Cir. 2006). Therefore, courts must determine whether an amendment to a judgment actually changed what the judgment did before deciding whether a litigant is afforded additional time to file second motion under Rule 9023. Here, where the IRS's first motion to alter or amend judgment merely challenged one sentence in the court's original opinion, and in response the court issued an amended opinion from which that sentence had been deleted, the IRS could not then file a second motion to alter or amend judgment, as the second motion was untimely.

Untimely Rule 59 motion may be treated as motion under Rule 60(b):

The Fifth Circuit has long held that an untimely motion filed under Rule 59 may be treated as a Rule 60(b) motion for relief from judgment as the latter has a more lenient time limit. See, e.g., *Torres v. Booker*, 228 F.3d 408 (5th Cir. 2000). Rule 60(b) provides that a court may relieve a party from a final judgment if such a motion is made within a reasonable time, but not more than a year after the entry of judgment. Here, however, the court determined that the IRS's second motion to alter or amend judgment was not filed within a reasonable time and was therefore denied, even if the motion was treated as a Rule 60(b) motion, and even if Rule 60(b) was a proper vehicle for the relief sought.

In re Fielding, Case No. 4:13-bk-43212 (Bankr. N.D. Tex., June 30, 2015)

(Bankruptcy Judge D. Michael Lynn)

Text of opinion

R

Jurisdiction

Topical compilation: All topical compilations

PDF Word All circuit compilations

Rooker-Feldman doctrine divested bankruptcy court of jurisdiction to consider debtor's objection to mortgage creditor's proof of claim:

The district court held that, under the *Rooker-Feldman* doctrine, the bankruptcy court lacked jurisdiction to consider the debtor's objection to the mortgage creditor's proof of claim. The proof of claim was based on a state court foreclosure judgment; the debtor's objection asserted that he had the right to rescind the mortgage. The debtor appealed, and the district court, vacating the bankruptcy court's decision, held that the *Rooker-Feldman* doctrine divested the bankruptcy court of jurisdiction to even consider the objection.

In re Deitch, 533 B.R. 138 (E.D. Pa., June 15, 2015), **appeal filed**, Case No. 15-2554 (3rd Cir., filed June 26, 2015)

(case no. 2:15-cv-204) (District Judge Wendy Beetlestone)

Text of opinion

Barton doctrine precluded jurisdiction over debtor's action against trustee appointed by state court:

Under the *Barton* doctrine, both the bankruptcy court and the district court lacked jurisdiction over the debtor's adversary proceeding, against a trustee who had been appointed by the state divorce court to sell marital property in order to satisfy a monetary judgment awarded to the debtor's former wife, alleging that postpetition contempt proceedings against the debtor violated the automatic stay, where the debtor failed to obtain leave from the state court before filing his adversary complaint against the trustee.

Tshiani v. Monahan, 533 B.R. 506 (D. Md., June 18, 2015)

(case no. 8:14-cv-3675) (District Judge George J. Hazel)

Text of opinion

Adversary defendants' failure to respond constituted consent to court's entering final judgment:

The Supreme Court ruled in *Wellness International Network, Ltd. v. Sharif*, 135 S.Ct. 1932, 191 L.Ed.2d 911 (May 26, 2015) that bankruptcy judges may enter final orders in proceedings entitled to Article III adjudication if the parties knowingly and voluntarily consent, and a majority in *Wellness* recognized that consent may be implied. Because the summons issued in this case, the Chapter 7 trustee's adversary proceeding to avoid certain transfers, stated that a party's failure to respond would be deemed consent to the authority of the bankruptcy court, and the defendants failed to respond, the court concluded that the defendants had consented to the court's entry of a final judgment.

In re McGrath, Case No. 2:15-bk-102, Adv. Proc. No. 2:15-ap-80030 (Bankr. D. S.C., June 3, 2015)

(Chief Bankruptcy Judge David R. Duncan)

Text of opinion

Barton doctrine, generally:

In an "unbroken line of cases," the circuit courts have unanimously applied the *Barton* doctrine in bankruptcy cases. The circuit courts applying *Barton* in bankruptcy cases in which the plaintiffs brought or intended to bring suit in state courts have all required leave of the bankruptcy court before the plaintiffs could proceed in state courts. Additionally, the *Barton* doctrine has been applied consistently to require leave of the bankruptcy court even when the suit was filed in the federal district court of the same district.

Barton doctrine does not apply to action against bankruptcy trustee filed in district court that authorized trustee's conduct:

However, when a bankruptcy trustee acts pursuant to an order by the district court, and the trustee's actions pursuant to that order are the basis of a claim against the trustee in the district court, the *Barton* doctrine does not require the plaintiffs to obtain leave from the bankruptcy court, and the district court has jurisdiction to entertain a suit with respect to the trustee's conduct.

Carroll v. Abide, 788 F.3d 502 (5th Cir., June 11, 2015)

(case no. 14-31230)

Text of opinion

Bankruptcy court may issue money judgment in nondischargeability proceeding:

A bankruptcy court may adjudicate the merits of a creditor's claim, and issue a money judgment in favor of the creditor, after finding that a debt is nondischargeable. *In re Hallahan*, 936 F.2d 1496 (7th Cir. 1991) (stating that it was "preferable to allow bankruptcy courts ruling on the dischargeability of a debt to adjudicate the issues of liability and damages also") held that a bankruptcy court has statutory authority, and a bankruptcy court does not lack constitutional authority under *Stern v. Marshall*. See *In re Deitz*, 760 F.3d 1038 (9th Cir. 2014); *In re Hart*, 564 Fed. Appx. 773 (6th Cir. 2014); *In re Carroll*, 464 B.R. 293 (Bankr. N.D. Tex. 2011); *Adas v. Rutkowski*, 2013 WL 6865417 (N.D. Ill., Dec. 30, 2013); *In re Boricich*, 464 B.R. 335 (Bankr. N.D. Ill. 2011).

Fifth Third Mortgage Co. v. Blouin, 2015 WL 3623630 (N.D. Ill., June 9, 2015)

(case no. 1:15-cv-366) (District Judge Amy J. St. Eve)

Text of opinion

R

Part D

Means Test

In General

Topical compilations:

PDF Word (household size)

PDF Word (income)

PDF Word (expenses)

PDF Word (special circumstances)

All topical compilations

All circuit compilations

Debtor with actual expense less than standard amount may only deduct actual expense in means test calculation:

When calculating an above-median-income Chapter 13 debtor's disposable monthly income, the debtor is only permitted to claim his or her actual expense, rather than the full amount of the deduction for home and transportation ownership expenses listed in the IRS Standards, if the debtor's actual expense is less than the amount listed in the IRS Standard. Comparing *In re Harris*, 522 B.R. 804 (Bankr. E.D. N.C. 2014) (debtor may deduct only actual expense) and *In re Daniel*, 2012 WL 3322438 (Bankr. M.D. Ala., May 30, 2012) (same) with *In re Miranda*, 449 B.R. 182 (Bankr. D. Puerto Rico 2011) (debtor may claim the full amount specified in the standard) and *In re Scott*, 457 B.R. 740 (Bankr. S.D. Ill. 2011) (same), the court said that it found *Harris* to be better-reasoned. *Harris* concluded that an expense amount is only "applicable" to a debtor to the extent it is actually incurred, with the IRS Standard serving merely as a cap on the amount of the deduction a debtor may claim, and the court agreed that this was a logical extension of the Supreme Court's decision in *Ransom v. FIA Card Services*, 562 U.S. 61, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011), which held that a debtor with no contractual expense could not take a vehicle ownership deduction in the means test. While the case involved a Chapter 13 debtor, the court's holding would seem to also apply in Chapter 7 cases.

In re Wilkerson, 2015 WL 3935259 (Bankr. D. D.C., June 25, 2015), **appeal filed**, Case No. 1:15-cv-1199 (D. D.C., filed July 24, 2015)

(case no. 1:14-bk-582) (Bankruptcy Judge S. Martin Teel, Jr.)

Text of opinion

Chapter 7 debtor who is not actually making secured debt payment is not entitled to deduction under means test:

A Chapter 7 debtor who is not actually making a secured debt payment on the petition date is not entitled to a secured debt expense deduction under the means test. The Supreme Court's reasoning in *Lanning* and *Ransom*, that the means test is designed to "ensure that [debtors] pay creditors the maximum they can afford," should apply with equal force in Chapter 7 cases. Congress intended the means test to approximate the debtor's reasonable expenditures on essential items. This can occur if a debtor is allowed a secured debt deduction only if he or she actually has an expense in that category. This interpretation employs the "snapshot approach" while using actual facts, not fiction; it also encompasses strengths of rulings on all sides of the issue. This reading of the statute does not rely on the debtor's statement of intentions, which is subject to change; nor does it require looking into a crystal ball to try to determine what the debtor's financial circumstances may be going forward. Reading the statute the way Congress drafted it amounts to looking at the debtor's true picture, or "snapshot" as of the petition date. Allowing a debtor to deduct payments she is not making is like looking at a "snapshot" of the debtor's finances that has been photoshopped to include the fictitious payments.

Since *Lanning* and *Ransom* were decided, eight bankruptcy courts have allowed a Chapter 7 debtor to deduct a mortgage expense despite the debtor's intent to surrender the property. See *In re Navin*, 526 B.R. 81 (Bankr. N.D. Ga. 2015); *In re Johnson*, 503 B.R. 447 (Bankr. N.D. Ind. 2013); *In re Hardigan*, 2012 WL 9703097 (Bankr. S.D. Ga., Dec. 20, 2012); *In re Rivers*, 466 B.R. 558 (Bankr. M.D. Fla. 2012); *In re Behague*, 497 B.R. 340 (Bankr. M.D. Fla. 2012); *In re Sonntag*, 2011 WL 3902999 (Bankr. N.D. W.Va., Sept. 6, 2011); *In re Grinkmeyer*, 456 B.R. 385 (Bankr. S.D. Ind. 2011); *In re Ng*, 2011 WL 576067 (Bankr. D. Haw., Feb. 9, 2011). Six courts have not allowed the deduction, although for varying reasons. See *In re White*, 512 B.R. 822 (Bankr. N.D. Miss. 2014); *In re Hamilton*, 513 B.R. 292 (Bankr. M.D. N.C. 2014); *In re Krawczyk*, 2012 WL 3069437 (Bankr. E.D. N.C., July 27, 2012); *In re Fredman*, 471 B.R. 540 (Bankr. S.D. Ill. 2012); *In re Sterrenberg*, 471 B.R. 131 (Bankr. E.D. N.C. 2012); *In re Thompson*, 457 B.R. 872 (Bankr. M.D. Fla. 2011).

In re Powers, 534 B.R. 207 (Bankr. N.D. Fla., May 1, 2015)

(case no. 4:14-bk-40433) (Bankruptcy Judge Karen K. Specie)

Text of opinion

R

Part E

Proof of Claim

Nature of Obligation as "Claim"; Setoff; Recoupment; Subrogation

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Status of claim as pre- or postpetition is determined under federal law:

Though the nature of a claim is dictated by state law, when the claim arises is a matter of federal law. *Siegel v. Fed. Home Loan Mortg. Corp.*, 143 F.3d 525 (9th Cir. 1998).

Ninth Circuit employs "fair contemplation test" to determine if claim is prepetition:

The Ninth Circuit employs the "fair contemplation test" in order to determine if a claim is prepetition in nature. See, e.g., *In re Jensen*, 995 F.2d 925 (9th Cir. 1993). Under the fair contemplation test, a claim arises when a claimant can fairly or reasonably contemplate the claim's existence even if a cause of action has not yet accrued under nonbankruptcy law.

Debtor's former wife's claim of right to monetary award in prepetition divorce proceeding was prepetition claim:

Under the "fair contemplation test," the assertion in a prepetition divorce complaint by the debtor's former wife of a right to a monetary award under Virginia law for her interest in marital property constituted a "claim" that arose prepetition, even though her right to or the amount of any such award was not yet established or liquidated, as the claim was "fairly contemplated" despite its disputed and unliquidated nature. This conclusion was supported not only by Ninth Circuit authority regarding the timing of claims, but also by the decisions of bankruptcy courts in Virginia.

In re Mooney, 532 B.R. 313 (Bankr. D. Idaho, June 23, 2015)

(case no. 1:12-bk-1243) (Chief Bankruptcy Judge Terry L. Myers)

Text of opinion

R

Proof of Claim: By Secured Creditor: Amount of Claim:

Topical compilations:

PDF Word (prepetition charges)

PDF Word (postpetition charges)

All topical compilations

All circuit compilations

Rooker-Feldman doctrine divested bankruptcy court of jurisdiction to consider debtor's objection to mortgage creditor's proof of claim:

The district court held that, under the *Rooker-Feldman* doctrine, the bankruptcy court lacked jurisdiction to consider the debtor's objection to the mortgage creditor's proof of claim. The proof of claim was based on a state court foreclosure judgment; the debtor's objection asserted that he had the right to rescind the mortgage. The debtor appealed, and the district court, vacating the bankruptcy court's decision, held that the *Rooker-Feldman* doctrine divested the bankruptcy court of jurisdiction to even consider the objection.

In re Deitch, 533 B.R. 138 (E.D. Pa., June 15, 2015), appeal filed, Case No. 15-2554 (3rd Cir., filed June 26, 2015)

(case no. 2:15-cv-204) (District Judge Wendy Beetlestone)

Text of opinion

Sale price of collateral determines creditor's oversecured status for purpose of Code § 506(b):

When secured collateral has been sold, so long as the sale price is fair and is the result of an arm's-length transaction, courts should use the sale price, not some earlier hypothetical valuation, to determine whether a creditor is oversecured and thus entitled to postpetition interest under Code § 506(b). *Ford Motor Credit Co. v. Dobbins*, 35 F.3d 860 (4th Cir. 1994).

In re Krumm, 534 B.R. 142 (W.D. N.C., June 30, 2015)

(case no. 5:14-cv-168) (District Judge Richard L. Vorhees)

Text of opinion

R

Proof of Claim: By Secured Creditor: Ownership of Claim

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Servicer must prove its status as servicer to establish standing to file proof of claim:

Where the claimant is a mortgage servicer, it must provide evidence that it is the servicer of the relevant mortgage in order to establish that it has standing to assert a claim for that mortgage. *In re Minbatiwalla*, 424 B.R. 104 (Bankr. S.D. N.Y. 2010).

In re Wilson, 532 B.R. 486 (S.D. N.Y., June 5, 2015)

(case no. 7:14-cv-9543) (District Judge Cathy Seibel)

Text of opinion

Borrowers lack standing to challenge compliance with PSA for mortgage securitization trust:

Courts have consistently found that borrowers lack standing to challenge compliance with the provisions of a Pooling and Servicing Agreement for a mortgage securitization trust. See, e.g., *In re Correia*, 452 B.R. 319 (1st Cir. B.A.P. 2011); *Rajamin v. Deutsche Bank Nat. Trust Co.*, 757 F.3d 79 (2d Cir. 2014); *Livonia Prop. Holdings, L.L.C. v. 12840–12976 Farmington Rd. Holdings, LLC*, 399 Fed. Appx. 97 (6th Cir. 2010); *Dauenhauer v. Bank of N.Y. Mellon*, 562 Fed. Appx. 473 (6th Cir. 2014).

In re McHugh, 2015 WL 3475520 (Bankr. N.D. Ohio, June 1, 2015)

(case no. 3:14-bk-31071; adv. proc. no. 3:14-ap-3140) (Bankruptcy Judge Mary Ann Whipple)

Text of opinion

R

Proof of Claim: By Secured Creditor: Secured Status of Claim

Scope note: This document collects cases addressing the status of a claim, as of the filing of the debtor's petition, as secured or unsecured. It also collects a few cases involving the avoidance of a lien solely on the basis of state law.

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Motor vehicle lease was true lease rather than security agreement:

The Alabama Motor Vehicle Lease Agreement entered into by the debtor was a true lease under Tenn. Code § 47–1–203(b). The debtor failed to establish that the lease agreement was a security interest because, regardless of whether the early termination provision was effective, the debtor failed to establish any one of the four conditions stated in § 47–1–203(b)(1)–(4).

In re Wells, 2015 WL 3862969 (Bankr. N.D. Ala., June 22, 2015)

(case no. 8:15-bk-80056; adv. proc. no. 8:15-ap-80015) (Bankruptcy Judge Clifton R. Jessup, Jr.)

Text of opinion

R

Proof of Claim: By Unsecured Creditor

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Certain elements of commercial lessor's claim were not subject to cap in Code § 502(b)(6):

The portion of a proof of claim filed by the lessor of commercial real property that sought unpaid rent, common area maintenance, and late fees through the date of the debtor's eviction was not subject to the cap in Code § 502(b)(6) because those amounts accrued prior to the termination of the lease and therefore could not be said to have resulted from the termination of the lease. Additionally, the portion of the lessor's claim for pre- and post-judgment interest on those amounts was derivative of the underlying debt and also could not be said to have resulted from termination of the lease. Moreover, the attorney's fees, costs, and disbursements—and the pre-petition interest thereon—awarded by the state court in connection with these elements of the lessor's claim also could not be said to have resulted from the termination of the lease.

Commercial lessor's claim for interest on its future rents was subject to cap in Code § 502(b)(6)(A):

The lessor's claim for interest on its future rents resulted from termination of the lease and therefore was subject to the cap established in Code § 502(b)(6)(A).

Creditor could not include two duplicative state-court judgments in its proof of claim:

A state-court judgment in favor of the creditor based on the debtor's fraudulent transfers was duplicative of an earlier state-court judgment awarding the creditor damages for a breach of a lease by the debtor's business, so that the creditor could not include both judgment amounts in its proof of claim. The Uniform Fraudulent Transfer Act, as adopted by the Minnesota legislature, does not create a "new" claim; rather, the act confers an alternate remedy for protecting preexisting creditor rights.

In re Wigley, 533 B.R. 267 (8th Cir. B.A.P., June 19, 2015), corrected (June 23, 2015)

(case no. 14-6043)

Text of opinion

Reliance of proof of claim on hearsay evidence does not warrant disallowance of claim:

Affirming *In re Walston*, 2014 WL 2086834 (Bankr. N.D. Ga., March 17, 2014), the Court of Appeals held that, when a proof of claim includes all of the information required under Bankruptcy Rule 3001, it constitutes prima facie evidence of the validity of the claim, regardless of whether the evidence on which the creditor relies would be considered inadmissible hearsay under state law. Moreover, the reliance of a proof of claim on evidence that would be considered hearsay outside of bankruptcy does not show that the "claim is unenforceable against the debtor ... under any agreement or applicable law" and should be disallowed under Code § 502(b)(1).

In re Walston, 606 Fed. Appx. 543 (11th Cir., June 2, 2015)

(case no. 14-14593)

Text of opinion

R

Proof of Claim: Other Issues

Topical compilation: All topical compilations

PDF Word All circuit compilations

Requirements for proof of secured claim to comply with Bankruptcy Rule 3001:

Under Bankruptcy Rule 3001(f), a proof of claim is "prima facie evidence of the validity and amount of the claim" if it is filed in accordance with Rule 3001. These rules include the requirements that the proof of claim must "conform substantially to the appropriate Official Form" (Rule 3001(a)); include "an itemized statement of the interest, fees, expenses, or charges" included within the claim total (Rule 3001(c)(2)(A)); attach a copy of the writing that secures the claim, if applicable (Rule 3001(c)(1)); include "the attachment prescribed by the appropriate Official Form" if the security interest is the debtor's principal residence (Rule 3001(c)(2)(C)); and provide "evidence that the security interest has been perfected" (Rule 3001(d)). Failure to attach the documentation required by Rule 3001 will result in the loss of the prima facie validity of the claim.

Bankruptcy court may allow creditor's post-bar-date amendment of proof of claim filed by debtor:

While the claims bar date precluded the creditor from filing a "superseding" claim (defined as one that "by its nature may include a broader spectrum of demands against the debtors"), it did not prevent the creditor from amending the existing claim that the Chapter 13 debtors had timely filed on its behalf. See *In re Kolstad*, 928 F.2d 171 (5th Cir. 1991) (the bankruptcy court has discretion to allow a creditor to file, after the claims bar date, an amendment to a proof of claim timely filed on its behalf by the debtor).

Post-date-date amendment merely supplemented original proof of claim:

The bankruptcy court was well within its discretion to permit the Chapter 13 debtors' amended proof of claim for a creditor that had failed to file its own claim, although the amendment was filed after the claims bar date, as the court correctly found that the amendment merely supplemented the timely-filed original claim.

In re Wilson, 532 B.R. 486 (S.D. N.Y., June 5, 2015)

(case no. 7:14-cv-9543) (District Judge Cathy Seibel)

Text of opinion

Court disallows mortgage creditor's amended proof of claim filed in 60th month of Chapter 13 case:

Applying the test articulated in *In re Alonso*, 525 B.R. 195 (Bankr. D. Puerto Rico, June 10, 2015), the court disallowed the mortgage creditor's amended proof of claim, which increased the amount of the claim from $15,844 to $21,938, where the creditor filed the amendment during the 60th month of the debtors' Chapter 13 plan. Concluding that the balance of equities weighed against allowing the amendment, the court said that, at this late date, the debtors had already committed all of their disposable income to funding the plan for 60 months. Since Chapter 13 plans—by statute—could not exceed 60 months, the debtors would be unable to cure any deficiency caused by allowing the amended claim. Therefore, the Chapter 13 trustee would be forced to attempt to recover the amounts already paid to the unsecured creditors in order to pay the amended claim, and this would unfairly prejudice the unsecured creditors.

In re Ortiz Negron, 2015 WL 3634234 (Bankr. D. Puerto Rico, June 10, 2015)

(case no. 2:09-bk-6350) (Bankruptcy Judge Edward A. Godoy)

Text of opinion

R

Part F

Property of the Estate

Property of the Estate: Generally

Scope note: This topic collects cases determining whether an asset is property of the estate in the first place, prior to the consideration of exemptions and exclusions.

Topical compilation: [All topical compilations]

[PDF] [Word] [All circuit compilations]

Property abandoned by Chapter 7 trustee prior to conversion of case to Chapter 13 becomes property of estate under Code § 1306(a):

Addressing an issue as to which it could find no precedent, the court held that property abandoned by the Chapter 7 trustee prior to the debtors' conversion of the case to Chapter 13 becomes property of the estate under Code § 1306(a). The property was a claim against the debtors' mortgage creditor, and the court reasoned that, if the court were to hold otherwise, and the debtors subsequently recovered money in their suit against the creditor, it would be a windfall to the debtors if they were not required to use that money to pay their creditors.

In re Hotop, 2015 WL 3793102 (Bankr. E.D. La., June 16, 2015)

(case no. 2:14-bk-12204; adv. proc.no. 2:14-ap-1062) (Bankruptcy Judge Jerry A. Brown)

Text of opinion

Child support arrearage owed debtor was property of her bankruptcy estate:

Bankruptcy courts look to the applicable state law to determine whether a child support arrearage is a property right of the parent or of the child. *In re Green*, 423 B.R. 867 (Bankr. W.D. Ark. 2010). Ohio state courts generally presume that, since the custodial parent already bore the expense of feeding, clothing and raising the child, the parent has the superior claim to the arrearage. Therefore, here, a child support arrearage owed the debtor by her former husband was property of the debtor's bankruptcy estate.

In re Roberts, 532 B.R. 906 (Bankr. N.D. Ohio, June 30, 2015)

(case no. 1:15-bk-10859) (Bankruptcy Judge Arthur I. Harris)

Text of opinion

Bankruptcy estate has no interest in property subject to prepetition foreclosure sale:

Under Georgia law, a security deed transfers legal title to the property conveyed to the grantee, leaving the grantor with equitable title including an equitable right of redemption by payment of the debt, and a debtor's equitable right of redemption is property of the bankruptcy estate. Whether a debtor's equitable right of redemption is terminated by a foreclosure sale is a question of state law, and, under Georgia law, a debtor's equitable right of redemption is terminated by a foreclosure sale held prior to the commencement of the debtor's bankruptcy case. See *In re Davis*, 1998 WL 34066146 (Bankr. S.D. Ga. 1998); *In re Grissom*, 1989 WL 1113450 (Bankr. S.D. Ga. 1989). See also *In re Williams*, 393 B.R. 813 (Bankr. M.D. Ga. 2008) (valid foreclosure sale divests all of the debtor's rights and title in the property); *In re Pearson*, 75 B.R. 254 (Bankr. N.D. Ga. 1985) (equity of redemption expires when the high bid is received at the foreclosure sale).

In re Poole, 2015 WL 4039167 (Bankr. S.D. Ga., June 30, 2015)

(case no. 5:14-bk-50954) (Bankruptcy Judge John S. Dalis)

Text of opinion

Code § 348(f)(1)(A) pulls property vested in debtors by Chapter 13 plan confirmation order back into bankruptcy estate upon conversion of case:

Under Code § 348(f)(1)(A), which provides that, when a Chapter 13 case is converted to another chapter, "property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion," tools that were in the debtors' possession when they filed their Chapter 13 petition, and that remained in their possession when they subsequently voluntarily converted to Chapter 7, were property of the Chapter 7 bankruptcy estate, and this result was not changed by the fact that, while the debtors' case was progressing under Chapter 13, the court confirmed the debtors' plan, and Code § 1327(b) provides that the confirmation of a Chapter 13 plan vests all of the property of the estate in the debtor. Section 348(f) pulls property vested in the debtors by a Chapter 13 confirmation order back into the bankruptcy estate upon conversion of the case to another chapter. *In re John*, 352 B.R. 895 (Bankr. N.D. Fla. 2006).

In re Curtis, 2015 WL 4065260 (Bankr. M.D. Fla., June 30, 2015)

(case no. 6:13-bk-8201) (Chief Bankruptcy Judge Karen S. Jennemann)

Text of opinion

Inheritance received more than 180 days postpetition is property of Chapter 13 estate:

Agreeing with *In re Dale*, 505 B.R. 8 (9th Cir. B.A.P. 2014), the court held that an inheritance received more than 180 days postpetition by a Chapter 13 debtor is property of the estate.

In re Wirshing, 2015 WL 3525061 (Bankr. D. Mont., June 3, 2015)

(case no. 2:13-bk-60990) (Bankruptcy Judge Ralph B. Kirscher)

Text of opinion

R

Exclusions from Property of the Estate

Elements of exclusion of spendthrift trust from estate under Code § 541(c)(2):

An inquiry under Code § 541(c)(2) normally has three parts: First, does the debtor have a beneficial interest in a trust? Second, is there a restriction on the transfer of that interest? Third, is the restriction enforceable under nonbankruptcy law? *In re Wilcox*, 233 F.3d 899 (6th Cir. 2000).

Spendthrift provision in self-settled trust was invalid under Michigan law:

A spendthrift provision in a trust was unenforceable under Michigan law, so that the trust was not excluded from the bankruptcy estate under Code § 541(c)(2), where the debtor was a settlor, a trustee, and a beneficiary of the trust. Although the debtor's wife was also a beneficiary, this did not alter the fact that the debtor was a settlor who contributed his own assets to the trust and named himself as a beneficiary. Similarly, the fact that the trust documents prohibited the debtor from receiving any distribution from the trust unless his wife jointly requested such a distribution did not change the result. And, while the debtor lacked the authority to revoke the trust unless his wife concurred, whether or not a trust was revocable did not affect the invalidity of a self-settled spendthrift trust under Michigan law.

In re Lewiston, 532 B.R. 36 (Bankr. E.D. Mich., June 24, 2015), appeal filed, Case No. 2:15-cv-12462 (E.D. Mich., filed July 10, 2015)

(case no. 2:12-bk-58599; adv. proc. no. 2:14-ap-5115) (Chief Bankruptcy Judge Phillip J. Shefferly)

Text of opinion

R

Property of the Estate: Exemptions: Availability under Code § 522(b)(3)

Scope note: This topic includes cases discussing whether the debtor is permitted or required to elect state or federal exemptions under Code § 522(b)(3)(A) and the hanging paragraph of § 522(b)(3), and, for debtors electing state exemptions, whether a state's exemptions are available to a nonresident debtor or applicable to property outside the state. Cases on certain related issues are also collected.

Topical compilation: All topical compilations

PDF Word All circuit compilations

Missouri exemptions are not limited to residents, so that debtors were not entitled to claim federal exemptions under savings paragraph of Code § 522(b)(3):

The bankruptcy court did not err in ruling that the debtors, who had moved from Missouri to Arizona in 2013, were required by Code § 522(b)(3)(A) to apply Missouri exemption law, and they could claim exemptions under Missouri law because Missouri exemptions are not limited to residents. Accordingly, the debtors were not ineligible for any exemption for the purpose of the savings paragraph of § 522(b)(3), and they therefore could not claim federal exemptions under that paragraph.

In re Cline, 2015 WL 3988992 (9th Cir. B.A.P., June 30, 2015)

(case no. 14-1503)

Text of opinion

R

Property of the Estate: Exemptions: Avoidance of Liens under Code § 522(f)

Scope note: For cases on the debtor's avoidance of a lien under Code § 522(h), see Avoidable Transfers and Liens (in Part G. of this Section One).

Topical compilation: PDF Word

All topical compilations
All circuit compilations

Creditor's judgment lien attached to debtor's property and was avoidable under Code § 522(f) even though lien was not presently enforceable:

The lien held by a creditor with a judgment against the debtor attached to the debtor's residence, even though the lien was not presently enforceable because the property was owned by the debtor and his wife as tenants by the entirety but the judgment was only against the debtor. Accordingly, the debtor could avoid the lien under Code § 522(f).

In re O'Sullivan, 2015 WL 3526996 (Bankr. W.D. Mo., June 4, 2015), **appeal filed**, Case No. 15-6020 (8th Cir. B.A.P., filed June 16, 2015)

(case no. 3:15-bk-30173) (Bankruptcy Judge Cynthia A. Norton)

Text of opinion

Determination of impairment of exemption under Code § 522(f), generally:

The extent to which a lien may be avoided under Code § 522(f) may be easily computed once four variables are determined: (1) the amount of the lien in question; (2) the sum of all other liens on the property; (3) the amount of the debtor's exemption; and (4) the value of the subject property. A debtor who moves under § 522(f) to avoid a creditor's lien bears the burden of proof by a preponderance of the evidence on every statutory element. The "petition date is the operative date for determining the various § 522(f) calculations." *In re Wilding*, 475 F.3d 428 (1st Cir. 2007).

In re Garcia, 532 B.R. 173 (1st Cir. B.A.P., June 24, 2015)

(case nos. 14-64, 14-71)

Text of opinion

Petition date controls in determining impairment of exemption under Code § 522(f), even in converted cases:

The date of the filing of the petition is the operative date to make lien avoidance determinations under Code § 522(f), including the amount of the liens and the value of the exempt property, and this does not change if the case is converted from Chapter 13 to Chapter 7.

Stipulation of value of debtor's residence did not apply after conversion from Chapter 13 to Chapter 7:

Code § 348(f)(1)(B), providing that "valuations of property ... in the chapter 13 case" do not apply "in a case converted to a case under chapter 7," applied to a stipulation of the value of the debtor's residence entered into by the debtor and the creditor whose lien the debtor sought to avoid under Code § 522(f). And, while the stipulation provided that the valuation applied "for all purposes in this bankruptcy case," this did not amount to an effective waiver of the debtor's right to invoke Code § 348(f)(1)(B).

In re Martinez, 2015 WL 3814935 (Bankr. D. N.M., June 18, 2015)

(case no. 1:10-bk-11101) (Chief Judge Robert H. Jacobvitz)

Text of opinion

R

Property of the Estate: Exemptions: Debtor Who Applies Federal Exemptions

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

There are no cases in this issue.

R

Property of the Estate: Exemptions: Debtor Who Applies State Exemptions

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Colorado law: Funds paid out from retirement plan are not exempt:

Affirming *In re Gordon*, 2014 WL 2442519 (D. Colo., May 30, 2014), which had affirmed *In re Gordon*, 2013 WL 5763314 (Bankr. D. Colo., Oct. 24, 2013), the Court of Appeals held that Colo. Rev. Stat. § 13–54–102(1)(s), which permits an exemption for "[p]roperty, including funds, held in or payable from any pension or retirement plan or deferred compensation plan," does not provide an exemption for funds that have been paid out from a retirement plan, even when the funds are in a segregated bank account.

In re Gordon, 791 F.3d 1182 (10th Cir., June 26, 2015)

(case no. 14-1257)

Text of opinion

Colorado law: Debtor could not claim homestead exemption in long-haul truck:

The Chapter 7 debtor, a long-haul truck drive, could not claim a homestead exemption, under Colorado law, in a Peterbilt commercial truck in the cab of which the debtor had been living continuously since approximately 1998, and that the debtor considered to be his home, where the truck was not permanently or semi-permanently installed on real property, so that the truck was not associated with the land and did not qualify as a homestead. The cab has a bed, microwave oven, toaster, coffee pot, refrigerator, laser printer, television, light, and vacuum. In addition to food and water, the debtor stores his clothes, laundry, and sundry items in a dozen plastic boxes mainly located in a small loft above the bed. A self-contained portable toilet rounds out the cab's equipment. The debtor's dog lives with him in a small kennel near the bed. The truck has a 12–volt generator to provide electricity, heat, and air-conditioning when the vehicle is parked.

In re Romero, 533 B.R. 807 (Bankr. D. Colo., June 23, 2015), appeal filed, Case No. 1:15-cv-1484 (D. Colo., filed July 14, 2015)

(case no. 1:15-bk-11254) (Bankruptcy Judge Thomas B. McNamara)

Text of opinion

Florida law: Debtor could claim homestead exemption only in portion of mixed-use property used exclusively as residence:

Where the debtor was residing in a building that she also used to conduct her medical practice, the debtor could claim a homestead exemption only in the portion of the property that functioned solely as the debtor's residence on the petition date. *In re Wilson*, 393 B.R. 778 (Bankr. S.D. Fla. 2008). Under this standard, the court found that only the bathroom and a portion of the "kitchen" in the property were exempt homestead.

In re Kain, 2014 WL 10250731 (Bankr. N.D. Fla., Feb. 14, 2014)

(case no. 3:12-bk-31492) (Bankruptcy Judge Karen K. Specie)

Text of opinion

Comment: This is an older decision that has only now become available.

Provision of Georgia's bankruptcy-specific exemption statute is constitutional:

Affirming *McFarland v. Wallace*, 516 B.R. 665 (S.D. Ga., Sept. 10, 2014), which had affirmed *In re McFarland*, 500 B.R. 279 (Bankr. S.D. Ga., Sept. 30, 2013) and *In re McFarland*, 481 B.R. 242 (Bankr. S.D. Ga., Sept. 29, 2012), the Court of Appeals held that Ga. Code Ann. § 44-13-100(a)(9), a provision of Georgia's bankruptcy-specific exemption statute limiting the exemption of the cash value of a life insurance policy to $2,000, while general debtors had an unlimited exemption under a different statute, does not violate the uniformity provision of the Bankruptcy Clause of the U.S. Constitution or the equal protection clause of the Georgia Constitution. The Bankruptcy Clause, which vests Congress with the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States," does not require states to treat bankruptcy and non-bankruptcy debtors exactly alike. And, although the statute provides a lower exemption to bankruptcy debtors than to general debtors, the Georgia legislature had at least rationally balanced the needs of creditors and bankruptcy debtors and therefore had not transgressed equal protection.

Georgia law: Exemption of life insurance policy cash value is limited to $2,000:

While Ga. Code Ann. § 33–25–11(c)—a non-bankruptcy provision—permits the exemption of the entire cash value of a whole life insurance policy, Ga. Code Ann. § 44–13–100(a)(9), which explicitly limits—to $2,000—a bankruptcy debtor's ability to exempt the "cash value" of his "unmatured life insurance contract," takes precedence as the more specific statute.

[continued on the following page]

Georgia law: Annuity was not exempt where it was not substitute for wages:

An annuity that the Chapter 7 debtor purchased in an effort to provide for his wife after his death was not exempt under Ga. Code Ann. § 44-13-100(a)(2)(E), which provides an exemption for the debtor's right to payment under a pension, annuity, or similar plan or contract. *Silliman v. Cassell*, 292 Ga. 464, 738 S.E.2d 606 (2013) held that an "annuity" under the statute is one that "provides income as a substitute for wages," and, here, the debtor had never drawn money from the annuity, nor did he intend to withdraw any funds during his lifetime.

In re McFarland, 790 F.3d 1182 (11th Cir., June 22, 2015)

(case no. 14-14514)

Text of opinion

Idaho law: Debtor could not claim homestead exemption in former marital residence awarded wife in divorce decree:

The debtor could not claim a homestead exemption in certain property under Idaho law, even though he had recorded a declaration of homestead with respect to the property, because he could not establish an intent to live on the property. While he previously resided on the property, he had moved out from the property after he and his wife had experienced marital difficulties, and in their subsequent marital dissolution proceedings, the wife was given possession of the property and required to either refinance the property or sell it. As envisioned in the stipulated divorce decree, there was no scenario that contemplated the debtor's resuming residency at the property.

In re Lugo, 2015 WL 3932108 (Bankr. D. Idaho, June 25, 2015)

(case no. 8:15-bk-40121) (Bankruptcy Judge Jim D. Pappas)

Text of opinion

Kansas law: Inherited IRA is not exempt:

Concluding that an inherited IRA is not exempt under Kan. Stat. Ann. § 60–2308(b), which provides an exemption for "any money or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement plan which is qualified under Sections 401(a), 403(a), 403(b), 408, 408A or 409 of the federal internal revenue code of 1986, and amendments thereto," the court said it found the reasoning of the unanimous decision in *Clark v. Rameker*, 134 S. Ct. 2242, 189 L. Ed. 2d 157 (2014) (holding an inherited IRA not exempt under exemptions provided in the Bankruptcy Code) to be compelling, as the court found no material difference between the federal and Kansas exemptions.

In re Mosby, 532 B.R. 167 (Bankr. D. Kan., June 17, 2015), appeal filed, Mosby v. Clark, Case No. 2:15-cv-9153 (D. Kan., filed July 1, 2015)

(case no. 2:14-bk-22981) (Bankruptcy Judge Dale L. Somers)

Text of opinion

Missouri law: Additional child tax credit is exempt as "public assistance benefit":

Reversing *In re Hardy*, 503 B.R. 722 (8th Cir. B.A.P., Dec. 23, 2013), which had affirmed *In re Hardy*, 495 B.R. 440 (Bankr. W.D. Mo., May 16, 2013), the Court of Appeals held that the debtor could exempt, as a "public assistance benefit" under Mo. Rev. Stat. § 513.430.1(10)(a), the portion of her federal income tax refund that was attributable to an additional child tax credit. The various amendments to the additional child tax credit statute since its initial enactment demonstrated Congress's intent to help low-income families.

In re Hardy, 787 F.3d 1189 (8th Cir., June 2, 2015)

(case no. 14-1181)

Text of opinion

Ohio law: Debtor could exempt child support arrearage even though children were now adults:

Under Ohio Rev. Code Ann. § 2329.66(A)(11), permitting the exemption of "[t]he person's right to receive spousal support, child support, an allowance, or other maintenance to the extent reasonably necessary for the support of the person and any of the person's dependents," the debtor was permitted to exempt a child support arrearage owned her by her former husband, even though her children were now adults and were no longer dependents of the debtor, as the exemption under the statute was not limited to the amount reasonably necessary for the support of dependent children, but also encompassed amounts reasonably necessary for the support of the debtor. Moreover, the "right to receive" language encompassed not only the right to receive future payments, but also the right to receive past payments, such as a child support arrearage. *In re Edwards*, 255 B.R. 726 (Bankr. S.D. Ohio 2000).

In re Roberts, 532 B.R. 906 (Bankr. N.D. Ohio, June 30, 2015)

(case no. 1:15-bk-10859) (Bankruptcy Judge Arthur I. Harris)

Text of opinion

Debtor could exempt real property as owned in tenancy by the entireties although property was originally acquired by debtor's non-filing spouse:

The debtor could exempt real property as held in a tenancy by the entireties with her non-filing husband, although the debtor's husband first acquired ownership of the property in his name alone and then transferred title to himself and the debtor later that same day, as Fla. Stat § 689.11(1)(b) explicitly states that "[a]n estate by the entirety may be created by the action of the spouse holding title ... [c]onveying to both spouses," and this statute was enacted prior to the date of the transfers of the debtor's property.

In re Dumay, 2015 WL 3505233 (Bankr. S.D. Fla. June 2, 2015)

(case no. 1:15-bk-10472) (Bankruptcy Judge Robert A. Mark)

Text of opinion

R

Property of the Estate: Exemptions: Limitations on Right to Claim Exemption

Scope note: This topic collects cases involving general principles, and specific Code provisions, limiting a debtor's exemptions, often (although not always) in response to the debtor's misconduct.

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

There are no cases in this issue.

R

Property of the Estate: Exemptions: Procedure

Topical compilation:
PDF Word
All topical compilations
All circuit compilations

State law governing burden of proof regarding exemptions prevails over Bankruptcy Rule 4003(c) when debtor claims exemptions under state law:

Bankruptcy Rule 4003(c), which provides that the objecting party has the burden of proving that a debtor's exemptions are not properly claimed, is invalid to the extent it assigns the burden of proof on an objection to a state-law claim of exemption in a manner contrary to state law. The Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075, forbids rules that alter substantive rights. The Supreme Court clarified in *Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15, 120 S.Ct. 1951, 147 L.Ed.2d 13 (2000), that burden of proof is substantive, not procedural. It follows that Rule 4003(c), which was first adopted in 1973 on the assumption that burden of proof was procedural, offends § 2075. Thus, here, where the debtor claimed exemptions under California law, and Cal. Civ. Proc. Code § 703.580(b) provided that, except with respect to homestead exemptions, the person claiming an exemption has the burden of proof, the California statute prevailed over Rule 4003(c). It followed under Fed. R. Evid. 302 (which states that "[i]n a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision") that California law regarding evidentiary presumptions also applied.

Creditor's objection to debtor's claimed exemptions would be sustained where debtor failed to establish his ownership of property claimed as exempt:

Here, where the debtor claimed exemptions under California law in personal property seized from the premises of his bicycle repair shop before he filed his bankruptcy petition, and the levying creditor objected to the exemptions on the ground that the debtor's LLC, rather than the debtor personally, owed the property, so that the debtor could not claim exemptions in the property, California law regarding the burden of proof governed and required the debtor to establish his ownership of the property. Since the evidence was conflicting, he failed to do so with respect to property other than his tools, and the creditor's objection would be sustained.

In re Tallerico, 532 B.R. 774 (Bankr. E.D. Cal., June 30, 2015)

(case no. 2:15-bk-22117) (Chief Bankruptcy Judge Christopher Klein)

Text of opinion

State law governing burden of proof regarding exemptions prevails over Bankruptcy Rule 4003(c) when debtor claims exemptions under state law:

Under *Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15, 120 S.Ct. 1951, 147 L.Ed.2d 13 (2000), the burden of proof in bankruptcy remains where the substantive nonbankruptcy law places it, unless the Bankruptcy Code itself modifies the burden of proof. Thus, where a debtor claims exemptions under California law, Cal. Civ. Proc. Code § 703.580(b), which provides that, except with respect to homestead exemptions, the person claiming an exemption has the burden of proof, prevails over Bankruptcy Rule 4003(c), which provides that the objecting party has the burden of proving that a debtor's exemptions are not properly claimed.

In re Pashenee, 531 B.R. 834 (Bankr. E.D. Cal., June 8, 2015)

(case no. 2:14-bk-30386) (Bankruptcy Judge Christopher D. Jaime)

Text of opinion

Debtor's alleged bad faith is not basis for disallowing amended exemptions:

The Supreme Court's decision in *Law v. Siegel*, 134 S.Ct. 1188 (2014) precluded the Chapter 7 trustee's objection, based on the debtor's alleged bad faith, to the debtor's amended exemptions.

In re Pratts, 2015 WL 3484286 (Bankr. D. Puerto Rico, June 1, 2015)

(case no. 3:11-bk-902) (Chief Bankruptcy Judge Enrique S. Lamoutte)

Text of opinion

R

Property of the Estate: Exemptions: Other Issues

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

There are no cases in this issue.

R

Property of the Estate: Turnover

Topical compilation: All topical compilations

PDF Word All circuit compilations

Debtor's turnover motion required debtor to avoid creditor's lien:

Where, six hours before the debtor's Chapter 7 filing, the county sheriff levied on all personal property at the premises of the debtor's bicycle repair business to enforce a money judgment that a creditor had obtained against the debtor, and the debtor filed a motion for turnover under Code § 543 against the sheriff as a custodian, the debtor needed to establish a right to exempt the property and a right under Code § 522(f) to avoid the creditor's judicial lien on the property in order to recover the property.

In re Tallerico, 532 B.R. 774 (Bankr. E.D. Cal., June 30, 2015)

(case no. 2:15-bk-22117) (Chief Bankruptcy Judge Christopher Klein)

Text of opinion

R

Part G

Other Issues

Misrepresentations by debtor's attorney warranted six-month suspension under Rule 9011:

Affirming *In re Young*, 507 B.R. 286 (8th Cir. B.A.P., March 12, 2014), which had affirmed in part and reversed in part *In re Young*, 497 B.R. 922 (Bankr. W.D. Ark., Sept. 11, 2013), the Court of Appeals held that the bankruptcy court did not abuse its discretion in sanctioning the Chapter 13 debtor's attorney under Bankruptcy Rule 9011 and suspending the attorney from practice for six months, where the bankruptcy court found that the attorney repeatedly mischaracterized past-due postpetition alimony obligations as prepetition obligations, falsely asserted that the debtor was current on his alimony payments, and represented to the bankruptcy court that the debtor would "continue" to make his alimony payments even though, up to that point, he had not been making any such payments. Ultimately, the bankruptcy court found that the attorney "manipulated the Code, the court, and the bankruptcy system."

In re Young, 789 F.3d 872 (8th Cir., June 17, 2015), reh'g and reh'g en banc denied (July 20, 2015)

(case no. 14-1665)

Text of opinion

Court sanctions mortgage creditor for delay in providing proof of possession of note:

Where the Chapter 7 debtors' mortgage creditor failed to provide the Chapter 7 trustee with proof of the creditor's possession of the debtors' mortgage note until eight months after the trustee requested this information, and four months after the trustee filed an adversary proceeding against the creditor to compel its provision of this information, the court would sanction the creditor by awarding the trustee the reasonable attorney's fees and costs incurred in prosecuting the adversary proceeding.

In re Phillips, 2015 WL 3612875 (Bankr. M.D. Tenn., June 9, 2015)

(case no. 3:14-bk-5711; adv. proc. no. 3:14-ap-90534) (Bankruptcy Judge Marian F. Harrison)

Text of opinion

Bankruptcy courts possess inherent power to impose non-contempt sanctions:

Bankruptcy courts possess the inherent power to impose punitive non-contempt sanctions for failures to comply with their orders. See generally *Pearson v. First NH Mortg. Corp.*, 200 F.3d 30 (1st Cir. 1999) (a bankruptcy court has the inherent power to impose sanctions); *Fellheimer, Eichen & Braverman, P.C. v. Charter Techs., Inc.*, 57 F.3d 1215 (3d Cir. 1995) (a bankruptcy court has the inherent power to impose sanctions); *In re Weiss*, 111 F.3d 1159 (4th Cir. 1997) ("[a] federal court also possesses the inherent power to regulate litigants' behavior and to sanction a litigant for bad-faith conduct"); *In re Case*, 937 F.2d 1014 (5th Cir. 1991) ("the bankruptcy court has the inherent power to award sanctions for bad-faith conduct in a bankruptcy court proceeding. This power does not reach conduct which does not occur in proceeding in the bankruptcy court"); *In re Downs*, 103 F.3d 472 (6th Cir. 1996) ("[b]ankruptcy courts, like Article III courts, enjoy inherent power to sanction parties for improper conduct"); *Isaacson v. Manty*, 721 F.3d 533 (8th Cir. 2013) (bankruptcy court has inherent authority to sanction bad-faith conduct); *In re Rainbow Magazine, Inc.*, 77 F.3d 278 (9th Cir. 1996) (by enacting Code 105(a), "Congress impliedly recognized that bankruptcy courts have the inherent power to sanction"); *In re Mroz*, 65 F.3d 1567 (11th Cir. 1995) (a bankruptcy court has the inherent power to impose sanctions for bad-faith conduct).

Imposition of sanction under bankruptcy court's inherent power does not require showing of bad faith if sanction is not award of attorney's fees:

While an award of attorneys' fees as an inherent-power sanction requires a showing of bad faith, a finding of bad faith is not ordinarily required where an inherent-power sanction does not take the form of an award of attorneys' fees (and thus does not involve a departure from the American Rule).

Bankruptcy court did not abuse discretion in imposing $100 sanction on Chapter 13 debtor for tardy provision to trustee of tax return extension request:

Affirming *Charbono v. Sumski*, 2014 WL 4922988 (D. N.H., Sept. 30, 2014), the Court of Appeals held that the bankruptcy court did not abuse its discretion in imposing a $100 sanction on the Chapter 13 debtor for failing to deliver a copy of his request for an extension of the filing deadline for his federal income tax return to the Chapter 13 trustee within the time allowed under the terms of the debtor's confirmed plan, in accordance with the court's standing policy, even though the debtor had provided the copy to the trustee prior to the court's imposition of the sanction.

In re Charbono, 790 F.3d 80 (1st Cir., June 15, 2015)

(case no. 14-2151)

Text of opinion

R

Avoidable Transfers and Liens

Topical compilation: All topical compilations

PDF Word All circuit compilations

Prepetition tax foreclosure sale was avoidable because debtor did not receive "reasonably equivalent value":

The transfer of the debtor's home pursuant to a prepetition tax foreclosure sale was constructively fraudulent under Code § 548(a)(1)(B), and the debtor could avoid the transfer under Code § 522(h), where the home was worth $40,700 at the time of the sale, the home was subject to a mortgage of about $25,000, and the debtor's tax debt was $11,259. While the foreclosure sale eliminated the mortgage lien, the debtor did not receive any benefit from this because she remained personally liable under the mortgage note. And, while this personal liability might be dischargeable in the debtor's bankruptcy case, the determination of whether the debtor received "reasonably equivalent value" in the transfer for the purpose of § 548(a)(1)(B)(i) was made as of the time of the transfer.

In re Clay, 2015 WL 3878454 (Bankr. E.D. Wis., June 22, 2015)

(case no. 2:14-bk-27268; adv. proc. no. 2:14-ap-2315) (Bankruptcy Judge G. Michael Halfenger)

Text of opinion

Transfer avoidance proceeding under Code § 522(h) requires adversary proceeding:

A debtor exercising a trustee's avoidance powers under Code § 522(h) must proceed by adversary proceeding, as this was "a proceeding to recover money or property" under Bankruptcy Rule 7001(1).

In re Montellano, 2015 WL 3878412 (Bankr. C.D. Cal., June 19, 2015)

(case no. 2:15-bk-11049) (Bankruptcy Judge Robert Kwan)

Text of opinion

R

Prepetition credit counseling statement does not have to be signed under penalty of perjury:

A debtor's statement of compliance with the prepetition credit counseling requirement in Code § 109(h)(1) does not have to be signed under penalty of perjury.

In re Segraves, Case No. 4:12-bk-49433 (Bankr. E.D. Mo., June 9, 2015), appeal filed, Case No. 15-6021 (8th Cir. B.A.P., filed July 2, 2015)

(Bankruptcy Judge Barry S. Schermer)

Text of opinion

Chapter 13 debtors' completion of postpetition financial management course was not untimely:

The Chapter 13 debtors' completion of a postpetition financial management course was not untimely, although the debtors apparently completed the course more than 60 months postpetition, where the court permitted the debtors to make their final plan payment about 63 months postpetition, and the debtors completed the course prior to making the final payment, as called for under Bankruptcy Rule 1007(c).

In re Klaas, 533 B.R. 482 (Bankr. W.D. Pa., June 4, 2015), aff'd, Shovlin v. Klaas, Case No. 2:15-cv-802 (W.D. Pa., August 28, 2015)

(case no. 2:09-bk-29574) (Bankruptcy Judge Gregory L. Taddonio)

Text of opinion

R

Scope and Violation of Discharge Injunction

Effect of discharge on lien extending to property acquired by debtor postpetition:

Under Code § 552(b)(1), a prepetition security interest in the "proceeds, products, offspring, or profits" of property acquired prepetition remains valid following a debtor's discharge. However, Code § 552(a) provides that any other property acquired by the debtor postpetition is free of any prepetition lien, even if a prepetition security agreement extends to after-acquired property. See *In re Bumper Sales, Inc.*, 907 F.2d 1430 (4th Cir. 1990) ("[p]roceeds coverage, but not after-acquired property clauses, are valid under title 11"); *In re Skagit Pacific Corp.*, 316 B.R. 330 (9th Cir. B.A.P. 2004) ("[s]ection 552(a) cuts off security interests on property acquired by the debtor after the petition date even if there is an 'after-acquired' clause in the security agreement").

Creditor's continuation of prepetition lien does not violate discharge injunction:

There are number of decisions that have specifically held that renewal of a prepetition lien, securing a debt where the underlying personal liability has been discharged, is not a violation of the discharge injunction. Thus, here, neither the creditor's failure to release a prepetition UCC-1 financing statement, nor the creditor's post-discharge filing of a UCC-3 continuation statement, violated the discharge injunction.

In re Botson, 531 B.R. 719 (Bankr. N.D. Ohio, June 1, 2015)

(case no. 3:11-bk-36509; adv. proc. no. 3:14-ap-3056) (Bankruptcy Judge John P. Gustafson)

Text of opinion

Violation of discharge injunction was willful despite creditor's subjective belief that debt was not discharged:

Where the creditor and his attorney knew of the debtor's bankruptcy discharge, the subjective belief of the creditor and attorney that the discharge did not apply to the creditor's claim against the debtor did not preclude a determination that their violation of the discharge injunction was willful.

Violation of discharge injunction requires proof by clear and convincing evidence:

A willful violation of the discharge injunction must be proven by clear and convincing evidence.

In re Moon Joo Lee, 2015 WL 3960897 (9th Cir. B.A.P., June 29, 2015)

(case no. 14-1423)

Text of opinion

Foreclosure proceeding and communications in connection with proceeding did not violate discharge injunction:

The form letters sent to the Chapter 7 debtor following her discharge by her mortgage creditor, the creditor's filing of a foreclosure complaint, and the creditor's issuance of a summons for the foreclosure proceeding were within the ordinary course of business between the debtor and the creditor and therefore came within Code § 524(j) and did not violate the discharge injunction. Moreover, a creditor's pursuing its lien rights does not violate the debtor's discharge.

Waterhouse v. Wells Fargo Home Mortgage, 2015 WL 3867005 (M.D. Fla., June 23, 2015)

(case no. 8:14-cv-2794) (District Judge Elizabeth A. Kovachevich)

Text of opinion

Chapter 13 debtors' personal liability on mortgage debt paid outside plan is not discharged:

In two cases, the court held that the Chapter 13 debtors' personal liability on a mortgage debt was not discharged under Code § 1328(a) where the only mention of the debt in the debtors' plan stated that the debtors would make the payments "outside the plan." Such a debt is not "provided for by the plan," the court concluded, and under § 1328(a) a discharge extends only to debts "provided for by the plan." Moreover, if the debt was provided for by the plan, it would come within the discharge exception in § 1328(a)(1) for a debt "provided for under section 1322(b)(5)," even if there were no arrearages paid under the plan.

In re Park, 532 B.R. 392 (Bankr. M.D. Fla., June 19, 2015), appeal filed, Park v. Multibank 2009-1 RES-ADC Venture, LLC, Case No. 2:15-cv-414 (M.D. Fla., filed July 8, 2015)

(case no. 9:08-bk-2806) (Bankruptcy Judge Caryl E. Delano)

Text of opinion

In re Dukes, 2015 WL 3856335 (Bankr. M.D. Fla., June 19, 2015), appeal filed, Dukes v. Suncoast Credit Union, Case No. 2:15-cv-420 (M.D. Fla., filed July 13, 2015)

(case no. 9:09-bk-2778; adv. proc. no. 9:14-ap-569) (Bankruptcy Judge Caryl E. Delano)

Text of opinion

Creditor's collection on post-discharge promissory note violates discharge injunction if any part of consideration for note was discharged debt:

Creditors are not permitted to circumvent the reaffirmation protections of Code § 524(c) by re-obligating the debtor post-discharge or by disguising a reaffirmation as a novation. That a promissory note is dated after a discharge in bankruptcy is not determinative of whether its collection violates the discharge injunction. Rather, courts look at the consideration for the note. If any part of the consideration for a promissory note is a debt which was previously discharged in bankruptcy, collection of the note violates the discharge injunction. Even if a portion of the consideration for a new note is fresh consideration, collection of the note nevertheless violates the discharge injunction. The fresh consideration may have an impact on the remedy to be provided, but it does not excuse the violation of the discharge injunction.

In re White, 2015 WL 5011022 (Bankr. M.D. Ala., June 26, 2015)

(case no. 1:05-bk-12545; adv. proc. no. 1:13-ap-1119) (Chief Bankruptcy Judge William R. Sawyer)

Text of opinion

Valuation of Property

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Valuation of property as of petition date was not clearly erroneous although based on appraisal performed 15 months later:

The bankruptcy court's conclusion that the value of the Chapter 7 debtor's residential property was $635,000 was not clearly erroneous, where the bankruptcy court was confronted with four values for the property and the court found the $635,000 value of the property established by the licensed appraiser most probative of the actual value of the property on the petition date. Although this appraisal postdated the petition date by 15 months, there was nothing in the record to refute the debtor's representation that the condition of the property was essentially the same on the petition date as on the date of the appraisal. Additionally, the bankruptcy court's determination of value was well within the range set forth in a $625,000–$660,000 valuation the Chapter 7 trustee had obtained. Further, the court's decision was informed by the inability of the trustee to sell the property and the lack of any offers for the property.

In re Garcia, 532 B.R. 173 (1st Cir. B.A.P., June 24, 2015)

(case nos. 14-64, 14-71)

Text of opinion

Stipulation of value of debtor's residence did not apply after conversion from Chapter 13 to Chapter 7:

Code § 348(f)(1)(B), providing that "valuations of property ... in the chapter 13 case" do not apply "in a case converted to a case under chapter 7," applied to a stipulation of the value of the debtor's residence entered into by the debtor and the creditor whose lien the debtor sought to avoid under Code § 522(f). And, while the stipulation provided that the valuation applied "for all purposes in this bankruptcy case," this did not amount to an effective waiver of the debtor's right to invoke Code § 348(f)(1)(B).

In re Martinez, 2015 WL 3814935 (Bankr. D. N.M., June 18, 2015)

(case no. 1:10-bk-11101) (Chief Judge Robert H. Jacobvitz)

Text of opinion


R

Miscellaneous Issues

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

There are no cases in this issue.

R

Section Two:
Chapter 7 Issues

Abuse

Topical compilations:

PDF Word (in general)

PDF Word (under totality of circumstances)

All topical compilations

All circuit compilations

There are no cases in this issue.

R

"Cause" for Dismissal under Code § 707(a)

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

There are no cases in this issue.

R

Conversion or Dismissal of Case by Debtor

Court has discretion to allow reconversion of Chapter 7 case to Chapter 13:

On an issue as to which the courts disagree, the court held that it is within the court's discretion to allow a reconversion of a case from Chapter 7 to Chapter 13. See *In re Offer*, 2006 WL 995858 (Bankr. M.D. N.C. 2006); *In re Anderson*, 354 B.R. 766 (Bankr. D. S.C. 2006).

Chapter 7 debtors did not establish basis for reconversion of case to Chapter 13:

A debtor has the burden of proof to show that reconversion from Chapter 7 to Chapter 13 is appropriate. *In re Johnson*, 376 B.R. 763 (Bankr. D. N.M. 2007). Here, reconversion would not be allowed, where the Chapter 7 debtors failed to demonstrate any facts that would persuade the court to exercise its discretion to allow reconversion to Chapter 13. The debtors articulated no specific reasoning in support of a reconversion.

In re Salley, 2015 WL 3880384 (Bankr. M.D. N.C., June 4, 2015)

(case no. 1:13-bk-81532) (Bankruptcy Judge Lena Mansori James)

Text of opinion

Chapter 7 debtors did not establish basis for reconversion of case to Chapter 13:

Where the debtors had originally filed under Chapter 13, converted to Chapter 7, and now sought to reconvert to Chapter 13, reconversion would not be permitted where the debtors failed to demonstrate that their proposed Chapter 13 plan was feasible.

In re Adlawan, 2015 WL 3934900 (Bankr. N.D. Cal., June 25, 2015)

(case no. 5:14-bk-53190) (Bankruptcy Judge Arthur S. Weissbrodt)

Text of opinion

R

Denial or Revocation of Discharge

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Denial of extension of time for objecting to Chapter 7 debtor's discharge was not error:

Affirming *In re Robinson*, 2013 WL 3993741 (Bankr. S.D. N.Y., August 1, 2013), the district court held that, where the creditors exhibited a "remarkable lack of diligence" in prosecuting their case, the bankruptcy court did not err in denying the creditors' motion for a second extension of the time in which to object to the Chapter 7 debtor's discharge.

Chua v. Robinson, 2015 WL 3833542 (S.D. N.Y., June 18, 2015)

(case no. 1:13-mc-346) (District Judge Richard M. Berman)

Text of opinion

R

Reaffirmation Agreements; Statement of Intention; Surrender or Redemption of Collateral; Assumption of Lease of Personal Property

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

There are no cases in this issue.

R

Other Issues

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Chapter 7 trustee's options in prosecuting cause of action belonging to bankruptcy estate:

A prepetition cause of action that the Chapter 7 debtor failed to list in his bankruptcy schedules was property of his bankruptcy estate, and only the trustee in the debtor's bankruptcy case had standing to prosecute the claim. If the bankruptcy action was reopened, the trustee would have three options in exercising his or her discretion regarding the litigation the debtor had already commenced to prosecute the claim: (1) intervene and assume prosecution as trustee, (2) consent to prosecution by the debtor for the benefit of the estate, or (3) decline prosecution, in which case the debtor would standing in his individual capacity.

Sibert v. Wells Fargo Bank, N.A., 2015 WL 3946698 (E.D. Va., June 26, 2015)

(case no. 3:14-cv-737) (District Judge Henry E. Hudson)

Text of opinion

Chapter 7 debtor was not entitled to distribution from sale of homestead representing one-half of homestead exemption where sale price took exemption into account:

Where the Chapter 7 trustee sold, to the debtor's non-filing husband under Code § 363(i), the bankruptcy estate's interest in the spouses' homestead, which was community property, and the trustee calculated the sale price by deducting the Louisiana $35,000 homestead exemption from the spouses' equity in the property and dividing that amount in half, the debtor was not entitled to receive one-half of the $35,000 exemption amount from the proceeds of the sale, since the trustee's calculation of the sale price had already taken the exemption amount into account.

In re Schexnayder, 532 B.R. 667 (Bankr. M.D. La., May 22, 2015)

(case no. 3:12-bk-10407) (Bankruptcy Judge Douglas D. Dodd)

Text of opinion

Chapter 7 trustee may pay administrative expense, including estate tax liability, only after notice and hearing:

The plain language of Code § 503(b)(1)(B) establishes conclusively that "notice and a hearing" are required before a Chapter 7 trustee may pay an administrative expense, even if the administrative expense is a federal income tax liability of the bankruptcy estate that, under 28 U.S.C. § 960(b), the trustee is obligated to pay. The hearing requirement insures that interested parties have an opportunity to contest the amount of tax paid before the estate's funds are diminished, perhaps irretrievably.

In re Cloobeck, 788 F.3d 1243 (9th Cir., June 12, 2015)

(case no. 13-15432)

Text of opinion

Court has discretion to convert Chapter 7 case to Chapter 11 under Code § 706(b):

Agreeing with *In re Lenartz*, 263 B.R. 331 (Bankr. D. Idaho 2001) and disagreeing with *In re Graham*, 21 B.R. 235 (Bankr. N.D. Iowa 1982), the court held that the plain language of Code § 706(b) permits the involuntary conversion of any Chapter 7 case to Chapter 11 in the exercise of the court's discretion. While the language of § 706(b) does not require a balancing of interests in making the decision of whether to order conversion of the case, courts have historically considered these competing interests in furtherance of responsibly exercising their discretion.

Conversion of Chapter 7 case to Chapter 11 benefitted both creditors and debtors and would be ordered:

Here, the court granted the U.S. Trustee's motion to convert the individual debtors' Chapter 7 case to Chapter 11, where the debtors (who were not subject to the means test because their debts were primarily business debts) clearly had the ability to pay between $4,500 and $11,200 per month into a Chapter 11 plan, the debtors had no non-exempt assets to liquidate for the benefit of creditors in a Chapter 7 case, and conversion to Chapter 11 benefitted the debtors because it gave them an opportunity to pay a $100,000 federal income tax debt that appeared to be nondischargeable, even though the debtors strongly opposed conversion. The court found the case similar to *In re Gordon*, 465 B.R. 683 (Bankr. N.D. Ga. 2012) and *In re Baker*, 503 B.R. 751 (Bankr. M.D. Fla. 2013), in both of which conversion had been ordered.

In re Decker, --- B.R. ----, 2015 WL 5027558 (Bankr. D. Alaska, March 31, 2015), appeal filed, Decker v. U.S. Trustee, Case No. 3:15-cv-59 (D. Alaska, filed April 13, 2015)

(case no. 3:14-bk-65) (Chief Bankruptcy Judge Gary A. Spraker)

Text of opinion

Chapter 7 trustee is not entitled to compensation when case is converted to Chapter 13 prior to distribution of assets:

Because Code § 326(a) fixes the maximum compensation a court may award a Chapter 7 trustee, and bases that compensation on "all moneys disbursed or turned over in the case by the trustee to parties in interest," courts have struggled to find a legal basis for compensating a Chapter 7 trustee who has expended considerable effort in the performance of his or her statutory duties in an asset case that is converted to another chapter before the trustee has the opportunity to administer the assets. Because the Bankruptcy Code does not have a rule for how to calculate a Chapter 7 trustee's compensation in these circumstances, courts have developed six distinct theories for how to treat these situations. See *In re Philips*, 507 B.R. 2 (Bankr. N.D. Ga. 2014) ("More simply, these cases tend to fall into three main categories: some cases hold that the amount payable is zero when the trustee has made no disbursements; others hold that the cap simply does not apply to a case that is no longer a case under Chapter 7; still others hold that the cap applies but it is calculated based on funds distributed by any trustee after conversion to Chapter 13"). Here, the court concluded that, under § 326(a), the Chapter 7 trustee was not entitled to any compensation, even though the debtor consented to the trustee's $3,000 administrative allowance claim.

In re Mingledorff, 2015 WL 3897374 (Bankr. S.D. Ga., June 23, 2015)

(case no. 4:12-bk-41543) (Bankruptcy Judge Edward J. Coleman, III)

Text of opinion

R

Section Three:
Chapter 13 Issues

Part A

Confirmation of Plan—Treatment of Secured Claims

Confirmation of Plan: Treatment of Secured Claims: Generally

Topical compilations:

PDF	Word	(general matters)	All topical compilations
PDF	Word	(plan provisions restricting residential mortgage creditors)	All circuit compilations
PDF	Word	(910-day vehicles; other issues under hanging paragraph)	

Secured creditor accepted Chapter 13 plan by failing to object to its confirmation:

A secured creditor that received notice of the Chapter 13 debtors' bankruptcy case and filed a proof of claim but did not object to plan confirmation, appeal the confirmation order, or otherwise raise any issue as to the treatment of its claim until the motorcycle was totaled in an accident accepted the debtors' plan for the purpose of Code § 1325(a)(5)(A) even though the plan bifurcated the creditor's claim in violation of the hanging paragraph of Code § 1325(a). See *In re Crawford*, 532 B.R. 645 (Bankr. D. S.C., June 8, 2015).

In re Ross, 2015 WL 3781074 (Bankr. D. S.C., June 16, 2015)

(case no. 7:11-bk-4792) (Bankruptcy Judge Helen E. Burris)

Text of opinion

Secured creditor accepted Chapter 13 plan by failing to object to its confirmation:

The debtors' Chapter 13 plan could permanently modify the interest rate on a secured claim, although the debtors were not eligible for a discharge, because the creditor's failure to object to confirmation of the plan amounted to acceptance of the plan under Code § 1325(a)(5)(A).

In re Crawford, 532 B.R. 645 (Bankr. D. S.C., June 8, 2015)

(case no. 3:09-bk-8171) (Bankruptcy Judge John E. Waites)

Text of opinion

Interest rate of 5% under Till was reasonable:

The plurality decision in *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S.Ct. 1951, 158 L.Ed.2d 787 (2004) establishes a "prime plus" formula for determining the interest rate to be paid on a secured claim in a Chapter 13 case that is paid in monthly payments under Code § 1325(a)(5)(B). Here, where the debtor's amended Chapter 13 plan was filed on March 30, 2015, at which time the national prime rate was 3.25%, the debtor's proposed interest rate of 5% was reasonable. While *In re Ibarra*, 235 B.R. 204 (Bankr. D. Puerto Rico 1999) required payment of interest at a market rate, that decision had been superseded by *Till*.

In re Garcia, 2015 WL 3933992 (Bankr. D. Puerto Rico, June 25, 2015)

(case no. 3:14-bk-4028) (Bankruptcy Judge Brian K. Tester)

Text of opinion

Chapter 13 plan may provide for vesting of title to collateral in secured creditor:

A Chapter 13 plan may provide for transferring title to mortgaged real estate to the mortgagee in full satisfaction of its claim subject to the mortgagee's right to object, in which case the court must determine if the plan has been proposed in good faith and is otherwise in compliance with the Code. The words "vesting of property" in Code § 1322(b)(9) and "surrender the property" in § 1325(a)(5)(C) are different and mean different things. Any argument that Congress intended § 1325(a)(5)(C) to trump § 1322(b)(9) and so "vest" must be read to mean "surrender" is implausible. These provisions are not in conflict. A plan that contains a provision for transferring or vesting in the secured creditor the property that is its collateral would be compliant with and confirmable under § 1325(a)(5)(C) because a transfer of property presupposes its surrender by the transferor. Surrendering or "ceding possessory rights" is a preliminary step in the process of transferring title. This interpretation of vesting in § 1322(b)(9) is consistent with and presents an avenue for effectuating § 1322(b)(8), which permits "the payment of part or all of a claim against the debtor from property of the estate or property of the debtor." While Massachusetts law does not permit a mortgagor to force a mortgagee to take title to mortgaged property, the Bankruptcy Code preempts state law with which it is in conflict.

Chapter 13 plan may vest title to collateral in secured creditor in full payment of creditor's claim:

If a Chapter 13 plan proposes to transfer to a mortgage creditor property that is heavily encumbered or worth significantly less than the mortgage debt without also affording the creditor a right to participate as an unsecured creditor for any deficiency claim, the plan may be subject to an objection based on bad faith under Code § 1322(a)(3). Here, however, the property that the Chapter 13 debtor's plan proposed to vest in the mortgage creditor, in full payment of its claim, was worth more than the claim, according to the debtor's schedules.

In re Sagendorph, 2015 WL 3867955 (Bankr. D. Mass., June 22, 2015), **appeal pending**

(case no. 4:14-bk-41675) (Chief Bankruptcy Judge Melvin S. Hoffman)

Text of opinion

Court declines to permit Chapter 13 debtor to make direct postpetition mortgage payments:

While the bankruptcy court has discretion in deciding who should pay claims (as between a Chapter 13 debtor and the Chapter 13 trustee), the discretion is not unbridled, but is instead informed by considerable deference to the standing trustee's views. *In re Jutila*, 111 B.R. 621 (W.D. Mich. 1989); *In re Case*, 11 B.R. 843 (Bankr. D. Utah 1981). Considering the factors articulated in *In re Perez*, 339 B.R. 385 (Bankr. S.D. Tex. 2006), aff'd *Perez v. Peake*, 373 B.R. 468 (S.D. Tex. 2007), the court concluded that, on balance, these factors favored the presumption that the Chapter 13 trustee serve as disbursing agent for the debtor's postpetition mortgage payments. The debtor had not rebutted the presumption or persuaded the court to exercise its discretion in his favor on this point. Moreover, Congress set the means by which standing Chapter 13 trustees get paid and has elected to have the individuals that avail themselves of the system pay for the service based upon the "payments received" by the trustee. See 28 U.S.C. § 586(e)(2) and 11 U.S.C. § 1326(c). By diverting payments away from the trustee, there are fewer "payments received" and less money available for her to perform her statutory duties in this and other assigned cases.

In re Moore, Case No. 2:15-bk-90015 (Bankr. W.D. Mich., June 17, 2015)

(Chief Bankruptcy Judge Scott W. Dales)

Text of opinion

Payments into escrow account followed by balloon payment to secured creditor violates Code § 1325(a)(5)(B)(iii)(I), requiring payments to secured creditor under Chapter 13 plan to be in "equal monthly amounts":

Affirming *In re Ehiorobo*, 2015 WL 394363 (Bankr. E.D. Wis., Jan. 29, 2015), the district court held that the meaning of "payment" in Code § 1325(a)(5)(B)(iii)(I), requiring payments to secured creditors under a Chapter 13 plan to be in "equal monthly amounts," is broad enough to encompass a Chapter 13 debtor's proposed monthly deposits into an escrow account. Accordingly, the debtor's proposed plan, under which the debtor would make monthly deposits into escrow accounts for two secured creditors until the debtor was able to pay the debts in full via balloon payments, violated § 1325(a)(5)(B)(iii)(I).

Ehiorobo v. Talmer Bank and Trust, 2015 WL 3936936 (E.D. Wis., June 26, 2015)

(case no. 2:15-cv-169) (District Judge Lynn Adelman)

Text of opinion

Partial surrender of collateral does not comply with Code § 1325(a)(5)(C):

The court could not confirm a Chapter 13 plan that proposed to surrender one of three parcels of real property securing a creditor's claim to the creditor, and to pay any deficiency through payments over the term of the plan. Partial surrender (i.e., surrender of some but not all of the creditor's collateral) is not allowed under Code § 1325(a)(5)(C). *In re Kerwin*, 996 F.2d 552 (2d Cir. 1993); *In re Williams*, 168 F.3d 845 (5th Cir. 1999); *In re Covington*, 176 B.R. 152 (Bankr. E.D. Tenn. 1994). Contra, *In re McCommons*, 288 B.R. 594 (Bankr. M.D. Ga. 2002).

Partial surrender of collateral is not form of payment compliant with Code § 1325(a)(5)(B):

Nor could the surrender provision be confirmed as a method of payment of the creditor's claim under § 1325(a)(5)(B), which provides that a court shall confirm a Chapter 13 plan, if, in addition to other requirements, "the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim." By testing whether "the value ... of property to be distributed" under a plan equals or exceeds the amount of the allowed secured claim, § 1325 permits a plan to be confirmed prior to reducing the property to acceptable form, such as in the case of a plan that provides for the sale of property and the distribution of the proceeds to the secured creditor. While Code § 1322(b)(8) states that a plan may "provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor," the meaning of "payment" in the context of § 1322(b)(8) is ambiguous, and the court concluded that "payment" in § 1322(a)(8) should be interpreted as the delivery of money or of some non-monetary property to a creditor, provided that delivery of any such non-monetary property either (a) was consented to at confirmation, (b) had been previously accepted in satisfaction of the debt in the parties' course of dealings, or (c) in the case of commercial debt, was customarily accepted in satisfaction of that type of debt. While there were Chapter 12 cases allowing for payment in kind, those cases involved agricultural lenders in a specialized industry. If trade custom or course of dealings entailed routine settlement of debt with something other than money, it was possible that a plan in a Chapter 12 case or a Chapter 13 business case could provide for such a payment in kind.

Secured creditor may not be forced to accept possession of or title to surrendered property:

A Chapter 13 plan cannot require a secured creditor to accept a surrender of property or to take possession of or title to the property through repossession or foreclosure. *Bank of New York Mellon v. Watt*, 2015 WL 1879680 (D. Or., April 22, 2015); *In re Rose*, 512 B.R. 790 (Bankr. W.D. N.C. 2014); *In re Moore*, 477 B.R. 918 (Bankr. S.D. Ga. 2012); *In re Brown*, 477 B.R. 915 (Bankr. S.D. Ga. 2012); *In re Ogunfiditimi*, 2011 WL 2652371 (Bankr. D. Md. 2011); *In re White*, 282 B.R. 418 (Bankr. N.D. Ohio 2002); *In re Service*, 155 B.R. 512 (Bankr. E.D. Mo. 1993).

In re Lemming, 532 B.R. 398 (Bankr. N.D. Ga., June 18, 2015)

(case no. 4:14-bk-43080) (Bankruptcy Judge Mary Grace Diehl)

Text of opinion

Surrender of real property by Chapter 13 debtors precludes debtors from defending foreclosure proceedings:

Agreeing with *In re Metzler*, 530 B.R. 894 (Bankr. M.D. Fla., May 13, 2015), the court held, in a Chapter 13 case in which the debtors' compliance with the court's Mortgage Modification Mediation Program Procedures required them to modify their Chapter 13 plan so as to provide for the surrender of their real property to the secured creditor, that "surrender" meant that the debtors could not thereafter take any overt action to defend or impede the creditor's foreclosure proceedings.

In re Calzadilla, 534 B.R. 216 (Bankr. S.D. Fla., June 17, 2015)

(case no. 1:14-bk-11318) (Bankruptcy Judge Robert A. Mark)

Text of opinion

R

Confirmation of Plan:
Treatment of Secured Claims:
Bifurcation, Lien Stripping, Modification

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Requirements to strip wholly-unsecured junior lien:

In order for a Chapter 13 debtor to strip a wholly-unsecured junior lien, it is sufficient for the debtor to establish "the lien amount of the first mortgage, the proof of claim of the second mortgage and a valuation of the debtor's principal residence." *In re Robert*, 313 B.R. 545 (Bankr. N.D. N.Y. 2004). It is not required that the holder of the first mortgage have an allowed claim.

Caulkett decision by Supreme Court has no effect on lien-stripping in Chapter 13:

The recent Supreme Court decision on lien stripping, *Bank of America, N.A. v. Caulkett*, 135 S.Ct. 1995, 192 L.Ed.2d 52 (2015), applies only in the Chapter 7 context and has no effect on a Chapter 13 debtor's ability to strip a wholly-unsecured junior lien.

In re Wilson, 532 B.R. 486 (S.D. N.Y., June 5, 2015)

(case no. 7:14-cv-9543) (District Judge Cathy Seibel)

Text of opinion

Caulkett decision by Supreme Court has no effect on lien-stripping in Chapter 13:

A Chapter 13 debtor's ability to strip a wholly-unsecured junior lien is unaffected by the recent Supreme Court decision in *Bank of America, N.A. v. Caulkett*, 135 S.Ct. 1995, 192 L.Ed.2d 52 (2015), which applies only to Chapter 7 cases.

In re Turman, 2015 WL 3745304 (Bankr. D. Neb., June 12, 2015)

(case no. 8:14-bk-80062; adv. proc. no. 8:14-ap-8035) (Chief Bankruptcy Judge Thomas L. Saladino)

Text of opinion

Three types of liens under Bankruptcy Code are mutually exclusive:

The Bankruptcy Code recognizes three types of liens: judicial, statutory, and consensual. While the Code does not explicitly state that the three types of liens are mutually exclusive, the legislative history of the Code makes clear that they are.

Courts disagree concerning nature of condominium association's lien:

Courts are split regarding the classification of a condominium association's lien. Compare *In re Robinson*, 231 B.R. 30 (Bankr. D. N.J. 1997); *In re Beckley*, 210 B.R. 391 (Bankr. M.D. Fla. 1997); *In re Phillippy*, 178 B.R. 67 (Bankr. M.D. Pa. 1994); and *In re Bland*, 91 B.R. 421 (Bankr. N.D. Ohio 1988) (all holding that a condominium lien is a security interest) with *In re Green*, 793 F.3d 463 (5th Cir., July 13, 2015) (applying Louisiana law); *Young v. 1200 Buena Vista Condos.*, 477 B.R. 594 (W.D. Pa. 2012); and *In re Lopez*, 512 B.R. 663 (Bankr. D. Colo. 2014) (all concluding that a condominium association lien is statutory).

Condominium association's lien was consensual:

Concluding that the lien held by the Chapter 13 debtors' condominium association was a consensual lien, the court reasoned that, by bargaining for, voluntarily accepting, and subsequently recording a deed to a condominium unit that incorporated the Master Deed and Bylaws, the unit owner agreed to be bound by the rules and regulations of the deed and bylaws. While the condominium was subject to the New Jersey Condominium Association Act, the lien arose under the deed and bylaws.

Condominium association's claim came within anti-modification provision in Code § 1322(b)(2):

Because the lien held by the Chapter 13 debtors' condominium association was a consensual lien, the association held a security interest under the Bankruptcy Code, as Code § 101(51) defines "security interest" as a "lien created by an agreement." Accordingly, the association's claim came within the anti-modification provision in Code § 1322(b)(2).

Chapter 13 plan could strip condominium association's unsecured lien other than amount given statutory priority:

Because the debt due on the Chapter 13 debtors' first mortgage exhausted the equity in their condominium unit, the lien held by the condominium association was wholly unsecured and could be stripped under the debtors' plan, except for the amount of the association's claim that was given statutory priority under New Jersey law over the first mortgage lien, namely "the aggregate customary condominium assessment against the unit owner for the six-month period prior to the recording of the lien." The debtors' plan properly provided to pay this amount on the association's claim, and this result did not constitute a bifurcation of the association's claim forbidden by *Nobelman v. American Savings Bank*, 508 U.S. 324, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993).

In re Rones, 531 B.R. 526 (Bankr. D. N.J., June 11, 2015), appeal filed, Whispering Woods Condominium Association, Inc. v. Rones, Case No. 3:15-cv-4271 (D. N.J., filed June 24, 2015)

(case no. 3:14-bk-35899) (Bankruptcy Judge Christine M. Gravelle)

Text of opinion

Secured creditor's acceptance of Chapter 13 plan allowed permanent modification of interest rate paid on creditor's claim, despite debtors' ineligibility for discharge:

The debtors' Chapter 13 plan could permanently modify the interest rate on a secured claim, although the debtors were not eligible for a discharge, because the creditor's failure to object to confirmation of the plan amounted to acceptance of the plan under Code § 1325(a)(5)(A). As a result, § 1325(a)(5)(B)(i), requiring a plan to provide for a creditor's retention of its lien until the debtor received a discharge or the creditor's claim was paid in full, was inapplicable.

In re Crawford, 532 B.R. 645 (Bankr. D. S.C., June 8, 2015)

(case no. 3:09-bk-8171) (Bankruptcy Judge John E. Waites)

Text of opinion

Caulkett decision by Supreme Court has no effect on lien-stripping in Chapter 13:

The recent Supreme Court decision in *Bank of America, N.A. v. Caulkett*, 135 S.Ct. 1995, 192 L.Ed.2d 52 (2015) does not eliminate a Chapter 13 debtor's ability to strip a wholly-unsecured junior lien.

In re Grossman Rivera, 2015 WL 3932381 (Bankr. D. Puerto Rico, June 25, 2015)

(case no. 3:13-bk-7968; adv. proc. no. 3:14-ap-100) (Bankruptcy Judge Brian K. Tester)

Text of opinion

Changing variable rate of interest to a fixed rate is "modification" under Code § 1322(b)(2):

Changing a variable rate of interest to a fixed rate is a "modification" for the purpose of Code § 1322(b)(2). See *In re Coffey*, 52 B.R. 54 (Bankr. N.H. 1985). See also *In re Litton*, 330 F.3d 636 (4th Cir. 2003) (there is no dispute that Code § 1322(b)(2) "prohibit[s] any fundamental alteration in the debtor's obligation, e.g., lowering monthly payments, converting a variable interest rate to a fixed interest rate, or extending the repayment term of a note").

Payment of mortgage claim in full prior to note's maturity date was not "modification" under Code § 1322(b)(2) where note permitted full prepayment:

The debtors' Chapter 13 plan, which proposed to pay off a residential mortgage creditor's entire claim by month 26, which was approximately 13 years prior to the underlying note's maturity date, did not modify the claim, within the meaning of Code § 1322(b)(2), since the note by its own terms permitted prepayment in full without penalty.

In re Gaetje, 2015 WL 3825972 (Bankr. S.D. Tex., June 18, 2015)

(case no. 4:15-bk-30130) (Bankruptcy Judge Jeff Bohm)

Text of opinion

Time of determination of debtor's principal residence for purpose of Code § 1322(b)(2):

To determine whether property is the debtor's principal residence for the purpose of Code § 1322(b)(2), courts in the Fifth Circuit look to the time the loan was made. The relevant inquiry is not what the lender believed, but rather whether the property was in fact the debtor's principal residence.

Anti-modification provision of Code § 1322(b)(2) applied where Chapter 13 debtor's residence was located on two adjacent lots:

The anti-modification provision of Code § 1322(b)(2) applied where the Chapter 13 debtor's residence was located on two adjacent lots and the mortgage creditor's lien attached to only one of the two lots, as the claim was secured only by the debtor's principal residence.

In re Huriega, 2015 WL 4130866 (Bankr. W.D., Tex. June 1, 2015)

(case no. 5:12-bk-53080; adv. proc. no. 5:13-ap-5058) (Bankruptcy Judge Craig A. Gargotta)

Text of opinion

R

Part B

Confirmation of Plan—Treatment of Unsecured Claims

Confirmation of Plan:
Treatment of Unsecured Claims:
Compliance with Projected Disposable Income Requirement

Topical compilation: All topical compilations

PDF Word All circuit compilations

Above-median debtor with actual expense less than IRS standard amount may only deduct actual expense in calculating projected disposable income:

When calculating an above-median-income Chapter 13 debtor's disposable monthly income, the debtor is only permitted to claim his or her actual expense, rather than the full amount of the deduction for home and transportation ownership expenses listed in the IRS Standards, if the debtor's actual expense is less than the amount listed in the IRS Standard. Comparing *In re Harris*, 522 B.R. 804 (Bankr. E.D. N.C. 2014) (debtor may deduct only actual expense) and *In re Daniel*, 2012 WL 3322438 (Bankr. M.D. Ala., May 30, 2012) (same) with *In re Miranda*, 449 B.R. 182 (Bankr. D. Puerto Rico 2011) (debtor may claim the full amount specified in the standard) and *In re Scott*, 457 B.R. 740 (Bankr. S.D. Ill. 2011) (same), the court said that it found *Harris* to be better-reasoned. *Harris* concluded that an expense amount is only "applicable" to a debtor to the extent it is actually incurred, with the IRS Standard serving merely as a cap on the amount of the deduction a debtor may claim, and the court agreed that this was a logical extension of the Supreme Court's decision in *Ransom v. FIA Card Services*, 562 U.S. 61, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011), which held that a debtor with no contractual expense could not take a vehicle ownership deduction in the means test. While the case involved a Chapter 13 debtor, the court's holding would seem to also apply in Chapter 7 cases.

In re Wilkerson, 2015 WL 3935259 (Bankr. D. D.C., June 25, 2015), **appeal filed**, Case No. 1:15-cv-1199 (D. D.C., filed July 24, 2015)

(case no. 1:14-bk-582) (Bankruptcy Judge S. Martin Teel, Jr.)

Text of opinion

Income of Chapter 13 debtor's non-filing spouse needed to be taken into account if spouses operated as "single economic unit":

Following the approach taken in *In re Welch*, 347 B.R. 247 (Bankr. W.D. Mich. 2006), the court said that, if the Chapter 13 debtor and his non-filing spouse operated as a "single economic unit," the spouse's income and expenses would need to be taken into account in calculating the debtor's projected disposable income, even though the spouses had a prenuptial agreement that allegedly provided for "complete separation of property."

In re Ortiz-Feliciano, 532 B.R. 185 (Bankr. D. Puerto Rico, June 15, 2015)

(case no. 3:13-bk-5388) (Chief Bankruptcy Judge Enrique S. Lamoutte)

Text of opinion

Chapter 13 plan provision to account for possibility of debtor husband's becoming employed again:

Where the Chapter 13 debtor husband lost his job shortly after the debtors filed their bankruptcy petition, it was sufficient, to comply with the projected disposable income requirement in Code § 1325(b), for the plan to provide, as proposed by the debtors, that "[w]ithin 30 days of Debtor-husband obtaining employment, Debtors shall amend Schedule I and modify their plan, as necessary, to pay all disposable income into the plan." The debtors' plan was not required to provide, as proposed by the Chapter 13 trustee, that "Debtors will turnover 1/3 of gross income in excess of $65,652 during the duration of the plan," as this failed to take into account the possible changes in expenses the debtors might experience along with any increased income once the husband was able to find new employment.

In re Trobiano, 532 B.R. 355 (Bankr. D. Colo., June 23, 2015)

(case no. 1:14-bk-24635) (Bankruptcy Judge Thomas B. McNamara)

Text of opinion

Voluntary retirement contributions may be excluded from Chapter 13 debtor's calculation of projected disposable income to extent debtor made contributions prepetition:

Disagreeing with *In re Parks*, 475 B.R. 703 (9th Cir. B.A.P. 2012), and extending *In re Bruce*, 484 B.R. 387 (Bankr. W.D. Wash. 2012) to above-median debtors, the court held that, for all Chapter 13 debtors, voluntary retirement contributions may be excluded from the calculation of disposable income, to the extent that those contributions were being made pre-petition during the six-month look-back period used to determine current monthly income. The court noted that *Collier on Bankruptcy* concludes that the hanging paragraph to Code § 541(b)(7)(A)(i) "removes any doubt" that qualifying voluntary retirement contributions "are to be excluded from the disposable income calculation."

In re Vu, Case No. 3:15-bk-41405 (Bankr. W.D. Wash., June 16, 2015)

(Bankruptcy Judge Brian D. Lynch)

Text of opinion

Chapter 13 debtor could not deduct expense of retaining luxury boat:

Basing its analysis on Code § 707(b)(2)(A)(iii), the court held that, in calculating projected disposable income, an above-median Chapter 13 debtor may deduct amounts necessary to pay a secured debt only if the collateral for the debt is necessary for the support of the debtor and the debtor's dependents. If all secured debts were included in subsection (I) of § 707(b)(2)(A)(iii), which allows the deduction of "the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the filing of the petition," then there would be no need for subsection (II), which discusses additional payments that may be allowable expense deductions but limits them to payments on debts secured by collateral that is necessary for the support of the debtor and the debtor's dependents. It was clear to the court that both subsection (I) and (II) related to each other and were each limiting in their own respects with regard to permissible expenses. Thus, here, a luxury boat was not necessary for the support of the Chapter 13 debtor or his dependents, and the monthly expense to retain the boat was not an allowable expense for purposes of calculating disposable income.

In re Warren, 2015 WL 3505251 (Bankr. S.D. Fla., June 2, 2015)

(case no. 1:15-bk-11878) (Bankruptcy Judge A. Jay Cristol)

Text of opinion

R

Confirmation of Plan:
Treatment of Unsecured Claims:
Other Issues

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Chapter 13 plan not only may, but must, provide for payment of postpetition interest on prepetition DSO arrearage:

Amending *In re Lightfoot*, 2015 WL 3634098 (Bankr. S.D. Tex. June 10, 2015), and disagreeing with *In re Hernandez*, 2007 WL 3998301 (Bankr. E.D. Tex. 2007), the court reasoned that, because Code § 101(14A) defines a "domestic support obligation" as including postpetition interest, the interest is considered part of the underlying claim rather than interest on a claim; therefore, Code § 1322(b)(10), which provides that a Chapter 13 plan may not pay interest on nondischargeable claims unless the plan provides for full payment of all allowed claims, does not prohibit a plan that provides for the payment of postpetition interest on a prepetition DSO arrearage. Moreover, because § 101(14A) states that its definition of "domestic support obligation" applies "notwithstanding any other provision of this title," neither Code § 502(b)(2), which disallows claims for unmatured interest, nor § 502(b)(5), which disallows claims for unmatured DSOs, prohibits a Chapter 13 plan from providing for the payment of postpetition interest on a prepetition DSO arrearage. In fact, the debtors were not only allowed, but were required under Code § 1322(a)(2), which mandates full payment of most priority claims, to provide in their proposed plan for the payment of the 6% interest that accrued under Texas law on a DSO claim filed by the debtor husband's former wife.

In re Lightfoot, 2015 WL 3956211 (Bankr. S.D. Tex., June 22, 2015)

(case no. 4:13-bk-32970) (Bankruptcy Judge Jeff Bohm)

Text of opinion

R

Part C

Confirmation of Plan—Other Issues

Other Objections to Confirmation

Topical compilations:

PDF Word (general matters)

PDF Word (good faith)

PDF Word (plan term)

All topical compilations

All circuit compilations

City was not party in interest with standing to object to confirmation of proposed Chapter 13 plan that redeemed debtor's property from city's tax sale:

A city was not a party in interest with standing to object to confirmation of the debtor's proposed Chapter 13 plan (which redeemed the debtor's property from the city's tax sale by paying the tax sale purchaser over the term of the plan), where the city had not filed a proof of claim and was not a creditor of the debtor, and the plan contained no language directed at the city that could give rise to even a "trifling interest" in the adjudication of plan confirmation. The city's allegation that confirmation of the plan would chill the capital market for future tax sales was too speculative an injury.

In re Minor, 531 B.R. 564 (Bankr. E.D. Pa., June 9, 2015), **appeal filed**, Case No. 2:15-cv-3562 (E.D. Pa., filed June 25, 2015)

(case no. 2:13-bk-19278) (Bankruptcy Judge Magdeline D. Coleman)

Text of opinion

Reconversion from Chapter 7 does not restart maximum 60-month Chapter 13 plan term:

Where the debtors had originally filed under Chapter 13, converted to Chapter 7, and now sought to reconvert to Chapter 13, reconversion would not restart the maximum 60-month term of the debtors' Chapter 13 plan.

In re Adlawan, 2015 WL 3934900 (Bankr. N.D. Cal., June 25, 2015)

(case no. 5:14-bk-53190) (Bankruptcy Judge Arthur S. Weissbrodt)

Text of opinion

Chapter 13 debtor's exclusion of live-in girlfriend's income was not in bad faith under Code § 1325(a)(3):

The below-median Chapter 13 debtor's plan was proposed in good faith for the purpose of Code § 1325(a)(3), even though the debtor failed to income the income of his live-in girlfriend on Schedule I and in computing his plan payments. First and foremost, nowhere does the Bankruptcy Code require that a live-in significant other's income be counted in analyzing a Chapter 13 plan, as was the case for a non-filing spouse. In addition, the Chapter 13 trustee had not shown that the debtor's girlfriend was otherwise legally obligated to financially contribute to the joint household, nor were any of the assets in play community property. Moreover, courts had held that, absent a formal agreement to contribute, a significant other's income should not be counted in determining whether a debtor had "regular income" so as to be eligible for Chapter 13 relief under Code § 109(e), and it seemed to the court that, if a non-spouse's contribution was not stable and regular enough to be counted toward a debtor's eligibility for Chapter 13, logic and consistency dictated that it was also not worthy of inclusion in the debtor's schedule I or the computation of required plan payments.

In re Broadbent, 531 B.R. 840 (Bankr. D. Idaho, June 8, 2015)

(case no. 4:14-bk-41269) (Bankruptcy Judge Jim D. Pappas)

Text of opinion

Chapter 13 debtor's retention of luxury boat was not in good faith under Code § 1325(a)(3):

Agreeing with *In re Hicks*, 2011 WL 2414419 (Bankr. N.D. Ala., June 15, 2011), the court held that an above-median Chapter 13 debtor's plan was not proposed in good faith for the purpose of Code § 1325(a)(3) where the debtor proposed to pay $255 monthly to retain a luxury boat that was not necessary for the support of the Chapter 13 debtor or his dependents. The debtor proposed to pay $15,330 over the pendency of the case towards his recreational boat while paying only $1,956 to his unsecured creditors. As the debtor listed a total of $145,353.84 in unsecured nonpriority claims, this equated to a total repayment of 1.34%.

In re Warren, 2015 WL 3505251 (Bankr. S.D. Fla., June 2, 2015)

(case no. 1:15-bk-11878) (Bankruptcy Judge A. Jay Cristol)

Text of opinion

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Effect of Plan Confirmation

Topical compilation: All topical compilations

PDF Word All circuit compilations

Secured creditor was bound by confirmation of Chapter 13 plan that bifurcated creditor's claim in violation of hanging paragraph of Code § 1325(a):

A creditor holding a claim secured by a lien on a used motorcycle purchased by the Chapter 13 debtors less than one year prepetition was bound by the confirmation of the debtors' plan, which bifurcated the creditor's claim in violation of the hanging paragraph of Code § 1325(a), where the creditor received notice of the debtors' bankruptcy case, filed a proof of claim but did not object to plan confirmation, and received payments under the debtors' plan for nearly four years, and there was no evidence of improper motive on the part of any party that sought or recommended confirmation of the plan. The parties apparently failed to recognize that the hanging paragraph applied because the motorcycle was a 2004 model and the debtors filed their case in 2011.

In re Ross, 2015 WL 3781074 (Bankr. D. S.C., June 16, 2015)

(case no. 7:11-bk-4792) (Bankruptcy Judge Helen E. Burris)

Text of opinion

Chapter 13 plan confirmation could bind creditor despite debtors' lack of ownership interest in residence:

Although a prepetition state court judgment had declared that the Chapter 13 debtors held no legal or equitable interests in their residence that could impede a creditor's foreclosure rights, and that finding was binding on the parties in the bankruptcy case under the *Rooker-Feldman* doctrine, the creditor was a "creditor" under the Bankruptcy Code and could be bound by the confirmation of the debtors' Chapter 13 plan.

In re Wolfe, 534 B.R. 158 (Bankr. S.D. Ohio, June 19, 2015), **appeal filed**, Bank of New York Mellon v. Wolfe, Case No. 2:15-cv-2662 (S.D. Ohio, filed July 28, 2015)

(case no. 2:14-bk-54523) (Bankruptcy Judge Chares M. Caldwell)

Text of opinion

Mortgage servicer's maintenance of two sets of books for Chapter 13 debtor's account did not violate Chapter 13 plan confirmation order:

Given the "limited scope" of a bankruptcy court's role in supervising mortgage lenders, the court concluded that the Chapter 13 debtor's mortgage servicer's conduct in maintaining two sets of books, one reflecting accounting for the debtor's account as dictated by the Bankruptcy Code, and a second one reflecting accounting under the parties' contract without reference to bankruptcy, did not violate the automatic stay or the court's Chapter 13 plan confirmation order, where the servicer said that it would adhere to the bankruptcy accounting if the debtor successfully completed her plan and obtained a discharge.

In re Ogden, 532 B.R. 329 (Bankr. D. Colo., April 3, 2014)

(case no. 1:11-bk-19841; adv. proc. no. 1:13-ap-1054) (Bankruptcy Judge Elizabeth E. Brown)

Text of opinion

Comment: This is an older decision that has only recently become available.

Confirmation of Chapter 13 debtor's plan precluded Chapter 13 trustee's subsequent adversary proceeding to avoid creditor's liens as unperfected:

Confirmation of the Chapter 13 debtor's plan, which treated a creditor's two claims as secured, precluded the Chapter 13 trustee's subsequent adversary proceeding to avoid the creditor's liens as unperfected, even though the creditor did not file its proofs of claim until after the confirmation of the plan, particularly since, prior to confirmation of the plan, the trustee signed an Agreed Order resolving the creditor's objection to the plan and providing for the creditor's claims to be treated as secured. But see *In re Johnson*, 279 B.R. 218 (Bankr. M.D. Tenn. 2002) (confirmation of "base" plan that did not allow or disallow claims, in district that confirmed Chapter 13 plans before claims bar date, did not preclude the Chapter 13 trustee's objection to a claim filed after plan confirmation that revealed an avoidable lien).

In re Brannan, 532 B.R. 834 (Bankr. D. Kan., June 25, 2015)

(case no. 6:13-bk-12834; adv. proc. no. 6:14-ap-5068) (Chief Bankruptcy Judge Robert E. Nugent)

Text of opinion

Confirmation of Chapter 13 plan did not modify IRS's lien rights:

Confirmation of the debtor's Chapter 13 plan, which provided that only $10,000 of the IRS's $215,000 claim was secured, in conformance with the IRS's proof of claim, did not eliminate the IRS's lien rights in the debtor's real property, which was subject to a prepetition tax lien, where the plan did not explicitly declare that it would modify the IRS's lien rights. See *In re Brawders*, 503 F.3d 856 (9th Cir. 2007) (a confirmed plan has no preclusive effect on issues that were not sufficiently evidenced in the plan to provide adequate notice to the creditor). Accordingly, when the debtor sold the property, the IRS was entitled to assert its lien rights in the proceeds.

In re Nomellini, 534 B.R. 166 (Bankr. N.D. Cal., June 25, 2015), appeal filed, Nomellini v. United States, Case No. 5:15-cv-4122 (N.D. Cal., filed Sept. 10, 2015)

(case no. 5:11-bk-61177; adv. proc. no. 5:14-ap-5083) (Bankruptcy Judge Arthur S. Weissbrodt)

Text of opinion

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Part D

Issues Other Than Confirmation of Plan

Modification of Confirmed Plan

Topical compilation: All topical compilations
PDF Word All circuit compilations

Court grants modification of Chapter 13 plan after debtors receive inheritance:

Where the Chapter 13 debtor wife received a postpetition inheritance that was sufficient to pay all the allowed claims in full, and the inheritance was property of the estate, the court granted the Chapter 13 trustee's motion to modify the debtors' confirmed plan so as to require the debtors to turn over the inheritance.

In re Wirshing, 2015 WL 3525061 (Bankr. D. Mont., June 3, 2015)

(case no. 2:13-bk-60990) (Bankruptcy Judge Ralph B. Kirscher)

Text of opinion

Creditor may not object to proposed modification of Chapter 13 plan on ground precluded by prior confirmation of plan:

Issues that were necessarily determined by confirmation of the Chapter 13 debtor's plan were no longer subject to challenge when the debtor proposed a modified plan, and a creditor could object only to any new issues raised by the proposed modification. *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 191 L. Ed. 2d 621 (2015) (confirmation of a Chapter 13 plan has preclusive effect, foreclosing relitigation of "any issue actually litigated by the parties and any issue necessarily determined by the confirmation order"); *In re Bateman*, 331 F.3d 821 (11th Cir. 2003) (a confirmed plan binds the debtor and creditor "to any issue ... necessarily determined by the confirmation order, including whether the plan complies with sections 1322 and 1325 of the Bankruptcy Code"). Thus, here, the secured creditor could not object to a proposed plan modification on the ground that the plan did not provide for payment of the creditor's claim in equal monthly amounts, where the debtor's confirmed plan provided the same treatment of the creditor's claim.

In re Grey, 2015 WL 3535410 (Bankr. S.D. Fla., June 4, 2015)

(case no. 1:14-bk-27803) (Bankruptcy Judge Laurel M. Isicoff)

Text of opinion

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Other Issues

Topical compilations:

PDF Word (general matters)

PDF Word (other matters involving mortgage creditors)

All topical compilations

All circuit compilations

Chapter 13 debtor's inaccurate schedules did not demonstrate bad faith:

Based on the Chapter 13 debtor's testimony, the court found that any misrepresentations the debtor made in his bankruptcy schedules were inadvertent and without an intention to mislead the court or deprive creditors their due. Although the debtor's best effort failed to produce flawlessly accurate schedules, the court found that the evidence as a whole did not support a finding of bad faith. The debtor, the court said, testified with obvious candor to a chaotic family life that made it very difficult for him to focus on his finances and prepare his bankruptcy petition and schedules. Accordingly, the court found that a creditor did not establish bad faith by the debtor such as would constitute cause under Code § 1307(c) to dismiss or convert the case.

Discharge of debt that was nondischargeable in Chapter 7 was not in bad faith:

The debtor's filing a Chapter 13 case that, if successful, would discharge a debt that was held nondischargeable under Code § 523(a)(6) in his prior Chapter 7 case did not demonstrate bad faith for the purpose of Code § 1307(c). The creditor had not asserted, nor did the facts demonstrate, any particular ill motive, malicious intent, or other special circumstance particular to the debtor's attempt to discharge the debt. The debtor wished to do that which Chapter 13 permitted him to do; this was not an unfair manipulation of the Bankruptcy Code, but rather the debtor's "[taking] advantage of a fundamental provision that Congress intentionally enacted." *In re Mandarino*, 312 B.R. 214 (Bankr. E.D. N.Y. 2002).

Debtor's pre-bankruptcy vacation did not demonstrate bad faith:

The Chapter 13 debtor's spending $6,800 on a family vacation, prior to his bankruptcy filing, did not demonstrate bad faith, where the debtor made the first installment payment for the Disneyworld trip in mid–2013, at a time when the debtor believed the family's finances supported the expenditure; the debtor made periodic installment payments, and planned the trip strategically to minimize airfare costs; and the debtor took the vacation approximately six months before he filed his bankruptcy petition and before he even contemplated filing for bankruptcy.

In re Ladieu, 2015 WL 3503941 (Bankr. D. Vt., June 1, 2015), appeal filed, Vobile, Inc. v. Ladieu, Case No. 2:15-cv-136 (D. Vt., filed June 16, 2015)

(case no. 5:14-bk-10551) (Bankruptcy Judge Colleen A. Brown)

Text of opinion

Court would not dismiss Chapter 13 case in which debtors made final plan payment 63 months after petition date:

The court was not required to dismiss the Chapter 13 debtors' case under Code § 1307(c) although the debtors made their final payment 63 months after their petition date. The debtors made all of the monthly payments called for in their 60-month plan, tendering in excess of $170,000 to the Chapter 13 trustee. At the end of the plan term, they owed less than one-half of a plan payment to complete the plan base. To deprive the debtors of a discharge under these circumstances would be contrary to the spirit and intent of the Bankruptcy Code which offered a "fresh start" to the honest but unfortunate debtor.

In re Klaas, 533 B.R. 482 (Bankr. W.D. Pa., June 4, 2015), aff'd, Shovlin v. Klaas, Case No. 2:15-cv-802 (W.D. Pa., August 28, 2015)

(case no. 2:09-bk-29574) (Bankruptcy Judge Gregory L. Taddonio)

Text of opinion

Disbursement of insurance proceeds following totaling of creditor's collateral:

Where the Chapter 13 debtors' motorcycle, which secured a creditor's claim, was totaled in an accident, and the debtors' confirmed plan bifurcated the creditor's claim, the creditor was entitled to receive only $563.79 of the $6,578 in insurance proceeds, as that was all the creditor was due under the plan. However, $2,461.08 of the proceeds needed to be held until the debtors had completed payments under the plan, since, if the case was dismissed or converted to Chapter 7, the bifurcation of the creditor's claim would no longer be effective, and the creditor would be entitled to receive the full amount of its claim, in that the creditor's lien attached to the insurance proceeds, giving the creditor a right to the proceeds to the extent of its allowed secured claim. See *In re Perry*, 2011 WL 5909065 (Bankr. E.D. N.C., Oct. 24, 2011). The balance of the proceeds could be distributed to the debtors and their attorney.

In re Ross, 2015 WL 3781074 (Bankr. D. S.C., June 16, 2015)

(case no. 7:11-bk-4792) (Bankruptcy Judge Helen E. Burris)

Text of opinion

Court orders creditor to pay Chapter 13 debtors' attorney's fees for failing to comply with plan confirmation order:

Where the secured motor vehicle creditor refused to release its lien after receiving full payment of its claim under the debtors' confirmed Chapter 13 plan, the court found the creditor's actions to be unreasonable and in bad faith and awarded attorney's fees to the debtors in the amount of $7,325. The plan paid the creditor interest at the *Till* rate, but the creditor contended that it was entitled to receive interest at the higher contractual rate because the debtors were ineligible for a discharge. Rejecting this assertion, the court said that the creditor had accepted the plan under Code § 1325(a)(5) by failing to object to its confirmation. The court said that it had previously recognized that Code § 105(a) and its inherent authority authorized the court to award attorney's fees when holding a party in contempt for failure to comply with a plan confirmation order. See *In re Ford*, 522 B.R. 842 (Bankr. D. S.C., Jan. 12, 2015) (requiring a creditor to pay debtor's attorney's fees where the creditor's conduct constituted a violation of the confirmation order); *In re Brown*, 270 B.R. 43 (Bankr. D. S.C. 2001) (ordering the payment of attorney's fees and costs pursuant to § 105 and the court's inherent authority to enforce its rules of practice). In this case, the creditor failed to comply with a requirement of the confirmed plan despite notification from both the debtors and the Chapter 13 trustee that it was obligated to satisfy its lien.

In re Crawford, 532 B.R. 645 (Bankr. D. S.C., June 8, 2015)

(case no. 3:09-bk-8171) (Bankruptcy Judge John E. Waites)

Text of opinion

Chapter 13 debtor is not required to obtain court approval of special counsel:

Agreeing with *In re Jones*, 505 B.R. 229 (Bankr. E.D. Wis., Jan. 31, 2014) and disagreeing with *In re Goines*, 465 B.R. 704 (Bankr. N.D. Ga., Feb. 9, 2012), the court held that a Chapter 13 debtor is not required to obtain court approval of special counsel that the debtor has retained to litigate a claim, such as, here, counsel retained to litigate a prepetition workers' compensation claim. Code § 327(e) applies only to the bankruptcy trustee and persons charged with performing the duties of a trustee, and nothing in the Bankruptcy Code suggests that the term "trustee" used in § 327(e) is intended to include a Chapter 13 debtor. Moreover, Code § 328 only applies in scenarios where a professional person is employed under § 327 or § 1103, so it followed that § 328 was also inapplicable to the current situation. Likewise, Bankruptcy Rule 2014 only applies in scenarios where a professional person is employed under § 327, § 1103, or § 1114.

In re Scott, 531 B.R. 640 (Bankr. N.D. Miss., June 9, 2015)

(case no. 1:14-bk-13788) (Bankruptcy Judge Neil P. Olack)

Text of opinion

Chapter 13 debtors were not entitled to discharge where debtors failed to maintain current payments to mortgage creditor:

The Chapter 13 debtors did not complete "all payments under the plan," and therefore were not entitled to a discharge under Code §1328(a), where, although the debtors made all payments to the Chapter 13 trustee called for by the plan, the debtors did not maintain current payments to their mortgage creditor, which the debtors paid directly, as was also required under the plan. See *In re Foster*, 670 F.2d 478 (5th Cir. 1982) (if mortgage arrearages are being paid under a Chapter 13 plan, the maintenance of current monthly payments must also be under the plan).

In re Kessler, 2015 WL 4726794 (Bankr. N.D. Tex., June 9, 2015), appeal filed, Kessler v. Wilson, Case No. 6:15-cv-40 (N.D. Tex., filed June 19, 2015)

(case no. 6:09-bk-60247) (Bankruptcy Judge Robert L. Jones)

Text of opinion

Harris v. Viegelahn does not apply when Chapter 13 case is dismissed rather than converted:

Harris v. Viegelahn, 135 S.Ct. 1829, 191 L.Ed.2d 783 (2015) applies only in the instance of conversion and does not abrogate Code § 1326(a)(2), which provides that, where a Chapter 13 case is dismissed prior to the confirmation of a plan, administrative expenses are to be paid out of undisbursed funds held by the Chapter 13, with the balance returned to the debtor.

In re Ulmer, 2015 WL 3955258 (Bankr. W.D. La., June 26, 2015)

(case no. 3:15-bk-30220) (Bankruptcy Judge Henley A. Hunter)

Text of opinion

Court grants deceased Chapter 13 debtor hardship discharge:

Granting the deceased Chapter 13 debtor a hardship discharge, the court reasoned that the elements stated in Code § 1328(b) for a hardship discharge were satisfied, and granting the debtor a hardship discharge would be of benefit to the debtor's wife and would not disadvantage the debtor's creditors, as secured creditors would retain their liens while no creditors had filed claims in the debtor's probate proceedings.

In re Conn, 2015 WL 3777958 (Bankr. N.D. Ohio, June 12, 2015)

(case no. 6:13-bk-62278) (Bankruptcy Judge Russ Kendig)

Text of opinion

Court orders Chapter 13 debtor to discontinue medical marijuana business in order to continue bankruptcy case:

Denying the U.S. Trustee's motion to dismiss a Chapter 13 case filed by a debtor who was a licensed marijuana grower under the Michigan Medical Marihuana Act (MMMA), the court said that to balance the court's (and the debtor's) obligations under federal law, the debtor's legitimate need for relief under Chapter 13, and Michigan's policy choices reflected in the MMMA, the court would refrain from dismissing the debtor's case at this time, but would enjoin him from conducting his medical marijuana business (and violating the federal Controlled Substances Act), while his case was pending. If, however, the debtor preferred to continue his illicit business activity (albeit subject to the possibility of federal criminal prosecution), he needed only to file a motion to dismiss the case and the court's injunction would cease upon dismissal.

In re Johnson, 532 B.R. 53 (Bankr. W.D. Mich., June 16, 2015)

(case no. 1:15-bk-2000) (Chief Bankruptcy Judge Scott W. Dales)

Text of opinion

Comment: The debtor, a 66-year-old man who grew medical marijuana to sell to three patients who had declared him as their medical marijuana caregiver, decided to divest himself of the business and continue in Chapter 13, and the court subsequently confirmed his amended Chapter 13 plan.

Creditor violated Chapter 13 co-debtor stay by suing debtor's non-filing spouse:

A credit card debt on which only the Chapter 13 debtor's non-filing spouse was personally liable was a debt "of the debtor" within Code § 1301, which enjoins a creditor from taking legal action to "collect all or part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor." Because Wis. Stat. § 766.55 provides that marital property assets held by either spouse are available to satisfy family-purpose obligations, and the parties stipulated that the debt was incurred during the marriage for consumer goods, the creditor had a claim against the debtor's marital property, which meant that, under the Bankruptcy Code, the creditor had a claim against the debtor. Thus, the creditor's suing the debtor's spouse after the debtor's bankruptcy filing in order to collect the debt violated the Chapter 13 co-debtor stay.

In re Smith, 2015 WL 3961422 (Bankr. E.D. Wis., June 29, 2015), appeal filed, Kohn Law Firm SC v. Smith, Case No. 2:15-cv-851 (E.D. Wis., filed July 14, 2015)

(case no. 2:11-bk-31782; adv. proc. no. 2:15-ap-2066) (Chief Bankruptcy Judge Susan V. Kelley)

Text of opinion

Debt secured by valueless lien is treated as unsecured debt for purpose of Chapter 13 debt limits:

Under *Matter of Day*, 747 F.2d 405 (7th Cir. 1984), a debt secured by a valueless lien is treated as unsecured debt for the purpose of the Chapter 13 debt limits, and the law has not changed since that decision.

In re Krueger, 534 B.R. 163 (Bankr. W.D. Wis., April 7, 2015)

(case no. 3:14-bk-14757) (Bankruptcy Judge Robert D. Martin)

Text of opinion

Chapter 13 debtors were not entitled to discharge where debtors failed to make postpetition monthly payments to mortgage creditor:

Vacating the Chapter 13 debtors' discharge as improvidently granted, the court held that the debtors were not entitled to a discharge under Code § 1328(a), which provides for the issuance of a discharge "after completion by the debtor of all payments under the plan," where the debtors' confirmed plan provided for the maintenance of regular monthly payments on the first mortgage loan in the amount of $1,280 monthly, which the debtors were to pay directly to the creditor, in addition to curing a prepetition arrearage through payments to the Chapter 13 trustee, and, while the debtors made all the monthly plan payments to the trustee, the debtors did not make all of the regular monthly payments to the creditor. The mortgage creditor's Statement in Response to Notice of Final Cure Payment stated that, while the prepetition arrearage had been fully paid, postpetition payments totaling $49,377.71 remained unpaid, and the debtors did not contest the accuracy of this information. The court noted that the debtors had filed a new bankruptcy case to deal with the postpetition arrearage. The court commented that, while it found the debtors' certification that they had made all required payments to be "somewhat understandable" because they were proceeding "without the guidance of counsel," the court found the Chapter 13 trustee's conduct, in filing her request for the court to enter the debtors' discharge, "more troubling." The Court said it had not located any cases in which a court had accepted the argument that payments made directly to a creditor under a confirmed Chapter 13 plan are not "under the plan" and are not required to be completed in order for a Chapter 13 debtor to be entitled to discharge under Code § 1328(a).

In re Gonzales, 532 B.R. 828 (Bankr. D. Colo., June 9, 2015)

(case no. 1:09-bk-27194) (Bankruptcy Judge Howard R. Tallman)

Text of opinion

Administrator of deceased Chapter 13 debtor's state-court probate estate was proper party to seek hardship discharge for debtor:

The administrator of the deceased Chapter 13 debtor's state-court probate estate was a proper party to file a motion seeking a hardship discharge for the debtor. See *In re Kosinski*, 2015 WL 1177691 (Bankr. N.D. Ill., March 5, 2015) ("Rule 1016 permits a case to continue despite the death of the debtor without the formal substitution of another party for the debtor").

Deceased Chapter 13 debtor was entitled to hardship discharge:

A deceased Chapter 13 debtor may receive a hardship discharge under Code § 1328(b), and, here, the best interests of all the parties warranted granting the debtor a discharge. The debtor had paid $20,148 towards completion of his Chapter 13 plan, with only $575 unpaid. The prepetition priority creditors have already been paid in full; there were no secured creditors; and unsecured creditors had already received payments in a larger amount than they would have received if debtor had filed his case under Chapter 7. Significantly, no creditor objected to the debtor's discharge; only the Chapter 13 trustee did. Postpetition creditors would clearly benefit from a hardship discharge because they would not have to share pro rata (in the assets of the probate estate) with prepetition unsecured nonpriority creditors, as their claims were provided for in the debtor's plan and would be discharged. Lastly, equity favored giving this deceased debtor the benefit of a hardship discharge.

In re Inyard, 532 B.R. 364 (Bankr. D. Kan., June 17, 2015)

(case no. 5:12-bk-40260) (Bankruptcy Judge Janice Miller Karlin)

Text of opinion

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Section Four:
Cases under
Related Federal Statutes

Fair Debt Collection Practices Act (FDCPA)

Creditor's filing proof of claim for time-barred debt does not ordinarily violate FDCPA:

The Fair Debt Collection Practices Act should not be implicated with regard to stale debts when (a) a creditor merely files an accurate proof of claim in a bankruptcy case, (b) the proof of claim includes all the required information including the timing of the debt, (c) the applicable statute of limitations is one that does not extinguish the right to collect the debt but merely limits the remedies, and (d) no legal impediment to collection or factual circumstances exist that would invoke the Act other than merely the applicability of a statute of limitations.

In re Broadrick, 532 B.R. 60 (Bankr. M.D. Tenn., June 19, 2015), appeal filed, Broadrick v. LVNV Funding, LLC, Case No. 3:15-cv-742 (M.D. Tenn., filed July 2, 2015)

(case. no. 3:14bk672; adv. proc. no. 3:14ap90357) (Bankruptcy Judge Randal S. Mashburn)

Text of opinion

Creditor's filing proof of claim for time-barred debt does not violate FDCPA:

While the filing of a proof of claim in a bankruptcy case is an effort to collect a consumer debt, and *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076 (7th Cir. 2013) held that the filing of a civil action against a consumer to recover a time-barred debt violates the Fair Debt Collection Practices Act, a creditor's filing a proof of claim for a time-barred debt does not suffer from the deception and unfairness of untimely lawsuits and does not violate the Act. First, the risk that an unsophisticated consumer will fail to recognize a limitations defense is substantially lower in a bankruptcy case because a debtor is not the only participant in the case charged with recognizing and defending against a time-barred claim. Second, a consumer debtor in a bankruptcy case usually has far less at stake in the allowance of a proof of claim than a defendant who faces a possible adverse judgment in a civil action. And, third, a consumer debtor in a bankruptcy case is more likely to have the benefit of counsel than a defendant sued in a collection action because the debtor in all probability has been represented from the outset of the case, whereas the defendant sued in a collection action would be forced to retain counsel specifically to defend the action.

In re Murff, 2015 WL 3690994 (Bankr. N.D. Ill. June 15, 2015), subsequent opinion, 2015 WL 4585167 (July 28, 2015)

(case no. 1:13-bk-44431; adv. proc. no. 1:14-ap-790) (Bankruptcy Judge A. Benjamin Goldgar)

Text of opinion

Creditor's filing proof of claim for time-barred debt may violate FDCPA:

Two courts held that a creditor's filing a proof of claim for a time-barred debt may be a deceptive act in connection with the collection of a debt in violation of the Fair Debt Collection Practices Act:

Taylor v. Galaxy Asset Purchasing, LLC, --- F.Supp.3d ----, 2015 WL 3645668 (N.D. Ill., June 11, 2015)

(case no. 1:14-cv-9276) (District Judge John W. Darrah)

Text of opinion

In re Avalos, 531 B.R. 748 (Bankr. N.D. Ill., June 12, 2015)

(case no. 1:13-bk-40865; adv. proc. no. 1:15-ap-91) (Bankruptcy Judge Jack B. Schmetterer)

Text of opinion

Action to recover under FDCPA for creditors' filing proofs of claim for time-barred debts was barred by statute of limitations:

Where the creditors violated the Fair Debt Collection Practices Act by filing proofs of claim for time-barred debts, the violations of the FDCPA occurred when the proofs of claim were filed, not when the bankruptcy court later sustained the debtors' objections to the proofs of claim, and the one-year FDCPA limitations period began to run on the day after the proofs of claim were filed. Accordingly, the debtors' action to recover for the creditors' violations of the Act was untimely.

Hansen v. Resurgent Capital Servs., L.P., 2015 WL 3652838 (M.D. Fla., June 11, 2015)

(case no. 8:15-cv-426) (District Judge James D. Whittemore)

Text of opinion

Court awards damages of $204,000 under Fair Debt Collection Practices Act:

Asking "[w]hat do you do when your bank repeatedly tries to collect a debt that is not due, you repeatedly try to tell them that they are making a mistake but they just won't listen, and then they file a foreclosure action on your home?," the court awarded the Chapter 13 debtors, who cured their mortgage arrearage under their Chapter 13 plan, $204,000 in damages under the Fair Debt Collection Practices Act, consisting primarily of $100,000 in punitive damages and $100,000 in emotional distress damages, $50,000 for each debtor.

Goodin v. Bank of America, N.A., --- F.Supp.3d ----, 2015 WL 3866872 (M.D. Fla., June 23, 2015)

(case no. 3:13-cv-102) (District Judge Timothy J. Corrigan)

Text of opinion

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Permanent Resources

Bankruptcy Code, Rules and Forms

Bankruptcy Code

Full Text of Code (Cornell Law School)

Bankruptcy Rules and Forms Currently in Effect

Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") (PDF document provided by the Administrative Office of the U.S. Courts; current through December 2014 amendments)

—HTML version at Cornell Law School

Official bankruptcy forms

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Federal Rulemaking Resources

Background:

- Federal Rules of Practice and Procedure
- The Judicial Conference of the United States

The Administrative Bodies Involved in Bankruptcy Court Rulemaking:

- The Advisory Committee on Bankruptcy Rules (the "Advisory Committee"), which initiates proposed changes to the Bankruptcy Rules or Official Forms.
- The Committee on Rules of Practice and Procedure (referred to as "the Standing Committee") of the Judicial Conference of the United States, which reviews the proposed changes.
- The Judicial Conference itself, which approves proposed changes and submits proposed Rule (but not bankruptcy form) changes to the Supreme Court. The 27-member Judicial Conference is the policy-making body for the federal court system. The Chief Justice of the Supreme Court serves as its presiding officer. Its other members are the chief judges of the 13 courts of appeals, a district judge from each of the 12 geographic circuits, and the chief judge of the Court of International Trade.

The process for the approval of a new or amended Bankruptcy Rule is as follows:

- Formulation by the Advisory Committee.
- Approval for publication for public comment by the Standing Committee. The public comment period generally is six months. Technical changes may be approved without publication for public comment
- Review of comments by the Advisory Committee; possible modification of proposal. If the modification is significant, the proposal may be submitted to the Standing Committee for publication for another round of public comment. Otherwise, the proposal is submitted to the Standing Committee for final approval.
- Final Approval by the Standing Committee.
- Approval by the Judicial Conference, typically at its annual conference in September.
- Approval by the U.S. Supreme Court. Must be by May 1 for a rule to be effective that year; the rule may not be effective earlier than December 1. See 28 U.S.C. § 2075.
- Lack of disapproval by the U.S. Congress.

Amendments to the Official Bankruptcy Forms follow a similar route, except that, under Bankruptcy Rule 9009, the Judicial Conference is the final authority on amendments to the forms; the amendments are not submitted to the Supreme Court or Congress.

The Advisory Committee makes available the suggestions for changes to the Bankruptcy Rules and Forms, and comments on proposed changes, it has received from members of the legal community:

Archived Bankruptcy Rule Suggestions

Archived Bankruptcy Rule Comments

Reports of the various bodies involved in the rulemaking process are available online:

- Proceedings of the Judicial Conference

- Standing Committee Meeting Reports
- Standing Committee Meeting Minutes
- Standing Committee Meeting Agendas

- Advisory Committee Meeting Reports
- Advisory Committee Meeting Minutes
- Advisory Committee Meeting Agendas

For a compilation of amendments to the Bankruptcy Rules and Official Forms adopted since 2009, when CBAR started keeping track of these things, click here

R

Bankruptcy Rules:

Proposed Amendment Effective December 1, 2015

Rule Involved:

- 1007 (Lists, Schedules, Statements and Other Documents)

Status: Approved by the Supreme Court on April 29, 2015. The rule will go into effect unless Congress disapproves it. See the Supreme Court transmittal letter

Summary of Change: In sections (a)(1) and (a)(2), references to "Schedules D, E, F, G, and H" are changed to refer to Official Forms 106 D, E/F, G, and H, reflecting the combining of Schedules E and F and the renumbering of all of the schedules)

History:

Proposed by the Advisory Committee at its September 24-25, 2013, meeting for submission directly to the Standing Committee as a conforming change for which publication for public comment is not required. See the draft minutes of that meeting on page 36 of Agenda for Advisory Committee Meeting of April 22-23, 2014.

Approved by the Standing Committee at its January 9-10, 2014, meeting for submission to the Judicial Conference. See the draft minutes of the Standing Committee meeting on page 57 of the Agenda for Advisory Committee Meeting of April 22-23, 2014.

Approved for submission to the Supreme Court by the Judicial Conference at its March 11, 2014, meeting. See page 23 of the Report of the Proceedings of the Judicial Conference on March 11, 2014.

R

Bankruptcy Forms:

Proposed New and Amended Forms Effective December 1, 2015

Most Official Bankruptcy Forms are scheduled to be replaced with substantially revised, reformatted and renumbered versions effective December 1, 2015, if approved by the Judicial Conference at its September 2015 meeting. While these forms are described in greater detail in the following pages, information is also available on the Administrative Office for the U.S. Courts website. This website includes a Forms Number Conversion Chart and a large file with the Full Text of the Revised Forms, along with their corresponding Committee Notes. This file includes the following forms in the stated order:

- 11A (General Power of Attorney)
- 11B (Special Power of Attorney)
- 101 (Voluntary Petition for Individuals)
- 101A (Initial Statement About an Eviction Judgment Against You)
- 101B (Statement About Payment of an Eviction Judgment Against You)
- 103A (Application for Individuals to Pay the Filing Fee in Installments)
- 103B (Application to Have the Chapter 7 Filing Fee Waived)
- 104 (List of 20 Largest Creditors For Individual Chapter 11 Cases)
- 105 (Involuntary Petition Against an Individual)
- 106A/B (Schedule A/B: Property)
- 106C (Schedule C: Property Claimed as Exempt)
- 106D (Schedule D: Secured Creditors)
- 106E/F (Schedule E/F: Unsecured Creditors)
- 106G (Schedule G: Executory Contracts and Unexpired Leases)
- 106H (Schedule H: Codebtors)
- 106I (Schedule I: Income)
- 106J (Schedule J: Expenses)
- 106J-2 (Schedule J-2: Expenses for Separate Household of Debtor 2)
- 106Sum (Summary of Assets and Liabilities and Certain Statistical Information)
- 106Dec (Declaration about an Individual Debtor's Schedules)

- Committee Note for Forms 106
- 107 (Statement of Financial Affairs)
- 108 (Statement of Intention for Individuals Filing Under Chapter 7)
- 119 (Bankruptcy Petition Preparer's Notice, Declaration, and Signature)
- 121 (Statement About Your Social Security Numbers)
- 122A—1 (Chapter 7 Statement of Your Current Monthly Income)
- 122A—1Supp (Statement of Exemption from Presumption of Abuse Under § 707(b)(2))
- 122A–2 (Chapter 7 Means Test Calculation)
- 122B (Chapter 11 Statement of Current Monthly Income)
- 122C–1 (Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period)
- 122C–2 (Chapter 13 Calculation of Your Disposable Income)
- Committee Note for Forms 122
- 201 (Voluntary Petition for Non-Individuals)
- 201A (Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy under Chapter 11)
- 202 (Declaration Under Penalty of Perjury for Non-Individual Debtors)
- 204 (Chapter 11 or Chapter 9 Cases: List of 20 Largest Creditors)
- 205 (Involuntary Petition Against a Non-Individual)
- 206A/B (Schedule A/B: Assets — Real and Personal Property)
- 206D (Schedule D: Secured Creditors)
- 206E/F (Schedule E/F: Unsecured Creditors)
- 206G (Schedule G: Executory Contracts and Unexpired Leases)
- 206H (Schedule H: Codebtors)
- 206Sum (Summary of Assets and Liabilities for Non-Individuals)
- Committee Note for Forms 206
- 207 (Statement of Financial Affairs for Non-Individuals)

- 309A (For Individuals or Joint Debtors) (Notice of Chapter 7 Bankruptcy Case -- No Proof of Claim Deadline)
- 309B (For Individuals or Joint Debtors) (Notice of Chapter 7 Bankruptcy Case -- Proof of Claim Deadline Set)
- 309C (For Corporations or Partnerships) (Notice of Chapter 7 Bankruptcy Case -- No Proof of Claim Deadline)
- 309D (For Corporations or Partnerships) (Notice of Chapter 7 Bankruptcy Case -- Proof of Claim Deadline Set)
- 309E (For Individuals or Joint Debtors) (Notice of Chapter 11 Bankruptcy Case)
- 309F (For Corporations or Partnerships) (Notice of Chapter 11 Bankruptcy Case)
- 309G (For Individuals or Joint Debtors) (Notice of Chapter 12 Bankruptcy Case)
- 309H (For Corporations or Partnerships) (Notice of Chapter 12 Bankruptcy Case)
- 309I (Notice of Chapter 13 Bankruptcy Case)
- Committee Note for Forms 309
- 312 (Order and Notice for Hearing on Disclosure Statement)
- 313 (Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof)
- 314 (Class [ ] Ballot for Accepting or Rejecting Plan of Reorganization)
- 315 (Order Confirming Chapter 11 Plan)
- 318 (Order of Discharge in Individual Chapter 7 Case)
- 401 (Chapter 15 Petition for Recognition of a Foreign Proceeding)
- 410 (Proof of Claim)
- 410A (Mortgage Proof of Claim Attachment)
- 410S1 (Notice of Mortgage Payment Change)
- 410S2 (Notice of Postpetition Mortgage Fees, Expenses, and Charges)
- Committee Note for Form 410
- 416A (Caption: Full)
- 416B (Caption: Short Title)
- 416D (Caption for Use in Adversary Proceeding)

- 417A (Notice of Appeal And Statement of Election)
- 417B (Optional Appellee Statement of Election to Proceed in District Court)
- 417C (Certificate of Compliance With Rule 8015(a)(7)(B) or 8016(d)(2))
- 423 (Certification About a Financial Management Course)
- 424 (Certification to Court of Appeals by All Parties)
- 427 (Cover Sheet for Reaffirmation Agreement)

Note that most, if not all, of the forms are accompanied by Committee Notes, but the above list includes only those Committee Notes that apply to groups of forms and therefore do not directly follow the forms to which they apply.

Bankruptcy Forms:

Proposed New and Amended Forms Effective December 1, 2015 (first group)

Forms Involved:

- 101 (Voluntary Petition for Individuals Filing for Bankruptcy)
- 101A (Initial Statement About an Eviction Judgment Against You) (new form)
- 101B (Statement About Payment of an Eviction Judgment Against You) (new form)
- 104 (For Individual Chapter 11 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims Against You and Are Not Insiders)
- 105 (Involuntary Petition Against an Individual)
- 106A/B (Schedule A/B: Property)
- 106C (Schedule C: The Property You Claim as Exempt)
- 106D (Schedule D: Creditors Who Hold Claims Secured by Property)
- 106E/F (Schedule E/F: Creditors Who Have Unsecured Claims)
- 106G (Schedule G: Executory Contracts and Unexpired Leases)
- 106H (Schedule H: Your Codebtors)
- 106Dec (Declaration About an Individual Debtor's Schedules)
- 106Sum (Summary of Your Assets and Liabilities and Certain Statistical Information)
- 107 (Statement of Financial Affairs for Individuals Filing for Bankruptcy)
- 108/112 (Statement of Intention for Individuals Filing Under Chapter 7; formerly Form 8; published as Form 112 and now proposed to be renumbered as Form 108)
- 119 (Bankruptcy Petition Preparer's Notice, Declaration, and Signature)
- 121 (Statement About Your Social Security Numbers)
- 318 (Order of Discharge; formerly Form 18)
- 423 (Certification About a Financial Management Course; formerly Form 23)
- 427 (Cover Sheet for Reaffirmation Agreement; formerly Form 27)
- Instructions (Bankruptcy Forms for Individuals)

Status: To be considered for final approval by the Judicial Conference at its September 2015 meeting.

Full Text: Report of Advisory Committee's April 22-23, 2014, Meeting [pages 113-237] (these do not reflect minor revisions made in 2015)

For changes made to Forms 106A/B, 106D, 106E/F and 106G, and to the Committee Note to Official Form 107, in 2015, see Bankruptcy Appendices to the Agenda for the Standing Committee's Meeting of May 28-29, 2015 (pages 209-230 [Forms 106], 287-290 [Committee Note])

History:

Proposed for publication by the Advisory Committee at its April 2-3, 2013, meeting. See "Action Item 14" on pages 26-31 of the Report of the Advisory Committee's April 2013 Meeting.

Approved for publication by the Standing Committee at its June 3-4, 2013: Report of the Standing Committee's June 3-4, 2013, meeting (pp 12-17)

Published for public comment from August 15, 2013, through February 18, 2014.

Approved by the Advisory Committee at its April 22-23, 2014, meeting for submission to the Standing Committee. Certain changes were made as a result of the public comments received. See "Action Item 4" on pages 6-12 of the Report of the Advisory Committee's April 22-23, 2014, Meeting

Approved by the Standing Committee at it May 29-30, 2014, meeting. See page 15 of the Minutes of Standing Committee's Meeting on May 29-30, 2014. Submission to the Judicial Conference was withheld so that all the modernized forms can go into effect on December 1, 2015.

Reconsidered by the Advisory Committee at its April 20, 2015, meeting and submitted to the Standing Committee for approval, at its May 28-29, 2015, meeting, for submission to the Judicial Conference. See Action Items 7 and 9, on pages 10-15 of the Report of the Advisory Committee's April 20, 2015, meeting (pages 448-453 overall) in the Agenda for the Standing Committee's Meeting of May 28-29, 2015.

The Advisory Committee made minor changes to Forms 106A/B, 106D, 106E/F and 106G, and to the Committee Note to Official Form 107. In particular, in Official Form 106A/B the Committee added qualified ABLE accounts to the list of accounts in question 24 that may be excluded from the estate. The Committee also proposed that Form 112 be renumbered as Form 108.

Apparently approved by the Standing Committee at its May 28-29, 2015, meeting for submission to the Judicial Conference for final approval, although the Committee's report is not yet available.

R

Bankruptcy Forms:

Proposed New and Amended Forms Effective December 1, 2015 (second group)

Forms Involved:

- 11A (General Power of Attorney) (Abrogated)
- 11B (Special Power of Attorney) (Abrogated)
- 106J (Schedule J: Your Expenses)
- 106J-2 (Schedule J-2: Expenses for Separate Household of Debtor 2) (new form)
- Instruction booklet for non-individuals
- 201 (Voluntary Petition for Non-Individuals Filing for Bankruptcy)
- 202 (Declaration Under Penalty of Perjury for Non-Individual Debtors)
- 204 (Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders)
- 205 (Involuntary Petition Against a Non-Individual)
- 206Sum (Summary of Assets and Liabilities for Non-Individuals)
- 206A/B (Schedule A/B: Assets—Real and Personal Property)
- 206D (Schedule D: Creditors Who Have Claims Secured by Property)
- 206E/F (Schedule E/F: Creditors Who Have Unsecured Claims)
- 206G (Schedule G: Executory Contracts and Unexpired Leases)
- 206H (Schedule H: Codebtors)
- 207 (Statement of Financial Affairs for Non-Individuals Filing for Bankruptcy)
- 309A (Notice of Chapter 7 Bankruptcy Case—No Proof of Claim Deadline (For Individuals or Joint Debtors))
- 309B (Notice of Chapter 7 Bankruptcy Case—Proof of Claim Deadline Set (For Individuals or Joint Debtors))
- 309C (Notice of Chapter 7 Bankruptcy Case—No Proof of Claim Deadline (For Corporations or Partnerships))
- 309D (Notice of Chapter 7 Bankruptcy Case—Proof of Claim Deadline Set (For Corporations or Partnerships))
- 309E (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors))

- 309F (Notice of Chapter 11 Bankruptcy Case (For Corporations or Partnerships))
- 309G (Notice of Chapter 12 Bankruptcy Case (For Individuals or Joint Debtors))
- 309H (Notice of Chapter 12 Bankruptcy Case (For Corporations or Partnerships))
- 309I (Notice of Chapter 13 Bankruptcy Case)
- 312 (Order and Notice for Hearing on Disclosure Statement)
- 313 (Order Approving Disclosure Statement and Fixing Time for Filing Acceptances and Rejections of Plan, Combined With Notice Thereof)
- 314 (Class Ballot for Accepting or Rejecting Plan of Reorganization)
- 315 (Order Confirming Plan [Chapter 11])
- 401 (Chapter 15 Petition) (new form)
- 410 (Proof of Claim) (currently Form 10)
- 410A (Mortgage Proof of Claim Attachment) (currently Form 10A)
- 410S1 (Notice of Mortgage Payment Change) (currently Form 10S1)
- 410S2 (Notice of Postpetition Mortgage Fees, Expenses, and Charges) (currently Form 10S2)
- 424 (Certification to Court of Appeals by All Parties)

Status: To be considered for final approval by the Judicial Conference at its September 2015 meeting.

Full text: Bankruptcy Appendices to the Agenda for the Standing Committee's Meeting of May 28-29, 2015 (pages 9-175)

Full text as published for public comment

History: Originated by the Advisory Committee at its April 22-23, 2014, meeting and proposed for publication for public comment. See "Action Item 11" (relating to Form 401, Chapter 15 Petition) on page 24, "Action Item 12" (relating to Form 410A, Mortgage Proof of Claim Attachment) on pages 24-26, and "Action Item 13" (relating to the other forms) on pages 26-29, in the Report of the Advisory Committee's April 22-23, 2014, Meeting

Approved for publication by the Standing Committee at its May 29-30, 2014, meeting. See page 8 of the Report of the Standing Committee's May 29-30, 2014, Meeting

Published for public comment from August 15, 2014, through February 17, 2015. Comments are available at the regulations.gov website. Comments are also analyzed in the Agenda for the Advisory Committee's April 20, 2015, Meeting.

Approved by the Advisory Committee at its April 20, 2015, meeting and submitted to the Standing Committee for approval, at its May 28-29, 2015, meeting, for submission to the Judicial Conference. See Action Items 4-6, on pages 5-10 of the Report of the Advisory Committee's April 20, 2015, meeting (pages 443-448 overall) in the Agenda for the Standing Committee's Meeting of May 28-29, 2015. The Advisory Committee made minor changes to some forms.

Apparently approved by the Standing Committee at its May 28-29, 2015, meeting for submission to the Judicial Conference for final approval, although the Committee's report is not yet available.

R

Bankruptcy Forms:
Proposed Amended and Renumbered Forms Effective December 1, 2015 (third group)

Forms Involved:

- 103A (Application for Individuals to Pay the Filing Fee in Installments; formerly 3A)
- 103B (Application to Have the Chapter 7 Filing Fee Waived; formerly 3B)
- 106I (Schedule I; formerly 6I)
- 122A-1 (Chapter 7 Statement of Your Current Monthly Income; formerly 22A-1)
- 122A-1Supp (Statement of Exemption from Presumption of Abuse Under §707(b)(2); formerly 22A-1Supp)
- 122A-2 (Chapter 7 Means Test Calculation; formerly 22A-2)
- 122B (Statement of Current Monthly Income—Chapter 11; formerly 22B)
- 122C-1 (Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period; formerly 22C-1)
- 122C-2 (Chapter 13 Calculation of Your Disposable Income; formerly 22C-2)
- 201A (Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy under Chapter 11)
- 416A (Caption [Full]; formerly 16A)
- 416B (Caption [Short Title]; formerly 16B)
- 416D (Caption for Use in Adversary Proceeding; formerly 16D)
- 417A (Notice of Appeal and Statement of Election; formerly 17A)
- 417B (Optional Appellee Statement of Election to Proceed in District Court; formerly 17B)
- 417C (Certificate of Compliance with Rule 8015(a)(7)(B) or 8016(d)(2); formerly 17C)

Status: To be considered for final approval by the Judicial Conference at its September 2015 meeting.

Full Text: Bankruptcy Appendices to the Agenda for the Standing Committee's Meeting of May 28-29, 2015 (pages 199-305)

Summary of Changes: All of the forms are renumbered, and minor amendments are made to some of the forms. With respect to the means test forms, the Advisory Committee's report states that "the Committee approved several formatting and line numbering changes and the correction of a few errors in the listed forms. It also made a change to Official Forms 22A-2 and 22C-2 in response to the Tax Increase Prevention Act of 2014, Pub. Law No. 113-295, which authorized contributions to qualified ABLE accounts, as defined by 26 U.S.C. § 529A(b), to be included in the means test deduction for contributions to the care of household or family members."

History: Approved by the Advisory Committee at its April 20, 2015, meeting and submitted to the Standing Committee for approval (without publication) at its May 28-29, 2015, meeting. See Action Item 7 on pages 10-12 of the Report of the Advisory Committee's April 20, 2015, meeting (pages 448-450 overall) in the Agenda for the Standing Committee's Meeting of May 28-29, 2015. Apparently approved by the Standing Committee at that meeting for submission to the Judicial Conference for final approval, although the Committee's report is not yet available.

R

Bankruptcy Rules:

Proposed Amendments Effective December 1, 2016

Rules Involved:

- Rule 1010 (Service of Involuntary Petition and Summons)
- Rule 1011 (Responsive Pleading or Motion in Involuntary Cases)
- Rule 1012 (Responsive Pleading in Cross-Border Cases; new rule)
- Rule 2002 (Notices to Creditors)
- Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence)
- Rule 9006 (Computing and Extending Time) (two amendments)

Status: To be considered for approval by the Standing Committee at its May 28-29, 2015, meeting for submission to the Judicial Conference for final approval. See page 5 of the Agenda for the Standing Committee's Meeting of May 28-29, 2015. Reportedly approved at the meeting, although the Committee's report is not yet available.

Full Text: Bankruptcy Appendices to the Agenda for the Standing Committee's Meeting of May 28-29, 2015 (pages 177-196)

Full text as published for public comment

Summary of Changes:

- Rule 1010 (subdivision (a) is amended to remove provisions regarding the issuance of a summons for service in certain Chapter 15 proceedings; the requirements for notice and service in Chapter 15 proceedings are found in Rule 2002(q))
- Rule 1011 (amended to remove provisions regarding Chapter 15 proceedings)
- Rule 1012 (new rule added to govern responses to petitions for recognition in cross-border cases; it incorporates provisions formerly found in Rule 1011)
- Rule 2002 (subdivision (q) is amended to clarify the procedures for giving notice in cross-border proceedings)

- Rule 3002.1 (amended to clarify that the rule applies whenever a Chapter 13 plan provides that contractual payments on the debtor's home mortgage will be maintained; further amended to provide that, unless the court orders otherwise, the notice obligations imposed by this rule cease on the effective date of an order granting relief from the automatic stay with regard to the debtor's principal residence)

- Rule 9006(f) (the first amendment changes "after service" to "after being served" so as to clarify that only the party that is served by mail or under the specified provisions of Civil Rule 5—and not the party making service—is permitted to add three days to any prescribed period for taking action after service is made; the second amendment would eliminate the three-day extension to time periods when service is effected electronically)

History (first amendment to Rule 9006(f):

Proposed for publication by the Advisory Committee at its April 2-3, 2013, meeting. See "Action Item 12" on page 25 of the Report of Advisory Committee's April 2-3, 2013, Meeting

Approved for publication by the Standing Committee at its June 3-4, 2013, meeting. See page 16 of Report of Standing Committee's June 3-4, 2013, Meeting

Published for public comment from August 15, 2013, through February 18, 2014.

No comments were received on the proposed amendment. See page 262 of the Agenda for Advisory Committee's Meeting of April 22-23, 2014.

Approved by the Advisory Committee at its April 22-23, 2014, meeting for submission to the Standing Committee. See "Action Item 1" on page 3 of the Report of the Advisory Committee's April 22-23, 2014, Meeting. The Advisory Committee recommended that, if the Standing Committee approves the amendment, the amendment be held in abeyance until the second amendment to Rule 9006(f) is ready for submission to the Judicial Conference.

The Standing Committee met on May 29-30, 2014, but its report does not indicate any action taken on this amendment. See pages 6-13 of the Report of the Standing Committee's May 29-30, 2014, Meeting

History (Rules 1010, 1011, 1012, 2002, 3002.1, and second amendment to Rule 9006(f)):

Originated by the Advisory Committee at its April 22-23, 2014, meeting. See "Action Item 8" (Rules 1010, 1011, 1012 and 2002; pages 20-22); "Action Item 9" (Rule 3002.1; pages 22-23); and Action Item 10 (second amendment to Rule 9006(f); pages 23-24) of the Report of the Advisory Committee's April 22-23, 2014, Meeting. The Advisory Committee submitted the proposed amendments to the Standing Committee with a recommendation that they be published for public comment.

Approved for publication by the Standing Committee at its May 29-30, 2014, meeting. See page 8 of the Report of the Standing Committee's May 29-30, 2014, Meeting

Published for public comment from August 15, 2014, through February 17, 2015 (other than the first amendment to Rule 9006, which has completed the public comment process and is on hold pending the completion of the process for the second proposed amendment to that rule). Comments are on the regulations.gov website. Comments are also analyzed in the Agenda for the Advisory Committee's April 20, 2015, Meeting.

Approved by the Advisory Committee at its April 20, 2015, meeting and submitted to the Standing Committee for approval, at its May 28-29, 2015, meeting, for submission to the Judicial Conference. See Action Items 1, 2 and 3, on pages 3-5, of the Report of the Advisory Committee's April 20, 2015, meeting (pages 441-443 overall) in the Agenda for the Standing Committee's Meeting of May 28-29, 2015.

R

Bankruptcy Rules:

Proposed Amendments Effective December 1, 2017

Rules involved:

- Rule 1001 (Scope of Rules and Forms)
- Rule 1006(b)(1) (Filing Fee)

Status: Published for public comment from August 14, 2015, through February 16, 2016:

Public Comment Site

Public hearings will be held in Washington, DC, on January 22, 2016, and in Pasadena, CA, on January 29, 2016.

Full Text: Full text as published for public comment Also available here

Summary of Changes:

- Rule 1001 (The last sentence of the rule is amended to read "These rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding" so as to reflect amendments to Fed. R. Civ. P. 1)
- Rule 1006 (Amended to provide that an individual debtor's petition must be accepted for filing so long as the debtor submits a signed application to pay the filing fee in installments and even if a required initial installment payment is not made at the same time)

History (Rule 1001):

Approved by the Advisory Committee at its September 29-30, 2014, meeting and submitted to the Standing Committee for approval for publication at its January 8-9, 2015, meeting. See page 2 of the Report of the Advisory Committee's September 29-30, 2014, meeting (page 80 overall) in the Agenda for the Standing Committee's January 8-9, 2015, Meeting.

Approved for publication in August 2015 by the Standing Committee at its January 8-9, 2015, meeting. See page 5 of the draft minutes for that meeting (page 29 overall), in the Agenda for the Standing Committee's Meeting of May 28-29, 2015

History (Rule 1006):

Approved by the Advisory Committee at its April 20, 2015, meeting and submitted to the Standing Committee for approval for publication at its May 28-29, 2015, meeting. See Action Item 10 on pages 16-17 of the Report of the Advisory Committee's April 20, 2015, meeting (pages 454-455 overall) in the Agenda for the Standing Committee's Meeting of May 28-29, 2015.

Approved for publication by the Standing Committee at its May 28-29, 2015, meeting. See page 6 of the Agenda for the Standing Committee's Meeting of May 28-29, 2015.

R

Bankruptcy Rule and Form Amendments Being Held in Abeyance

The Judicial Conference originally approved for transmission to the Supreme Court, in the group of Rule amendments slated to take effect on December 1, 2014, amendments to Rules 7008(a) (general rules of pleading in adversary proceedings), 7012 (defenses and objections in adversary proceedings), 7016 (pretrial procedures in adversary proceedings), 9027 (removal of case), and 9033 (proposed findings of fact and conclusions of law) that reflected the Supreme Court's decision in *Stern v. Marshall*. However, as noted in footnote 1 on page 30 of the Report of the Proceedings of the Judicial Conference (September 17, 2013), the Conference subsequently decided to recommit these proposed amendments to the Standing Committee because they "implicated an issue to be considered by the Supreme Court in *Executive Benefits Insurance Agency v. Arkison*," namely, whether the parties have the authority to consent to the bankruptcy court's jurisdiction See also page 40 of the Agenda for the Advisory Committee Meeting on April 22-23, 2014, which recounts the discussion of this matter by the Advisory Committee at its September 24-25, 2013, meeting. While the Court in *Arkison* declined to resolve the issue of consent, the Court decided the issue in *Wellness Int'l Network v. Sharif* on May 26, 2015, and the proposed amendments are being held in abeyance by the Advisory Committee pending that decision. See page 11 (item 7, "Report by the Subcommittee on Business Issues") of the Minutes of the Advisory Committee's Meeting of September 29-30, 2014 (page 103 overall). The Court had not rendered its decision when the Advisory Committee held its April 20, 2015, meeting, so these items remain pending. See page 29 of the Agenda for the Advisory Committee's April 20, 2015, Meeting.

A proposed national Chapter 13 form plan (Form 113), and associated Rule changes, have been published twice for public comment. As there remains substantial opposition to the proposal, the Advisory Committee voted at its April 20, 2015, meeting to study a "compromise" proposal "that would involve promulgating a national plan form and related rules, but would allow districts to opt out of the use of the Official Form if certain conditions were met." See pages 17-20 of the Report of the Advisory Committee's April 20, 2015, meeting (pages 455-458 overall) in the Agenda for the Standing Committee's Meeting of May 28-29, 2015. If the Committee decides to go forward with the compromise proposal, the effective date could be as early as December 1, 2016, and as late as December 1, 2018, depending on whether the Rules and Form are published again for public comment.

Forms Involved:

- Form 113 (national Chapter 13 form plan

Rules Involved:

- Rule 2002 (Notices to Creditors)
- Rule 3002 (Filing Proof of Claim or Interest)
- Rule 3007 (Objections to Claims)
- Rule 3012 (Valuation of Security)

- Rule 3015 (Filing, Objection to Confirmation, Effect of Confirmation, and Modification of a Plan in a Chapter 12 or a Chapter 13 Case)

- Rule 4003 (Exemptions)

- Rule 5009 (Closing Chapter 7, Chapter 12, Chapter 13, and Chapter 15 Cases; Order Declaring Lien Satisfied)

- Rule 7001 (Scope of Rules of Part VII)

- Rule 9009 (Forms)

Full Text: See the Report of the Advisory Committee's April 22-23, 2014, Meeting [pages 249–251 (Rule 2002); pages 253-255 (Rule 3002); pages 259-260 (Rule 3007); pages 261-262 (Rule 3012); pages 263-266 (Rule 3015); page 267 (Rule 4003); page 269-270 (Rule 5009); page 271 (Rule 7001); pages 275-276 (Rule 9009)]

Summary of Changes:

- Rule 2002 (Subdivisions (a) and (b) are amended and reorganized to alter the provisions governing notice under this rule in chapter 13 cases)

- Rule 3002 (extensively amended)

- Rule 3007 (amended to specify the manner in which an objection to a claim and notice of the objection must be served and to no longer require that a hearing be scheduled or held on every objection)

- Rule 3012 (several changes)

- Rule 3015 (extensively amended)

- Rule 4003 (subdivision (d) is amended to provide that a request under § 522(f) to avoid a lien or other transfer of exempt property may be made by motion or by a Chapter 12 or Chapter 13 plan)

- Rule 5009 (subdivision (d) is added to provide a procedure by which a debtor in a Chapter 12 or Chapter 13 case may request an order declaring a secured claim satisfied and a lien released under the terms of a confirmed plan)

- Rule 7001 (subdivision (2) is amended to provide that the determination of the amount of a secured claim under Rule 3012 or the validity, priority, or extent of a lien under Rule 4003(d) does not require an adversary proceeding)

- Rule 9009 (amended and reorganized into separate subdivisions; amended to require that an Official Form be used without alteration, except when another rule, the Official Form itself, or the national instructions applicable to an Official Form permit alteration)

History (Form 113):

Proposed for publication by the Advisory Committee at its April 2-3, 2013, meeting. See "Action Item 10" on pages 19-20 of the Report of Advisory Committee's April 2-3, 2013, Meeting. For the full text, see pages 451-459.

Approved for publication by the Standing Committee at its June 3-4, 2013:
Report of Standing Committee's June 3-4, 2013, Meeting (pp 12-17)

Published for public comment from August 15, 2013, through February 18, 2014.

Reconsidered and revised by the Advisory Committee at its April 22-23, 2014, meeting. See "Action Item 7" on pages 17-20 of the Report of the Advisory Committee's April 22-23, 2014, Meeting. The Advisory Committee submitted the proposed amendments to the Standing Committee with a recommendation that they be again published for public comment. For the full text, see pages 297-309.

History (amendments to Rules):

Proposed for publication by the Advisory Committee at its April 2-3, 2013, meeting. See "B. Items for Publication in August 2013" beginning on page 17 of the Report of Advisory Committee's April 2-3, 2013, Meeting.

Approved for publication by the Standing Committee at its June 3-4, 2013:
Report of Standing Committee's June 3-4, 2013, Meeting (pp 12-17)

Published for public comment from August 15, 2013, through February 18, 2014.

Reconsidered and in some cases redrafted by the Advisory Committee at its April 22-23, 2014, meeting. See "Action Item 6" on pages 12-17 of the Report of the Advisory Committee's April 22-23, 2014, Meeting. The Advisory Committee submitted the proposed amendments to the Standing Committee with a recommendation that they be again published for public comment.

Latest History (both Rules and Form 113):

Approved for publication by the Standing Committee at its May 29-30, 2014, meeting. See page 8 of the Report of the Standing Committee's May 29-30, 2014, Meeting

Published for public comment from August 15, 2014, through February 17, 2015. Comments are available on the regulations.gov website. Comments are collected on pages 2-73 of Appendix A to the Agenda for the Advisory Committee's Meeting of April 20, 2015. Comments are also analyzed in the Agenda for the Advisory Committee's April 20, 2015, Meeting.

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Internet Resources

Exemptions

John Bates' Exemptions Express

National Consumer Law Center

No Fresh Start: How States Let Debt Collectors Push Families into Poverty (October 2013)

Foreclosing a Dream: State Laws Deprive Homeowners of Basic Protections (February 2009)

—Summary of State Foreclosure Laws

50-State Report on Unfair and Deceptive Acts and Practices Statutes (February 2009)

—State-by-State Analysis

For more, see the National Consumer Law Center (NCLC) website

United States Trustee Program

USTP website

Means Test Expense Allowances and Other Figures

Guidelines for Reviewing Mortgage Proofs of Claim (April 2009) (for Chapter 13 trustees)

Chapter 13 Trustees Weigh Advantages and Disadvantages of Paying Debtors' Ongoing Mortgages (June 2009)

United States Trustee Manual

Chapter 7 Handbooks and Reference Materials

Chapter 11 Handbooks and Reference Materials

Chapter 12 Handbooks and Reference Materials

Chapter 13 Handbooks and Reference Materials

Statement of the U.S. Trustee's Program on Legal Issues Arising under the Chapter 13 Disposable Income Test (April 20, 2010)

Statement of the U.S. Trustee's Program on Legal Issues Arising under the Chapter 7 Means Test (April 23, 2010)

U.S. Trustee FAQs

Other Websites

13Network

Administrative Office of the U.S. Courts

-- Bankruptcy Case Policies

American Bankruptcy Institute (ABI)

--- Bankruptcy Blogs Exchange

Association of Bankruptcy Judicial Assistants

Bankruptcy Blogs (Justia)

Electronic Bankruptcy Noticing (EBN)

Federal Judicial Center

--- History of Bankruptcy Judgeships

Internal Revenue Manual: Financial Analysis Handbook (IRS)

National Association of Bankruptcy Trustees (NABT—Chapter 7)

National Association of Chapter 13 Trustees (NACTT)

--- NACTT Academy

National Association of Consumer Advocates (NACA)

National Association of Consumer Bankruptcy Attorneys (NACBA)

--- National Consumer Bankruptcy Rights Center

National Conference of Bankruptcy Judges

--- American Bankruptcy Law Journal

National Creditor Registration Service

PACER Service Center

States Association of Bankruptcy Attorneys

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Supreme Court Case Status

Certiorari petitions granted:

None.

Certiorari petitions pending:

Lawson v. Sauer Inc., Case No. 15-113 (U.S. Sup. Ct., pet. for cert. filed, July 24, 2015)

The debtor has filed a petition for certiorari seeking review of *In re Lawson*, 791 F.3d 214 (1st Cir., July 1, 2015), which held, in agreement with *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000) and in disagreement with the recent decision in *In re Ritz*, 787 F.3d 312 (5th Cir., May 22, 2015), that "actual fraud" under Code § 523(a)(2)(A) is not limited to fraud predicated on a misrepresentation or omission.

The petition has been distributed for the Court's conference on September 28, 2015.

Supreme Court docket

General Resources

SCOTUSblog

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