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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 *CBAR* discusses both published and unpublished opinions, including those not available in commercial databases.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.

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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.

Each issue of *CBAR* is e-mailed directly to subscribers in Adobe Acrobat (PDF) format. Subscribers may also elect to receive their newsletters in Microsoft Word 2003 format.

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Contents

How to Use This Newsletter Go p. 7

This Issue's New Cases: Summary

This Issue's Highlights Go p. 12

Case Summaries Arranged by Circuit (130)

Supreme Court . . . . . (no cases)
First Circuit (4) . . . . . p. 22
Second Circuit (11) . . . . . p. 24
Third Circuit (9) . . . . . p. 30
Fourth Circuit (10) . . . . . p. 34
Fifth Circuit (11) . . . . . p. 38
Sixth Circuit (23) . . . . . p. 43
Seventh Circuit (14) . . . . . p. 51
Eighth Circuit (7) . . . . . p. 58
Ninth Circuit (13) . . . . . p. 61
Tenth Circuit (9) . . . . . p. 66
Eleventh Circuit (17) . . . . . p. 71
District of Columbia Circuit (2) . . . . . p. 78

This Issue's New Cases: Full Abstracts

Section One: Nonchapter-Specific Issues

A. Automatic Stay

Existence of Stay . . . . . p. 82
Relief from Stay . . . . . p. 84
Violation of Stay . . . . . p. 85

B. Dischargeability

Domestic Support Obligations; Other Marital or Support Debts . . . p. 89
Student Loan Debts . . . . . p. 90
Other Debts . . . . . p. 94
Other Issues . . . . . p. 100

C. Jurisdiction and Procedure

Adversary Procedure . . . . . p. 103
Appellate Procedure . . . . . p. 106
Other Procedural Issues . . . . . p. 110
Jurisdiction . . . . . p. 114

D. Means Test

In General . . . . . p. 116

E. Proof of Claim

Nature of Obligation as "Claim"; Setoff; Recoupment; Subrogation . . p. 119
By Secured Creditor: Amount of Claim . . . . . p. 121
By Secured Creditor: Ownership of Claim . . . . . p. 124
By Secured Creditor: Secured Status of Claim . . . . . p. 125
Other Issues . . . . . p. 126

F. Property of the Estate

Generally . . . . . p. 128
Exclusions from Property of the Estate . . . . . p. 131
Exemptions: Availability under Code § 522(b)(3) . . . . . p. 132
Exemptions: Avoidance of Liens under Code § 522(f) . . . . . p. 133
Exemptions: Debtor Who Applies Federal Exemptions . . . . . p. 135
Exemptions: Debtor Who Applies State Exemptions . . . . . p. 136
Exemptions: Procedure . . . . . p. 140
Exemptions: Other Issues . . . . . p. 143

G. Other Issues

Authority of Court . . . . . p. 145
Avoidable Transfers and Liens . . . . . p. 146
Required Documentation . . . . . p. 149
Scope and Violation of Discharge Injunction . . . . . p. 152
Valuation of Property . . . . . p. 153
Miscellaneous Issues . . . . . p. 154

Section Two: Chapter 7 Issues

Abuse . . . . . p. 157
Cause for Dismissal under Code § 707(a) . . . . . p. 159
Conversion or Dismissal of Case by Debtor . . . . . p. 160
Other Issues . . . . . p. 161

Section Three: Chapter 13 Issues

A. Confirmation of Plan—Treatment of Secured Claims

Generally . . . . . p. 166
Bifurcation, Lien Stripping, Modification . . . . . p. 168

B. Confirmation of Plan—Treatment of Unsecured Claims

Compliance with Projected Disposable Income Requirement . . . p. 171
Other Issues . . . . . p. 173

C. Confirmation of Plan—Other Issues

Other Objections to Confirmation; Other Matters Related to Confirmation . p. 175

D. Topics Other than Confirmation of Plan

Modification of Confirmed Plan . . . . . p. 177
Other Issues . . . . . p. 178

Section Four: Cases under Related Federal Statutes (no cases)

Permanent Resources

Bankruptcy Code, Rules and Forms Go . . . . . p. 187

Internet Resources Go . . . . . p. 199

Supreme Court Case Status Go . . . . . p. 202

Terms and Conditions of Use Go p. 205

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:

Adversary procedure—Motion to compel arbitration: Affirming *In re Anderson*, 553 B.R. 221 (S.D. N.Y., June 14, 2016), the Court of Appeals held that the bankruptcy court did not err in refusing to compel arbitration in the debtor's proposed class action to recover for the defendant credit card issuer's alleged violation of the discharge injunction in continuing to report, as charged off, credit card debt that had been discharged in bankruptcy. Concluding that arbitration of a claim based on an alleged violation of Code § 524(a)(2) would seriously jeopardize a core bankruptcy proceeding, the Court of Appeals reasoned that (1) the discharge injunction was integral to the bankruptcy court's ability to provide debtors with the fresh start that was the very purpose of the Bankruptcy Code; (2) the claim involved an ongoing bankruptcy matter that required continuing court supervision; and (3) the equitable powers of the bankruptcy court to enforce its own injunctions were central to the structure of the Code. The fact that the debtor's claim came in the form of a putative class action did not undermine this conclusion. *In re Anderson*, 884 F.3d 382 (2nd Cir., March 7, 2018), pet. for cert. filed, *Credit One Bank, N.A. v. Anderson*, Case No. 17-1652 (U.S. Sup. Ct., June 5, 2018) (text of opinion).

Adversary procedure—Motion to compel arbitration: Denying, in a Chapter 7 debtor's adversary proceeding against a debt adjustment firm and a related company, the firm's motion to compel arbitration of the debtor's claims against the firm, which arose from the firm's prepetition debt adjustment services for the debtor, the bankruptcy court concluded that the arbitration provisions in the debtor's agreements with the firm were invalid because they denied the debtor the ability to assert her rights under North Carolina law, and, even if the agreements were valid, the court would decline to order arbitration because sending the debtor's claims under state law and Code § 548 to arbitration would have a significant adverse effect upon the adjudication of the claims and upon the fundamental purposes of the Bankruptcy Code. *In re Erwin*, 2018 WL 1614160 (Bankr. E.D. N.C., March 30, 2018), appeal dismissed, *ClearOne Advantage, LLC v. Lischwe*, Case No. 5:18-cv-158 (E.D. N.C., August 7, 2018) (text of opinion).

Adversary procedure—Motion to compel arbitration: An arbitration agreement in the debtor's contract with a lender was enforceable in the debtor's adversary proceeding against the lender asserting claims under the Truth in Lending Act and Mississippi state law. *In re Griffin*, 585 B.R. 794 (Bankr. S.D. Miss., March 9, 2018) (text of opinion).

Avoidable transfers—Defense under Code § 550(b): Prepetition and postpetition payments made by the debtor to two universities and a law school for tuition for the debtor's children while his case was proceeding under Chapter 11 were not avoidable by the Chapter 7 trustee following the conversion of the debtor's case, as the three schools established the defense available under Code § 550(b)(1) to a transferee from the initial transferee that took the transfer for value, in good faith, and without knowledge of the voidability of the transfer. The trustee sought to avoid the prepetition transfers under Code § 544(b) (applying New York law) and § 548(a)(1)(B) as constructively fraudulent transfers, and the

postpetition transfers under § 549 as unauthorized postpetition transfers. The court held that, as to all the payments, the debtor's children, not the schools, were the initial transferees because the payments were made to the children's accounts on the schools' electronic platforms. The children then transferred the payments to the schools when the children made their tuition payments from their accounts. At each school, the student's account belonged to the student, and the student's parents had no rights in or to the account. After the debtor transferred the funds to those accounts, the debtor was not able to access the account absent the account holder's authorization, nor was the school authorized to utilize the funds. Rather, the school did not obtain dominion and control of those funds until the student registered for classes for that semester, at which point the funds would be applied towards the tuition amount due. In the event the student decided to withdraw from the program, the student, and not the debtor or the school, was entitled to any funds remaining in the account. Put simply, the student maintained dominion and control over the funds in the account upon the debtor's transfer because it was the student's decision whether to enroll in classes and have the funds applied towards tuition or to withdraw from the program and have the funds refunded directly to him or her. While the accounts were maintained in an electronic platform provided by each school, the school was a "mere conduit" of the debtor's transfers of the funds to the children. The trustee did not dispute that the schools provided value to the children, in the form of enrollment in classes and education, in good faith in exchange for the tuition payments. *In re Adamo*, 582 B.R. 267 (Bankr. E.D. N.Y., March 28, 2018), appeal filed, *Pergament v. Brooklyn Law School*, Case No. 1:18-cv-2204 (E.D. N.Y., filed April 13, 2018) (text of opinion).

Avoidable transfers—Preferential transfer under Code § 547: Affirming *In re Hackler*, 571 B.R. 662 (Bankr. D. N.J., August 28, 2017), the district court agreed that the prepetition transfer of the Chapter 13 debtors' real property, with an estimated value of $335,000, in satisfaction of a tax debt of roughly $45,000 clearly enabled the tax sale purchaser's transferee to receive more than it would otherwise have received in a hypothetical Chapter 7 liquidation, and thus was avoidable as a preference under Code § 547(b), even though the tax sale was regularly conducted in accordance with state law. *In re Hackler*, --- B.R. ----, 2018 WL 1440326 (D. N.J., March 22, 2018), appeal filed, Case No. 18-1650 (3rd Cir., filed March 30, 2018) (text of opinion).

BAPCPA—Duties of attorney: Code § 526(a)(4), which was added by BAPCPA, provides in relevant part that a debt relief agency--including a law firm that provides bankruptcy-related services--"shall not advise" a debtor "to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer a fee or charge for services performed as part of preparing for or representing a debtor" in a bankruptcy case. In *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), the Supreme Court unanimously concluded that the section's first prohibition--on advice to incur additional debt "in contemplation of" a bankruptcy filing--requires proof that the advice was given for an invalid purpose designed to manipulate the bankruptcy process. In a case presenting the question whether the statute's second prohibition--on advice to incur debt to pay for a lawyer's bankruptcy-related representation--likewise entails an invalid-purpose requirement, the Court of Appeals held that it does not and that an attorney violates § 526(a)(4) if the attorney instructs a client to pay his bankruptcy-related legal fees using a credit card. A bankruptcy attorney's advice that a potential client take on additional debt in order to pay the attorney's fee is inherently abusive in at least two respects: it puts the attorneys financial interest--getting paid in full--ahead of the clients, and it puts the attorney's own interests ahead of the creditors' in that, while ensuring the lawyer's full payment, it leaves a diminished estate on which creditors can draw. *Cadwell v. Kaufman, Englett & Lynd, PLLC*, 886 F.3d 1153 (11th Cir., March 30, 2018) (text of opinion).

Chapter 7—Abandonment of property of estate—Upon closing of case under Code § 554(c): The Chapter 7 debtors' right to an inheritance was abandoned under Code § 554(c) when the case was closed because the inheritance was properly scheduled by the debtors and the Chapter 7 trustee fully administered the funds available while the case was pending. Accordingly, an additional inheritance amount that the debtors received following the closing of their case, after additional inheritance funds became available, was not property of the estate. *In re Morris*, 2018 WL 1321343 (Bankr. N.D. Ohio, March 13, 2018) (text of opinion).

Chapter 13—Application of Bankruptcy Rule 3002.1: Where a Notice of Mortgage Payment Change filed by the Chapter 13 debtor's mortgage creditor contained inaccurate information by misstating the debtor's escrow obligation, the debtor was entitled to recover the attorney's fees incurred in responding to the creditor's violation of Bankruptcy Rule 3002.1, but the court lacked authority to award either compensatory damages or monetary sanctions. *In re Tollstrup*, 2018 WL 1384378 (Bankr. D. Or., March 16, 2018) (text of opinion).

Chapter 13—Application of Bankruptcy Rule 3002.1: In identical opinions issued in two cases, the bankruptcy court, in resolving the Chapter 13 debtors' challenges to their mortgage creditors' notices of postpetition fees and expenses under Bankruptcy Rule 3002.1(c), held that the court must look to the underlying agreement and applicable nonbankruptcy law to determine if the amounts are permissible; the "reasonableness standard" applied under Code § 506(b) in the case of oversecured creditors does not apply. Here, in one case, the mortgage only permitted the recovery of fees incurred during a foreclosure proceeding initiated pursuant to a power of sale clause, and this did not include fees incurred in connection with a bankruptcy proceeding. Accordingly, the debtor's mortgage creditor was not entitled to recover postpetition fees. In contrast, the second debtor's mortgage permitted the creditor to collect fees if "there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy ...." This provision permitted the creditor to charge the debtor for fees incurred in the debtor's bankruptcy case. However, the fees still needed to be reasonable, and the fees—$500 in attorney's fees for filing a proof of claim and $400 in attorney's fees for reviewing the debtor's Chapter 13 plan—appeared to be unreasonable. Since the creditor provided little detail for the charges, the court would disallow the charges but permit the creditor to file an amendment to its response to provide further justification for the charges. *In re England*, 586 B.R. 795 (Bankr. M.D. Ala., March 30, 2018) (text of opinion) and *In re Ochab*, 586 B.R. 803 (Bankr. M.D. Ala., March 30, 2018) (text of opinion).

Chapter 13—Confirmation of plan—Calculation of projected disposable income: Affirming *In re Blake*, 565 B.R. 871 (Bankr. N.D. Ill., March 16, 2017), the Court of Appeals held that the approach adopted by the bankruptcy court to calculate the projected disposable income of a below-median Chapter 13 debtor complied with Code § 1325(b). Under this approach, the debtor prorated her annual tax refund (i.e., divided the annual tax refund by twelve) and added the resulting amount to her current monthly income. Then, the debtor prorated future expenses that the refund would be spent on over that 12-month period, thus partially or fully offsetting the tax refund income as long as her additional expenses were reasonably necessary. The bankruptcy court adopted this practice for a couple of reasons, the Court of Appeals explained. First, the court wanted to alleviate the burdens that the process of modifying confirmed Chapter 13 plan imposed on trustees, debtors' counsel, and the court. Second, the court sought to promote consistency among trustees who often had different practices as to whether a debtor could retain a portion of their tax refund. The Court of Appeals concluded that the reasoning of *Hamilton v. Lanning*, 560 U.S. 505 (2010), which adopted a forward-looking approach to the calculation of a Chapter 13 debtor's projected

disposable income in a case involving an above-median debtor, applied with equal force to below-median Chapter 13 debtors. *Marshall v. Blake*, 885 F.3d 1065 (7th Cir., March 22, 2018) (text of opinion).

Chapter 13—Confirmation of plan—Good faith—Effect of Social Security income: Because the Chapter 13 debtor's exclusion of his Social Security income from his "projected disposable income" is expressly allowed by the Bankruptcy Code, the debtor's failure to devote any of his Social Security income to the payment of unsecured creditors could not alone constitute bad faith under Code § 1325(a)(3). *In re Green*, 2018 WL 1581635 (Bankr. S.D. Ga., March 27, 2018) (text of opinion).

Chapter 13—Confirmation of plan—Treatment of secured claims—910-day car claims: A vehicle purchased by the Chapter 13 debtor less than 910 days prepetition was predominantly used to perform the functions of her job, although the debtor also used the vehicle for personal uses, and therefore was not "acquired for the personal use of the debtor" within the meaning of the hanging paragraph of Code § 1325(a). Under the predominant-use test from *In re Joseph*, 2007 WL 950267 (Bankr. W.D. La., March 20, 2007), the court found that the debtor's business use of the vehicle predominated over her personal use. The debtor testified that she was required to have a vehicle during the course of her employment with a healthcare provider to pick up patients and transport them to various events and medical appointments, that this portion of her job consumed three and a half to six hours per day, and that her employer reimbursed her for mileage. *In re McGinness*, 586 B.R. 14 (Bankr. E.D. Tenn., March 2, 2018) (text of opinion).

Chapter 13—Eligibility—Debt limits: Even if a Chapter 13 debtor has debt exceeding the debt limits in Code § 109(e), the court has discretion under Code § 1307(c) in deciding whether to dismiss the debtor's case, and, here, the court would decline to dismiss the case even though the debtor's unsecured debts may have exceeded the statutory limit of $394,725. The uncertainty arose because the debtor's schedules disclosed only $16,185 in student loans, in addition to several other student loans in unknown amounts, while the Chapter 13 trustee estimated that the debtor had $132,000 in scheduled student loans and the servicer for the U.S. Department of Education filed a claim for $341,136. The debtor's disposable income would render a Chapter 7 discharge an abuse, the court said, and requiring the debtor to proceed under Chapter 11 "would be absurd for this true consumer debtor." Based on the facts, it was in the best interests of the debtor, the estate, and the creditors that the debtor be permitted to pursue confirmation of her Chapter 13 plan. To hold otherwise would effectively exclude this debtor from bankruptcy relief, and the congressional intent behind limiting the availability of Chapter 13 through § 109(e) was not applicable here. *In re Fishel*, 583 B.R. 474 (Bankr. W.D. Wis., March 30, 2018) (text of opinion).

Chapter 13—Eligibility—Debt limits: Disagreeing with *In re Pratola*, 578 B.R. 414 (Bankr. N.D. Ill. 2017), the court said that, while the decision to dismiss or convert a case under Code § 1307 is discretionary, the court is bound to apply its discretion consistent with the plain terms of the Bankruptcy Code. Those plain terms precluded the court from allowing a person who was ineligible to be a Chapter 13 debtor from continuing in Chapter 13. Thus, the court dismissed the case, in which the debtor's unsecured debts totaled more than $870,000. *In re Bailey-Pfeiffer*, 2018 WL 1896307 (Bankr. W.D. Wis., March 23, 2018) (text of opinion).

Chapter 13—Entitlement to discharge: A Chapter 13 debtor's direct payments on a nonmodifiable, nondischargeable residential mortgage loan, provided for in the debtor's plan under Code § 1322(b)(5), are not "payments under the plan" for purposes of Code 1328(a). Accordingly, a debtor's failure to complete all such direct payments is not grounds to dismiss the case without a discharge. The court observed that, in 17 years on the bench, it

had never dismissed a Chapter 13 case without discharge, where the required payments to the trustee were completed, for the reason that the debtor failed to make all of the direct mortgage payments. Nor had the court's research uncovered any such cases in other jurisdictions prior to the decision in *In re Heinzle*, 511 B.R. 69 (Bankr. W.D. Tex. 2014). It was apparent that what triggered this recently-identified theory of dismissal without discharge was the adoption of Bankruptcy Rule 3002.1. It was equally clear that Rule 3002.1 was not intended to serve as the impetus for dismissal without discharge. Rather, it was universally recognized that the rule was intended to benefit debtors by better ensuring the fresh start to a Chapter 13 debtor who completed a plan, by providing a mechanism for review and a forum for resolving disputes over whether the debtor's obligations to the mortgage holder were current at the conclusion of the bankruptcy case. *In re Gibson*, 582 B.R. 15 (Bankr. C.D. Ill., March 5, 2018) (text of opinion)

Chapter 13—Stripping unsecured lien: The Court of Appeals held that, because the ability of a Chapter 13 debtor to strip off an unsecured lien stems from Code § 1322(b) rather than § 506(d), a Chapter 13 debtor may strip off a wholly-unsecured junior lien regardless of whether a proof of claim has been filed for the debt secured by the junior lien. Section 1322(b) permits Chapter 13 plans to modify the rights of holders of unsecured claims. Whether a creditor has an unsecured claim turns on the value of the underlying collateral, not the mere existence of a security interest. And in making this determination, courts are not limited to valuing claims that have been filed and allowed. Where, as here, a senior lienholder is only partially secured, any junior lienholder is by definition the holder of an unsecured claim for purposes of § 1322(b), which may be stripped without the filing of a proof of claim. *Burkhart v. Grigsby*, 886 F.3d 434 (4th Cir., March 29, 2018) (text of opinion).

Chapter 13—Stripping unsecured lien: Affirming *In re Poole*, 2017 WL 401799 (Bankr. E.D. Tenn., Jan. 30, 2017), the district court agreed that, where the Chapter 13 debtors had executed three notes in favor of a creditor, all of which were secured by the same deed of trust on the debtors' residence, each note was secured by a different lien, so that the debtors could strip the two lower-priority liens, as the amount due on the note secured by the highest-priority lien was greater than the value of the residence. *In re Poole*, Case No. 4:17-cv-8 (E.D. Tenn., March 19, 2018) (text of opinion).

Dischargeability of debt—Student loan debt under Code § 523(a)(8): There is no deadline expressly imposed by the Bankruptcy Code or Rules for filing an adversary proceeding to determine whether a student loan debt may be discharged under § Code 523(a)(8) for undue hardship, and six years following a Chapter 7 discharge is not, as a matter of law, always too long for a debtor to wait to commence an adversary proceeding to discharge student loan debt. *In re Gimbel*, 2018 WL 1229718 (Bankr. D. N.M., March 8, 2018) (text of opinion).

Dischargeability of debt—Student loan debt under Code § 523(a)(8)—Status of obligation as encompassed by provision: The debtor's obligation under a promissory note to pay her father for the principal sum of all Parent PLUS loans taken out by him on her behalf to attend college did not come within Code § 523(a)(8). The obligation did not fit within § 523(a)(8)(A)(i) because it was not made, insured or guaranteed by a governmental unit or nonprofit institution. Nor did the obligation fit within § 523(a)(8)(B), as the loan was not a "qualified educational loan" as defined by IRC § 221(d)(1). The IRC made clear, in 26 U.S.C. § 267(b) and § 707(b)(1), that qualified educational loans do not include debts owed to "related persons." Finally, agreeing with the narrow view, the court reasoned that interpreting § 523(a)(8)(A)(ii) to include loans used for educational purposes renders § 523(a)(8)(A)(i) and § 523(a)(8)(B) largely meaningless. *In re Nypaver*, 581 B.R. 431 (Bankr. W.D. Pa., March 7, 2018) (text of opinion).

Dischargeability of debt—Student loan debt under Code § 523(a)(8)—Status of obligation as encompassed by provision: To be excepted from discharge under Code § 523(a)(8)(A)(ii), which encompasses "an obligation to repay funds received as an educational benefit, scholarship, or stipend," a debtor must have taken on an obligation to repay funds that were given in the form of an educational benefit, a scholarship or a stipend; the provision does not encompass all loans used for educational purposes. Thus, here, a bar exam study loan owed by one debtor and a career training loan owed by a second debtor did not come within § 523(a)(8)(A)(ii). *In re Crocker*, 2018 WL 1626245 (Bankr. S.D. Tex., March 26, 2018), direct appeal filed, *Crocker v. Navient Solutions, L.L.C.*, Case No. 18-20254 (5th Cir., filed April 25, 2018) (text of opinion).

Dischargeability of debt—Student loan debt under Code § 523(a)(8)—Status of obligation as encompassed by provision: Disagreeing with *In re Posner*, 434 B.R. 800 (Bankr. E.D. Mich. 2010), which held that a co-signer of the debtor's student loan was a co-borrower, rather than a lender, so that the debtor's debt to the co-signer after the co-signer was obligated to repay the loan was not within the coverage of Code § 523(a)(8), the court held that the debtor's debt to a friend who had co-signed and guaranteed the debtor's student loan debt, and had been obligated to pay the debt after the debtor's default, came within Code § 523(a)(8)(ii). *In re Kelly*, 582 B.R. 905 (Bankr. S.D. Tex., March 23, 2018) (text of opinion).

Judicial estoppel—Application under circumstances: Vacating *Clark v. Advanced Composites Group*, 2017 WL 2266981 (S.D. N.Y., April 28, 2017), the Court of Appeals held that the district court abused its discretion in applying judicial estoppel where the Chapter 13 debtors failed to disclose that, shortly before the debtors made their final plan payment, the debtor husband was diagnosed with mesothelioma, a cancer caused by the inhalation of asbestos fibers. Because the debtors' plan already required the debtors to repay their creditors in full, disclosing the husband's diagnosis to the bankruptcy court would have affected the couple's bankruptcy proceeding only if their creditors were able to convince the bankruptcy court to raise the applicable interest rate under the plan. Given that the debtors were mere weeks away from completing repayment at the time of the husband's diagnosis, and were already paying interest at a standard rate, this scenario seemed more than implausible. While there might be unusual circumstances in which the need to safeguard the integrity of the courts might tip the equities in favor of judicial estoppel even when the inconsistency in question made no material difference, this case was surely not of that sort. *Clark v. AII Acquisition, LLC*, 886 F.3d 261 (2d Cir., March 30, 2018) (text of opinion).

Means test—Current monthly income: Rejecting the Chapter 13 debtors' contention that, because the statutory definition of "median family income" incorporates calculations reported by the Bureau of the Census, Congress must have intended "income" to be defined for purposes of Code § 1325 subject to the same exclusions used by the Census Bureau when it calculates median family income, the district court said that BAPCPA's statutory definition of "current monthly income" makes no mention of the categories excluded from income by the Census Bureau, but rather includes the average monthly income "from all sources that the debtor receives ... without regard to whether such income is taxable income." In the case of the BAPCPA definition of "current monthly income," the statutory language is plain: Quite simply, the term "all" means "all." *Ortiz-Peredo v. Viegelahn*, 587 B.R. 321 (W.D. Tex., March 29, 2018) (text of opinion).

Means test—Current monthly income: Earned income tax credits are income under the Bankruptcy Code and are included in a debtor's calculation of "current monthly income." The earned income tax credit statute provides that the credit shall not be treated as income for the purposes of several other federal statutes that provide public assistance benefits, but

the Bankruptcy Code is not one of the listed statutes, nor does the definition of "currently monthly income" in Code § 101(10A) exclude earned income tax credits. *Marshall v. Blake*, 885 F.3d 1065 (7th Cir., March 22, 2018) (text of opinion).

Proof of claim—Imposition of sanctions for inaccuracy: Where the Chapter 13 debtors' mortgage creditor filed a proof of claim and a mortgage proof of claim attachment that overstated the debtors' escrow shortage by over $4,000 despite what the creditor's escrow statement of account stated, the creditor failed to respond to both informal inquiries and formal discovery requests by the debtors' attorney, and the creditor failed to amend its proof of claim for over 200 days, the court imposed sanctions on the creditor, as provided for in Bankruptcy Rule 3001(c)(2)(D), in the amount of $5,875, representing the reasonable fees and expenses incurred by the debtors' attorney in her effort to get the creditor to properly state the amount of the debtors' escrow shortage. *In re Milliman*, 2018 WL 1475937 (Bankr. D. Kan., March 23, 2018) (text of opinion).

Property of the estate: Under Code § 541, a tax refund is property of the estate only if it is attributable to wages earned and withholding payments made during the prepetition years. Here, the court was not convinced that the debtor's tax refund was attributable to prepetition wages and withholding payments. The debtor was entitled to a refund, if at all, because of a tax credit that only arose because the debtor disgorged money postpetition, giving rise to a postpetition credit for the debtor's postpetition tax return, even though the credit was based on income paid years before the debtor's bankruptcy case was filed. *In re Steffen*, 583 B.R. 284 (Bankr. M.D. Fla., March 30, 2018) (text of opinion).

Property of the estate—Exemptions—Under state law—Of homestead proceeds: Reinstating *In re DeBerry*, 2015 WL 6528024 (Bankr. W.D. Tex., Oct. 28, 2015), which the district court had reversed, the Court of Appeals held that, in a Chapter 7 case, proceeds of the debtor's postpetition sale of the debtor's homestead do not lose their exempt status if they are not reinvested in a new homestead within six months, where the homestead itself was properly exempted. The Court of Appeals saw no reason to depart from the reasoning of *In re Hawk*, 871 F.3d 287 (5th Cir. 2017), which held that funds withdrawn from an exempted retirement account after the filing of a Chapter 7 bankruptcy do not lose their exempt status even if the money is not redeposited in a similar account within 60 days pursuant to Texas's proceeds rule. *In re DeBerry*, 884 F.3d 526 (5th Cir., March 7, 2018) (text of opinion).

Required schedules and information—Tax returns—Party's right of access: The creditor's motion to dismiss the Chapter 7 debtor's case under Code § 521(e)(2)(C) failed for two reasons: The creditor asserted that the debtor failed to provide the creditor with a copy of the debtor's 2015 tax return, but the debtor had not filed his 2015 tax return when he commenced his bankruptcy case, and the creditor's request for a copy of the debtor's tax return was not "timely" under Bankruptcy Rule 4002(b)(4), as the request was not submitted at least 14 days before the first date set for the meeting of creditors. *In re Jeffery*, 2018 WL 1605307 (Bankr. E.D. Pa., March 29, 2018) (text of opinion).

Required schedules and information—Tax returns—Party's right of access: Holding that the bankruptcy court erred in applying Code § 521(g)(2) to order turnover of the debtor's 2015 and 2016 state income tax returns to the Chapter 13 trustee, the BAP stated that Congress had been very clear as to when state income tax returns were required to be produced under the Code. The BAP pointed to Code § 1308—another BAPCPA provision—under which a Chapter 13 debtor is required to file all prepetition federal, state and local tax returns due for all of the taxable periods ending during the four-year period ending on the date the bankruptcy petition was filed. *In re Romeo*, 2018 WL 1463850 (9th Cir. B.A.P., March 23, 2018) (text of opinion).


R

Case Summaries Arranged by Circuit

Supreme Court R

There are no cases in this issue.

First Circuit (4) R

Nwachukwu v. Vinfen Corp., 2018 WL 1409795 (D. Mass., March 21, 2018)

(case no. 1:16-cv-11815) (Magistrate Judge M. Page Kelley) Text of opinion

- **Judicial estoppel—Application under circumstances:** The Chapter 13 debtor was not judicially estopped from prosecuting his employment discrimination lawsuit, although he initially failed to disclose the lawsuit in his later-filed bankruptcy case, where the debtor subsequently amended his bankruptcy schedules to disclose the lawsuit, and the bankruptcy court did not "accept" his prior representation that no such lawsuit existed.

Perez-Acevedo v. U.S. Department of Education, 301 F.Supp.3d 243 (D. Mass., March 30, 2018)

(case no. 1:17-cv-10937) (District Judge Nathaniel M. Gorton) Text of opinion

- **Chapter 13—Vacating of discharge:** The Chapter 13 debtor did not establish a right to the "extraordinary relief" of Fed. R. Civ. P. 60(b) in order to vacate his Chapter 13 discharge for the purpose of converting his case to Chapter 11.

In re Macomber, 2018 WL 1582626 (Bankr. D. Me., March 27, 2018)

(case no. 1:12-bk-10720) (Bankruptcy Judge Michael A. Fagone) Text of opinion

- **Dismissal of case with prejudice:** Where the Chapter 13 debtors, prior to moving to voluntarily dismiss their case under Code § 1307(b), failed to remit to the Chapter 13 trustee for distribution to creditors, as required under their confirmed plan, $50,000 that the debtors received from the sale of certain real property in which the debtors held a 1/6 interest, the court, acting under the authority of Code § 349(a), imposed a six-month filing ban and ordered that all debts that would have been discharged if the debtors had received a Chapter 13 discharge would be non-dischargeable in any subsequent case filed by the debtors jointly or separately. While the debtors asserted that a ruling of this nature was unduly harsh and draconian, the court said it was necessary because, due to the debtors' dissipation of the sale proceeds, creditors would not receive the dividend that they anticipated in this case.

In re Murphy, 2018 WL 1508729 (Bankr. D. N.H., March 26, 2018)

(case no. 1:17-bk-10500; adv. proc. no. 1:17-ap-1055) (Chief Bankruptcy Judge Bruce A. Harwood) Text of opinion

- **Issue preclusion—Application under circumstances; Dischargeability of debt—For misrepresentation under Code § 523(a)(2)(A):** Although the Massachusetts state court stated, in the creditor's prepetition lawsuit against the debtor, that the court could not find, with respect to alleged misrepresentations made by the debtor to the creditor, that the debtor knew the representations to be false at the time he made them, or that the debtor made the representations with the intent to mislead, these findings did not establish, under Massachusetts law of issue preclusion, a defense to the creditor's nondischargeability claim under Code § 523(a)(2)(A). A claim under §

523(a)(2)(A) requires proof that the debtor either made a knowingly false representation or made a misrepresentation in reckless disregard of the truth and, while the state court ruled that the evidence did not establish that the debtor knew the representations to be false, the state court did not address the possibility of a reckless misrepresentation. Moreover, while intent to defraud is an element of a claim under § 523(a)(2)(A), and the state court found that the creditor had not established such an intent, this finding was not essential to the state court's judgment and therefore was not entitled to issue-preclusive effect.

- **Issue preclusion—Application under circumstances; Dischargeability of debt—For willful and malicious injury under Code § 523(a)(6):** A state court decision for the creditor against the debtor for unfair trade practices under Massachusetts law did not establish the elements of nondischargeability under Code § 523(a)(6).

Second Circuit (11) R

Clark v. AII Acquisition, LLC, 886 F.3d 261 (2d Cir., March 30, 2018)

(case no. 17-1727) Text of opinion

- **Appellate procedure—Standard of review:** Putting to rest uncertainty in the Second Circuit, the court held that the invocation of judicial estoppel is reviewed only for abuse of discretion. Nearly every other circuit has likewise held that abuse of discretion is the appropriate standard, and even the one holdout--the Sixth Circuit--has recently "questioned the continuing viability" of de novo review.

- **Judicial estoppel—Elements:** The party asserting judicial estoppel must show (1) that the party against whom the estoppel is asserted took an inconsistent position in a prior proceeding and (2) that that position was adopted by the first tribunal in some manner, such as by rendering a favorable judgment. However, while these may be necessary conditions for judicial estoppel to be imposed, they are not sufficient ones. Before applying judicial estoppel, a court must inquire into whether the particular factual circumstances of a case "tip the balance of equities in favor" of doing so; judicial estoppel is not a mechanical rule.

- **Judicial estoppel—Application under circumstances:** Vacating *Clark v. Advanced Composites Group*, 2017 WL 2266981 (S.D. N.Y., April 28, 2017), the Court of Appeals held that the district court abused its discretion in applying judicial estoppel where the Chapter 13 debtors failed to disclose that, shortly before the debtors made their final plan payment, the debtor husband was diagnosed with mesothelioma, a cancer caused by the inhalation of asbestos fibers. Because the debtors' plan already required the debtors to repay their creditors in full, disclosing the husband's diagnosis to the bankruptcy court would have affected the couple's bankruptcy proceeding only if their creditors were able to convince the bankruptcy court to raise the applicable interest rate under the plan. Given that the debtors were mere weeks away from completing repayment at the time of the husband's diagnosis, and were already paying interest at a standard rate, this scenario seemed more than implausible. While there might be unusual circumstances in which the need to safeguard the integrity of the courts might tip the equities in favor of judicial estoppel even when the inconsistency in question made no material difference, this case was surely not of that sort.

In re Anderson, 884 F.3d 382 (2nd Cir., March 7, 2018), pet. for cert. filed, Credit One Bank, N.A. v. Anderson, Case No. 17-1652 (U.S. Sup. Ct., June 5, 2018)

(case no. 16-2496) Text of opinion

- **Adversary procedure—Motion to compel arbitration:** Affirming *In re Anderson*, 553 B.R. 221 (S.D. N.Y., June 14, 2016), the Court of Appeals held that the bankruptcy court did not err in refusing to compel arbitration in the debtor's proposed class action to recover for the defendant credit card issuer's alleged violation of the discharge injunction in continuing to report, as charged off, credit card debt that had been discharged in bankruptcy. Concluding that arbitration of a claim based on an alleged violation of Code § 524(a)(2) would seriously jeopardize a core bankruptcy proceeding, the Court of Appeals reasoned that (1) the discharge injunction was

integral to the bankruptcy court's ability to provide debtors with the fresh start that was the very purpose of the Bankruptcy Code; (2) the claim involved an ongoing bankruptcy matter that required continuing court supervision; and (3) the equitable powers of the bankruptcy court to enforce its own injunctions were central to the structure of the Code. The fact that the debtor's claim came in the form of a putative class action did not undermine this conclusion.

In re Adamo, 582 B.R. 267 (Bankr. E.D. N.Y., March 28, 2018), **appeal filed**, Pergament v. Brooklyn Law School, Case No. 1:18-cv-2204 (E.D. N.Y., filed April 13, 2018)

(case no. 8:14-bk-73640; adv. proc. nos. 8:16-ap-8122, 8:16-ap-8123, 8:16-ap-8124) (Chief Bankruptcy Judge Carla E. Craig)

Text of opinion

- **Avoidable transfers—Defense under Code § 550(b):** Prepetition and postpetition payments made by the debtor to two universities and a law school for tuition for the debtor's children while his case was proceeding under Chapter 11 were not avoidable by the Chapter 7 trustee following the conversion of the debtor's case, as the three schools established the defense available under Code § 550(b)(1) to a transferee from the initial transferee that took the transfer for value, in good faith, and without knowledge of the voidability of the transfer. The trustee sought to avoid the prepetition transfers under Code § 544(b) (applying New York law) and § 548(a)(1)(B) as constructively fraudulent transfers, and the postpetition transfers under § 549 as unauthorized postpetition transfers. The court held that, as to all the payments, the debtor's children, not the schools, were the initial transferees because the payments were made to the children's accounts on the schools' electronic platforms. The children then transferred the payments to the schools when the children made their tuition payments from their accounts. At each school, the student's account belonged to the student, and the student's parents had no rights in or to the account. After the debtor transferred the funds to those accounts, the debtor was not able to access the account absent the account holder's authorization, nor was the school authorized to utilize the funds. Rather, the school did not obtain dominion and control of those funds until the student registered for classes for that semester, at which point the funds would be applied towards the tuition amount due. In the event the student decided to withdraw from the program, the student, and not the debtor or the school, was entitled to any funds remaining in the account. Put simply, the student maintained dominion and control over the funds in the account upon the debtor's transfer because it was the student's decision whether to enroll in classes and have the funds applied towards tuition or to withdraw from the program and have the funds refunded directly to him or her. While the accounts were maintained in an electronic platform provided by each school, the school was a "mere conduit" of the debtor's transfers of the funds to the children. The trustee did not dispute that the schools provided value to the children, in the form of enrollment in classes and education, in good faith in exchange for the tuition payments. To the extent the trustee contended that, in order to invoke the good faith defense under § 550(b), value must have been provided to the debtor, this was incorrect. All of the courts that had considered this question had held or implied that value to the transferor (i.e., the child) was sufficient.

In re Consiglio, 2018 WL 1162869 (Bankr. D. Conn., March 2, 2018)

(case no. 3:15-bk-31915; adv. proc. no. 3:16-ap-3013) (Bankruptcy Judge Ann M. Nevins)

Text of opinion

- **Means test—Current monthly income—Contribution by nondebtor:** The party moving to dismiss a Chapter 7 case on the basis of abuse has the burden to demonstrate the extent to which funds received the debtor from other persons should be considered part of the debtor's current monthly income. *In re Justice*, 404 B.R. 506 (Bankr. W.D. Ark. 2009).

- **Means test—Current monthly income—Contribution by nondebtor:** The $300 annual contribution to the debtor's household by her daughter, plus the $6,480 annual contribution to the debtor's household by her mother, increased the debtor's annualized current monthly income to $77,778.

- **Chapter 7—Determination of abuse—Presumption of abuse:** Because the Chapter 7 debtor's annualized current monthly income of $77,778 was substantially less than the median income for a household of three, $91,131, for the state of Connecticut as of the petition date, the debtor qualified for the safe harbor of Code § 707(b)(7) and, as such, there was no presumption of abuse.

- **Property of the estate—Exemptions—Objection to exemption:** To deny the debtor an exemption that is based upon a dollar limitation, the objecting party cannot carry its burden of proof by merely impeaching the debtor's valuation. Competent evidence that affirmatively demonstrates a higher valuation by a preponderance of the evidence is required. *In re Woerner*, 483 B.R. 106 (Bankr. W.D. Tex. 2012) (quoting *In re Shurley*, 163 B.R. 286 (Bankr. W.D. Tex. 1993).

In re Fioriglio, 2018 WL 1629779 (Bankr. E.D. N.Y., March 27, 2018)

(case no. 1:16-bk-40602) (Bankruptcy Judge Nancy Hershey Lord) Text of opinion

- **Chapter 13—Eligibility—Debt limits:** In determining whether a Chapter 13 debtor's debts are within the Chapter 13 debt limits established in Code § 109(e), the court is not limited to a review of the debtor's schedules. See, e.g., *In re Shukla*, 550 B.R. 204 (Bankr. E.D. N.Y. 2016); *Stebbins v. Artificial Horizon, Ltd.*, 2016 WL 1069077 (E.D. N.Y., March 17, 2016). The schedules, while important, are not binding, and must be considered along with all readily-available evidence, including claims filed, any liens that are obviously avoidable, and the like. *In re Garcia*, 520 B.R. 848 (Bankr. D. N.M. 2014); *In re Barcal*, 213 B.R. 1008 (8th Cir. B.A.P. 1997).

- **Chapter 13—Eligibility—Debt limits:** A debt secured by property in which the Chapter 13 debtor has an ownership interest is considered a secured debt for the purpose of the Chapter 13 debt limits in Code § 109(e), even where the debtor is not personally liable on the debt.

- **Chapter 13—Eligibility—Debt limits:** Because Code § 109(e), establishing debt limits for Chapter 13 eligibility, is not jurisdictional, a motion to dismiss a Chapter 13 case under § 109(e) is subject to a defense of laches.

- **Chapter 13—Eligibility—Debt limits:** A creditor's motion to dismiss the Chapter 13 debtor's case due to the debtor's exceeding the Chapter 13 debt limits was not barred by laches, although the creditor filed the motion nine months postpetition, where the mortgage that put the debtor over the secured debt limit was not so much as mentioned until it appeared in a passing reference in the debtor's amended Schedule A, rendering the debtor responsible for five months of the delay. Moreover, from that point forward, some additional amount of time would have been required for the creditor to track down the mortgage and determine that it put the debtor over the debt limit.

In re Gianopolous, 584 B.R. 598 (Bankr. S.D. N.Y., March 15, 2018)

(case no. 1:10-bk-14817) (Bankruptcy Judge James L. Garrity, Jr.) Text of opinion

- **Dischargeability of debt—Jurisdiction of nonbankruptcy court to determine:** State courts have concurrent jurisdiction to determine whether a debt is nondischargeable under Code § 523(a)(3)(B).

- **Reopening of case:** The bankruptcy court denied the Chapter 7 debtor's motion to reopen his case for the purpose of asserting a creditor's violation of the discharge injunction where the creditor asserted that the debt was excepted from the debtor's discharge under Code § 523(a)(3)(B) and the matter had already been raised in the creditor's state court action against the debtor, as state courts have concurrent jurisdiction to determine whether a debt is nondischargeable under Code § 523(a)(3)(B).

In re Miller, 2018 WL 1226012 (Bankr. N.D. N.Y., March 8, 2018)

(case no. 6:17-bk-60023) (Bankruptcy Judge Diane Davis) Text of opinion

- **Chapter 7—Dismissal for cause:** A Chapter 7 debtor's failure to cooperate with the trustee constitutes cause to dismiss the case under Code § 707(a) due to the trustee's inability to effectively administer the estate, and here, where the debtor had not fulfilled his statutory duties to cooperate with the trustee, the court would dismiss the case.

In re Muscato, 582 B.R. 599 (Bankr. W.D. N.Y., March 22, 2018)

(case no. 1:98-bk-14386) (Chief Bankruptcy Judge Carl L. Bucki) Text of opinion

- **Property of the estate—Exemptions—Amendment of exemptions:** After *Law v. Siegel*, 571 U.S. 415, 134 S.Ct. 1188, 188 L.Ed.2d 146 (2014), neither a debtor's alleged bad faith, nor asserted prejudice to creditors, is a basis for disallowing a debtor's amended claim of exemptions.

- **Property of the estate—Exemptions—Amendment of exemptions:** Relying in part on *Law v. Siegel*, 571 U.S. 415, 134 S.Ct. 1188, 188 L.Ed.2d 146 (2014), the court said that it was compelled to follow those cases that had held that the debtor, under Bankruptcy Rule 1009, may amend schedules, including claimed exemptions, without limitation of whether the case is open or reopened after closing. See *In re Martin*, 157 B.R. 268 (Bankr. W.D. Va. 1993); *In re Boyd*, 243 B.R. 756 (N.D. Cal. 2000); *In re Goswami*, 304 B.R. 386 (9th Cir. B.A.P. 2003); *In re Jordan*, 276 B.R. 434 (Bankr. N.D. Miss. 2000). The court said it acknowledged but rejected those decisions that

had held that, in a reopened case, a debtor may amend the exemption schedule only upon a showing of excusable neglect sufficient to satisfy the requirements of Bankruptcy Rule 9006(b). See, e.g., *In re Benjamin*, 580 B.R. 115 (Bankr. D. N.J. 2018) and *In re Dollman*, 583 B.R. 268 (Bankr. D. N.M. 2017).

In re Peterson, 2018 WL 1172447 (Bankr. D. Conn., March 2, 2018)

(case no. 2:10-bk-23429; adv. proc. nos. 2:15-ap-2008, 2:17-ap-2081) (Bankruptcy Judge Ann M. Nevins) Text of opinion

- **Automatic stay—Termination of stay:** The Chapter 13 debtor's mortgage creditor filed a motion for relief from stay on August 15, 2017, and the 60th day from that date fell on October 14, 2017. While the court held a hearing on October 4, 2017, the court did not issue a decision by October 14, so that, under Code § 362(e)(2)(A), the automatic stay terminated by operation of law on October 15, 2017, as to the property with respect to which the creditor sought relief from stay. The record of the October 4 hearing did not support the debtor's assertion that the creditor waived the protection of § 362(e)(2)(A), as the creditor's counsel specifically asked the court to issue a decision that day.

In re Taylor, 2018 WL 1413538 (Bankr. D. Conn., March 20, 2018), **motion for reconsideration filed** (March 23, 2018)

(case no. 3:15-bk-31208) (Bankruptcy Judge Ann M. Nevins) Text of opinion

- **Chapter 7—Abandonment of property of estate:** A trustee's abandonment constitutes a complete divesture of the estate's interests in the property. Once an asset is abandoned, it is removed from the bankruptcy estate, and this removal is irrevocable except in very limited circumstances. *Chartschlaa v. Nationwide Mutual Ins. Co.*, 538 F.3d 116 (2d Cir. 2008) (citing *Catalano v. Comm'r*, 279 F.3d 682 (9th Cir. 2002)). Abandoned property reverts to the debtor and the debtor's rights to the property are treated as if no bankruptcy petition was filed.

- **Chapter 7—Prosecution of cause of action:** Where the debtor continued the prosecution of a prepetition claim after her Chapter 11 case was converted to Chapter 7, the Chapter 7 trustee was the proper party to prosecute the claim following conversion. However, where the trustee subsequently abandoned the claim, the claim reverted to the debtor and was treated as if no bankruptcy petition had been filed.

- **Violation of stay—Standing to recover:** While Code § 362 is intended to protect debtors, creditors, and assets of the estate, it is not intended to protect the defendants in litigation commenced by the debtor. Accordingly, the defendants lacked prudential standing to pursue remedies under Code § 362(k) for the debtor's alleged violation of the stay.

In re Todd, 585 B.R. 297 (Bankr. N.D. N.Y., March 23, 2018), **appeal filed**, Todd v. Endurance American Insurance Company, Case No. 1:18-cv-420 (N.D. N.Y., filed April 5, 2018)

(case no. 1:15-bk-11083) (Bankruptcy Judge Robert E. Littlefield, Jr.) Text of opinion

- **Property of the estate—Exemptions—Under state law:** An IRA funded by funds inherited by the debtor from her mother's IRA was not exempt under N.Y. C.P.L.R. § 5205(c). The property was not held in trust because the debtor maintained exclusive

control over the inherited IRA; therefore, the IRA was not exempt under § 5205(c)(1), which exempts "all property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor." Nor was the inherited IRA exempt under § 5205(c)(2), which exempts "all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either any trust or plan, which is qualified as an individual retirement account under section four hundred eight or section four hundred eight A of the United States Internal Revenue Code of 1986." Because neither § 5205(c)(2) nor IRC § 408 defined "qualified," the court turned to legislative history and concluded that exempting funds that had not been saved by individuals for their retirement would be fundamentally inconsistent with the statute's purpose.

- Property of the estate—Exclusions—Spendthrift trust: The debtor's inherited IRA was not excluded from property of the estate under Code § 541(c)(2) because the inherited IRA was not a trust, as the debtor maintained exclusive control over the IRA.

Third Circuit (9) R

In re Hackler, --- B.R. ----, 2018 WL 1440326 (D. N.J., March 22, 2018), **appeal filed**, Case No. 18-1650 (3rd Cir., filed March 30, 2018)

(case no. 3:17-cv-6589) (District Judge Peter G. Sheridan) Text of opinion

- **Avoidable transfers—Preferential transfer under Code § 547:** Affirming *In re Hackler*, 571 B.R. 662 (Bankr. D. N.J., August 28, 2017), the district court agreed that the prepetition transfer of the Chapter 13 debtors' real property, with an estimated value of $335,000, in satisfaction of a tax debt of roughly $45,000 clearly enabled the tax sale purchaser's transferee to receive more than it would otherwise have received in a hypothetical Chapter 7 liquidation, and thus was avoidable as a preference under Code § 547(b), even though the tax sale was regularly conducted in accordance with state law. The court said that *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994), which held that the consideration received from a non-collusive real estate mortgage foreclosure sale conducted in conformance with applicable state law was conclusively presumed to constitute "reasonably equivalent value" for the purpose of Code § 548(a)(2), was distinguishable for several reasons. First, *BFP* discussed fraudulent transfers under § 548 and the underlying federalism issues that arose when a federal court set aside a long- observed state remedy of foreclosure. Here, a different section of the Bankruptcy Code, § 547(b), was at issue, and the distinction between the two sections was significant. Moreover, in New Jersey, there were significant procedural differences between a mortgage foreclosure and a tax sale certificate foreclosure.

IRS v. Davis, 2018 WL 1440323 (D. N.J., March 22, 2018)

(case no. 3:15-cv-7601) (District Judge Michael A. Shipp) Text of opinion

- **Dischargeability of debt—Tax debt under Code § 523(a)(1)—Filing of "return":** Reversing *In re Davis*, 2015 WL 5734332 (Bankr. D. N.J., Sept. 29, 2015), the district court held that, under *In re Giacchi*, 856 F.3d 244 (3d Cir. 2017), which adopted the majority version of the *Beard* test, tax returns filed by the debtor after the IRS has assessed the debtor's tax liability for the tax years involved did not constitute "returns" for the purpose of Code § 523(a)1), so that the debtor's tax liabilities for those years were nondischargeable under § 523(a)(1)(B)(i), which excepts from discharge any debt for a tax with respect to which "a return ... if required, was not filed or given."

In re Bergman, 2018 WL 1393728 (Bankr. E.D. Pa., March 19, 2018)

(case no. 2:11-bk-17320) (Bankruptcy Judge Eric L. Frank) Text of opinion

- **Dischargeability of debt—Homeowners' association dues under Code § 523(a)(16):** In a Chapter 7 case, postpetition condominium assessments are nondischargeable under Code § 523(a)(16) even though the debtor stated the intention to surrender the condominium unit.

In re Culler, 584 B.R. 516 (Bankr. E.D. Pa., March 19, 2018)

(case no. 2:17-bk-14554) (Bankruptcy Judge Eric L. Frank) Text of opinion

- **Proof of claim—Secured claim—Amount of claim:** Where the Chapter 13 debtor's mortgage creditor had obtained a judgment of $49,516.62 in a prepetition mortgage foreclosure proceeding, the court allowed the creditor's claim in the amount of $51,719.13, rather than the $59,280 sought. Under the doctrine of merger under Pennsylvania law, as articulated in *In re Stendardo*, 991 F.2d 1089 (3d Cir. 1993), after the entry of a foreclosure, the terms of a mortgage are merged into the foreclosure judgment and the mortgage no longer provides a basis for determining the respective rights and obligations of the parties. However, a provision of a mortgage may survive the entry of judgment if the mortgage clearly evidences the parties' intent to preserve the effectiveness of that provision even after the entry of judgment. *In re Cohen–Harvin*, 571 B.R. 672 (Bankr. E.D. Pa. 2017); *In re Smith*, 463 B.R. 756 (Bankr. E.D. Pa. 2012). Here, the court concluded, (1) the mortgage authorized the creditor to charge post-judgment interest at the 11.25% contract rate, and this was sufficient to establish the parties' intent that the contract interest rate survive the merger of the mortgage into the judgment; (2) claimed legal costs of $152.79 would be disallowed in the absence of evidence in the record that the costs were actually incurred; (3) $600 in legal fees, rather than the $1,455 sought, would be allowed because some attorney time was necessary after the entry of the foreclosure judgment to schedule the sheriff's sale and to obtain two postponements of the sale; (4) a $433.50 insurance charge which presumably was a request for reimbursement of a disbursement made for hazard insurance was not allowable; and (5) charges for satisfaction of a lien against the property ($1,629.91), property preservation ($141.00) and corporate advances ($10.05) were disallowed under the merger doctrine.

In re Demeza, 582 B.R. 868 (Bankr. M.D. Pa., March 1, 2018)

(case no. 1:16-bk-2789) (Chief Bankruptcy Judge Robert N. Opel II) Text of opinion

- **Avoidable transfers—Avoidance by creditor:** Derivative standing may be conferred in a Chapter 13 case to prosecute a transfer avoidance action under the Bankruptcy Code only if the action would benefit the bankruptcy estate. See *In re Weyandt*, 544 Fed. Appx. 107 (3d Cir. 2013); *In re Stewart*, 473 B.R. 612 (Bankr. W.D. Pa. 2012), aff'd 2013 WL 4041963 (W.D. Pa., August 8, 2013) (debtors failed to establish conditions for derivative standing); *In re Rosenblum*, 545 B.R. 846 (Bankr. E.D. Pa. 2016) (creditors established conditions for derivative standing); *In re Skinner*, 519 B.R. 613 (Bankr. E.D. Pa. 2014), aff'd 532 B.R. 599 (E.D. Pa. 2015), aff'd 636 Fed. Appx. 868 (3d Cir. 2016) (a creditor was not entitled to derivative standing). Here, a creditor in a Chapter 13 case was not entitled to derivative standing to prosecute a fraudulent transfer action where the action would not benefit the bankruptcy estate.

In re Jeffery, 2018 WL 1605307 (Bankr. E.D. Pa., March 29, 2018)

(case no. 4:16-bk-15037; adv. proc. no. 2:17-ap-28) (Bankruptcy Judge Jean K. FitzSimon)

Text of opinion

- **Required schedules and information—Tax returns:** The creditor's motion to dismiss the Chapter 7 debtor's case under Code § 521(e)(2)(C) failed for two reasons: The

creditor asserted that the debtor failed to provide the creditor with a copy of the debtor's 2015 tax return, but the debtor had not filed his 2015 tax return when he commenced his bankruptcy case, and the creditor's request for a copy of the debtor's tax return was not "timely" under Bankruptcy Rule 4002(b)(4), as the request was not submitted at least 14 days before the first date set for the meeting of creditors.

- **Adversary procedure:** While the creditor's request that the Chapter 7 debtor's case be dismissed under Code § 521(e)(2)(C) for the debtor's failure to provide the creditor with a copy of the debtor's most recently filed tax return should have been filed as a motion, the court would permit the matter to be raised in the creditor's adversary proceeding, as the dispute was squarely before the court and no party in interest would be prejudiced by the court's ruling on it. To do otherwise would be an inefficient use of judicial resources and a senseless exercise that would result in yet more legal fees being incurred.

In re Nypaver, 581 B.R. 431 (Bankr. W.D. Pa., March 7, 2018)

(case no. 2:16-bk-23381) (Bankruptcy Judge Thomas P. Agresti) Text of opinion

- **Dischargeability of debt—Student loan debt under Code § 523(a)(8)—Status of obligation as encompassed by provision:** The debtor's obligation under a promissory note to pay her father for the principal sum of all Parent PLUS loans taken out by him on her behalf to attend college did not come within Code § 523(a)(8). The obligation did not fit within § 523(a)(8)(A)(i) because it was not made, insured or guaranteed by a governmental unit or nonprofit institution. Nor did the obligation fit within § 523(a)(8)(B), as the loan was not a "qualified educational loan" as defined by IRC § 221(d)(1). The IRC made clear, in 26 U.S.C. § 267(b) and § 707(b)(1), that qualified educational loans do not include debts owed to "related persons."

- **Dischargeability of debt—Student loan debt under Code § 523(a)(8)—Status of obligation as encompassed by provision:** This left § 523(a)(8)(A)(ii), applying to an "obligation to repay funds received as an educational benefit," as the only possible ground for excepting the loan from discharge. There was a split of authority on the question of whether the term "educational benefit" in § 523(a)(8)(A)(ii) included a loan such as the one under consideration in the present case. Generally speaking, this split broke down into those cases finding that, so long as the purpose of a loan was to provide for education, it could constitute an "educational benefit" under § 523(a)(8(A)(ii) (which the court called the "Broad View"), and those cases finding that an "educational benefit" is something distinct from a loan, and therefore that a loan in and of itself cannot be an "educational benefit" under § 523(a)(8)(A)(ii) (which the court called the "Narrow View").

- **Dischargeability of debt—Student loan debt under Code § 523(a)(8)—Status of obligation as encompassed by provision:** Agreeing with the narrow view, the court reasoned that interpreting § 523(a)(8)(A)(ii) to include loans used for educational purposes renders § 523(a)(8)(A)(i) and § 523(a)(8)(B) largely meaningless. See generally *In re Essangui*, 573 B.R. 614 (Bankr. D. Md. 2017); *In re Dufrane*, 566 B.R. 28 (Bankr. C.D. Cal. 2017); *In re Campbell*, 547 B.R. 49 (Bankr. E.D. N.Y. 2016). Here, if the court were to determine that an "educational benefit" included a loan between a father and daughter, the specific exclusion of loans between family members from the definition of a "qualified educational loan" in § 523(a)(8)(B) would be rendered ineffectual and superfluous. Moreover, the fact that Congress amended § 523(a)(8) in 2005 to contain three disjunctive subsections more likely

indicated that Congress intended § 523(a)(8)(A)(ii) to cover debts totally different from the other two subsections.

In re Viruet, 2018 WL 1568921 (Bankr. D. N.J., March 29, 2018)

(case no. 2:15-bk-22851; adv. proc. no. 2:15-ap-2429) (Bankruptcy Judge Stacey L. Meisel)

Text of opinion

- **Dischargeability of debt—Status as domestic support obligation:** The debtor's debt for repayment of excess child support paid to her by her former husband was not a DSO because the debt was not in the nature of support; the debt was merely reimbursement owed by the debtor for an overpayment made by the former husband.

- **Dischargeability of debt—Non-DSO debt under Code § 523(a)(15):** The debtor's debt for repayment of excess child support paid to her by her former husband was nondischargeable under Code § 523(a)(15) because the repayment obligation arose from a court order issued in furtherance of the parties' divorce decree.

In re Zaid, 582 B.R. 370 (Bankr. E.D. Pa., March 6, 2018)

(case no. 2:16-bk-17095; adv. proc. no. 2:17-ap-368) (Bankruptcy Judge Eric L. Frank)

Text of opinion

- **Jurisdiction—Effect of *Rooker-Feldman* doctrine:** The *Rooker-Feldman* doctrine barred an adversary proceeding by the Chapter 7 debtor, an attorney, seeking to modify or set aside an arbitration award in favor of his former clients on their legal malpractice claim, as well as the state court judgment confirming the award, on the ground that the award and judgment were obtained by false representations.

Fourth Circuit (10) R

Burkhart v. Grigsby, 886 F.3d 434 (4th Cir., March 29, 2018)

(case no. 16-1971) Text of opinion

- **Chapter 13—Stripping unsecured lien:** Reversing *Burkhart v. Community Bank of Tri-County*, 2016 WL 4013917 (D. Md., July 27, 2016), which had affirmed *In re Burkhart*, 505 B.R. 444 (Bankr. D. Md., Jan. 23, 2014), the Court of Appeals held that, because the ability of a Chapter 13 debtor to strip off an unsecured lien stems from Code § 1322(b) rather than § 506(d), a Chapter 13 debtor may strip off a wholly-unsecured junior lien regardless of whether a proof of claim has been filed for the debt secured by the junior lien. Section 1322(b) permits Chapter 13 plans to modify the rights of holders of unsecured claims. Whether a creditor has an unsecured claim turns on the value of the underlying collateral, not the mere existence of a security interest. And in making this determination, courts are not limited to valuing claims that have been filed and allowed. Where, as here, a senior lienholder is only partially secured, any junior lienholder is by definition the holder of an unsecured claim for purposes of § 1322(b), which may be stripped without the filing of a proof of claim.

In re Wijewickrama, 2018 WL 2212983 (W.D. N.C., March 15, 2018)

(case no. 1:16-cv-347) (District Judge Martin Reidinger) Text of opinion

- **Appellate procedure—Finality of order:** A bankruptcy court order extending the time for a creditor to file a nondischargeability claim was interlocutory. See *Matter of Aucoin*, 35 F.3d 167 (5th Cir. 1994) (explaining that an order granting a motion to extend time to object to discharge is an interlocutory order because "the bankruptcy court will still have to determine whether to grant or deny those objections."). However, construing the debtor's timely-filed notice of appeal as a motion for leave to appeal, the district court granted the motion and allowed the appeal.

- **Appellate procedure—Interlocutory appeal:** In determining whether to grant leave to appeal an interlocutory order of the bankruptcy court, a district court employs an analysis similar to that employed by the Court of Appeals in certifying interlocutory review under 28 U.S.C. § 1292(b). *Atlantic Textile Group, Inc. v. Neal*, 191 B.R. 652 (E.D. Va. 1996). Under that analysis, leave to appeal an interlocutory order should be granted only when (1) it involves a controlling question of law, (2) as to which there is substantial ground for a difference of opinion, and (3) and an immediate appeal would materially advance the termination of the litigation.

- **Dischargeability of debt—Timeliness of complaint:** The Bankruptcy Rules do not expressly limit an extension of time for filing a nondischargeability complaint to only the specific creditor who filed the motion. See *Burger King Corp. v. B-K of Kansas, Inc.*, 73 B.R. 671 (D. Kan. 1987) (holding that the bankruptcy court's order granting extensions of time to file objections to discharge of debt to two moving creditors did not enlarge the time for a nonmoving creditor). The lack of an express limitation, however, does not imply a broad grant of discretion to allow an extension to all

creditors based on the motion of just one. In cases in which courts have held that an extension of the bar date can extend to nonmoving creditors, the court have found that three elements were met: (1) the surrounding circumstances provided notice to the court and the debtor that a general extension was requested; (2) the surrounding circumstances demonstrated that cause existed for a general extension; and (3) the subsequent order indicated that a general extension was granted. See *In re Kneis*, 2009 WL 1750101 (Bankr. D. N.J., June 15, 2009); *In re Watkins*, 365 B.R. 574 (Bankr. W.D. Pa. 2007). See also *In re Brady*, 101 F.3d 1165 (6th Cir. 1996) (the Chapter 7 had standing to request an extension of time on behalf of any creditor to file a nondischargeability complaint); *In re Demos*, 57 F.3d 1037 (11th Cir. 1995) (a creditor was entitled to rely on the bankruptcy court's order granting the Chapter 7 trustee's motion to the extend deadline for filing nondischargeability complaints, though the creditor had not joined in the trustee's motion). But see *Matter of Farmer*, 786 F.2d 618 (4th Cir. 1986) (the Chapter 7 trustee was not a "party in interest" permitted to move for an extension of time within which creditors could object to the dischargeability of specific debts).

- **Dischargeability of debt—Timeliness of complaint:** Applying these three factors, and finding two of them absent, the district court held that there was no basis in the record on which the bankruptcy court could extend the deadline for filing a nondischargeability complaint for any party other than the one creditor who had moved for an extension of time to file a complaint.

Schweiger v. MidFirst Bank, 2018 WL 1471680 (D. Md., March 26, 2018)

(case no. 1:17-cv-3255) (Chief District Judge James K. Bredar) Text of opinion

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Cure of default—Termination of right:** Because, under Maryland law, the Chapter 13 debtor possessed no right of redemption following the prepetition foreclosure sale of his residence, under Code § 1322(c)(1) the debtor's right to cure the default on his mortgage debt expired prepetition; § 1322(c)(1) did not extend the debtor's right to cure the default.

In re Blackwell, 2018 WL 1189257 (Bankr. S.D. W. Va., March 5, 2018)

(case no. 2:17-bk-20203) (Chief Bankruptcy Judge Frank W. Volk) Text of opinion

- **Valuation of property—Manufactured or mobile home:** The court valued the Chapter 13 debtors' 2009 Fleetwood manufactured home at its $5,000 salvage value provided by the debtors' appraiser given that the home, with its many deficiencies, would not satisfy even the minimal warranty of habitability as required by W. Va. Code § 37–6–30.

In re Cho, 581 B.R. 452 (Bankr. D. Md., March 13, 2018)

(case nos. 1:17-bk-22057, 1:17-bk-22058) (Bankruptcy Judge Michelle M. Harner)

Text of opinion

- **Executory contract—Status of contract as executory:** A prepetition settlement agreement reached in a state court suit by the former owners of the Chapter 11

debtors' business asserting claims for fraud and fraudulent conveyance, among others, against the debtors was an executory contract subject to rejection in the debtors' Chapter 11 cases where both parties unquestionably had unperformed obligations under the agreement.

In re Chorba, 582 B.R. 380 (Bankr. D. Md., March 8, 2018)

(case no. 1:17-bk-16032; adv. proc. no. 1:17-ap-380) (Bankruptcy Judge Michelle M. Harner)

Text of opinion

- **Proof of claim—Objection; Chapter 13—Effect of plan confirmation:** The confirmation of a Chapter 13 plan that addresses distributions to general unsecured creditors in a collective manner and does not assign individual values to, or allow, any particular unsecured claims does not preclude the debtor's subsequent objection to an unsecured claim, even if it was filed prior to plan confirmation. *LVNV Funding, LLC v. Harling*, 852 F.3d 367 (4th Cir. 2017); *In re Haskins*, 563 B.R. 177 (Bankr. W.D. Va. 2017).

In re Erwin, 2018 WL 1614160 (Bankr. E.D. N.C., March 30, 2018), **appeal dismissed**, ClearOne Advantage, LLC v. Lischwe, Case No. 5:18-cv-158 (E.D. N.C., August 7, 2018)

(case no. 5:15-bk-6713; adv. proc. no. 5:17-ap-55) (Bankruptcy Judge David M. Warren)

Text of opinion

- **Adversary procedure—Motion to compel arbitration:** Denying, in a Chapter 7 debtor's adversary proceeding against a debt adjustment firm and a related company, the firm's motion to compel arbitration of the debtor's claims against the firm, which arose from the firm's prepetition debt adjustment services for the debtor, the bankruptcy court concluded that the arbitration provisions in the debtor's agreements with the firm were invalid because they denied the debtor the ability to assert her rights under North Carolina law, and, even if the agreements were valid, the court would decline to order arbitration because sending the debtor's claims under state law and Code § 548 to arbitration would have a significant adverse effect upon the adjudication of the claims and upon the fundamental purposes of the Bankruptcy Code.

In re Helms, 2018 WL 1465796 (Bankr. E.D. N.C., March 23, 2018)

(case no. 5:17-bk-3266) (Bankruptcy Judge David M. Warren) Text of opinion

- **Valuation of property—Residence:** Valuing the Chapter 13 debtors' home at 105 Chalon Drive in Cary, Wake County, North Carolina, at $620,000 on the basis of the debtor husband's testimony, the court said that it found the husband to be a credible witness with a strong knowledge of the real estate market in his neighborhood specifically. He competently compared the residence to four properties situated within a mile of the residence; three of the comparison properties had sold in 2017, while the other was under contract and projected to sell in March 2018. In contrast, the creditor's appraiser performed calculations in an effort to estimate the value of the residence on the basis of averages across the county as a whole, and a reliable value could not be ascertained from this methodology. The appraiser's testimony was unlike any the court had ever received, and while potentially novel, the testimony was neither credible nor helpful.

In re Libbus, 2018 WL 1470513 (Bankr. E.D. N.C., March 23, 2018)

(case no. 5:15-bk-5128) (Bankruptcy Judge David M. Warren) Text of opinion

- **Property of the estate—Exemptions—Amendment of exemptions—In reopened case:** A debtor may amend his claimed exemptions in a reopened case only upon a showing of excusable neglect, and here the Chapter 7 debtors failed to make that showing.

In re White, 2018 WL 1352680 (Bankr. N.D. W. Va., March 14, 2018)

(case no. 1:16-bk-1240; adv. proc. no. 1:17-ap-16) (Bankruptcy Judge Patrick M. Flatley)

Text of opinion

- **Avoidable transfers—Avoidance under Code § 544(a)(3):** Where the Chapter 13 debtors' mortgage creditor did not record its deed of trust until after the debtors filed their bankruptcy petition, the Chapter 13 trustee could set aside the creditor's security interest under Code § 544(a)(3), which grants the trustee the power to "avoid a transfer of property that is voidable by a hypothetical bona fide purchaser of Debtors' real estate for value and without notice of the transfer."

Fifth Circuit (11) R

In re DeBerry, 884 F.3d 526 (5th Cir., March 7, 2018)

(case no. 17-50315) Text of opinion

- **Property of the estate—Exemptions—Under state law—Of homestead proceeds:** Reinstating *In re DeBerry*, 2015 WL 6528024 (Bankr. W.D. Tex., Oct. 28, 2015), which the district court had reversed, the Court of Appeals held that, in a Chapter 7 case, proceeds of the debtor's postpetition sale of the debtor's homestead do not lose their exempt status if they are not reinvested in a new homestead within six months, where the homestead itself was properly exempted. The Court of Appeals saw no reason to depart from the reasoning of *In re Hawk*, 871 F.3d 287 (5th Cir. 2017), which held that funds withdrawn from an exempted retirement account after the filing of a Chapter 7 bankruptcy do not lose their exempt status even if the money is not redeposited in a similar account within 60 days pursuant to Texas's proceeds rule. The court distinguished *In re Frost*, 744 F.3d 384 (5th Cir. 2014), which required reinvestment of homestead sale proceeds in a Chapter 13 case, on the ground that newly-acquired property interests become part of a Chapter 13 bankruptcy estate under Code § 1306(a)(1).

Hoa Dao v. Sommers, 2018 WL 1139157 (S.D. Tex., March 1, 2018), **appeal filed**, Case No. 18-20444 (5th Cir., filed July 12, 2018)

(case no. 4:16-cv-1381) (District Judge Melinda Harmon) Text of opinion

- **Appellate procedure—Mootness:** The doctrine of equitable mootness was developed in response to the particular problems presented by the consummation of plans of reorganization under Chapter 11. However, several circuits have applied the doctrine of equitable mootness in Chapter 7 proceedings. See *ANR Co. v. Rushton*, 2012 WL 1556236 (D. Utah, May 2, 2012). The present court was persuaded that equitable mootness should apply in Chapter 7 cases.

- **Appellate procedure—Mootness:** The Fifth Circuit has articulated three factors courts should apply when considering equitable mootness: (1) whether a stay has been obtained, (2) whether the plan has been substantially consummated, and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan. *In re Block Shim Dev. Co.*, 939 F.2d 289 (5th Cir. 1991). Here, an appeal by the Chapter 7 debtor's wife and two adult daughters from the bankruptcy court's orders approving two compromises involving property and litigation in which the wife and daughters claimed an interest was equitably moot, where neither the wife nor the daughters ever sought a stay of the bankruptcy court's orders approving the compromises, the compromises had all been substantially consummated, and the court could not fashion an equitable remedy without unraveling the compromises and affecting the interests of third parties.

Hobby v. Parker, 2018 WL 1528225 (W.D. La., March 28, 2018)

(case no. 5:17-cv-920) (Chief District Judge S. Maurice Hicks, Jr.) Text of opinion

- **Appellate procedure—Interlocutory appeal:** 28 U.S.C. § 158(a) authorizes a district court to grant leave to appeal an interlocutory order from a bankruptcy court, but does not indicate the standard a district court uses in determining whether to grant leave to appeal. Moreover, the Fifth Circuit has not provided a hard and fast rule for determining when an interlocutory appeal should be allowed. However, guided by the comments in *Ichinose v. Homer Nat'l. Bank*, 946 F.2d 1169 (5th Cir. 1991), district courts in the Fifth Circuit have relied on the standard under 28 U.S.C. § 1292(b) for interlocutory appeals from district court orders in considering whether to grant leave to appeal an interlocutory order of a bankruptcy court.

Ortiz-Peredo v. Viegelahn, 587 B.R. 321 (W.D. Tex., March 29, 2018)

(case no. 5:17-cv-796) (Chief District Judge Orlando L. Garcia) Text of opinion

- **Appellate procedure—Notice of appeal—Orders encompassed:** Where the bankruptcy court entered an order sustaining the Chapter 13 trustee's objections to confirmation of the debtors' proposed Chapter 13 plan on July 18, 2017, an order denying confirmation of the plan on August 1, 2017, and an order dismissing the case on August 4, 2017, and the debtors filed a notice of appeal as to all three orders on August 18, 2017, the notice of appeal was timely as to all three orders. The court's first two orders were interlocutory, and when a party elects not to seek leave to appeal an interlocutory order, that order merges in the final judgment and may be challenged in an appeal from that judgment.

- **Chapter 13—Calculation of projected disposable income:** Agreeing with the majority approach, the court held that the Chapter 13 debtors' workers' compensation award was income included in the debtors' projected disposable income, even though the debtors exempted the award.

- **Means test—Current monthly income; Chapter 13—Calculation of projected disposable income:** Rejecting the Chapter 13 debtors' contention that, because the statutory definition of "median family income" incorporates calculations reported by the Bureau of the Census, Congress must have intended "income" to be defined for purposes of Code § 1325 subject to the same exclusions used by the Census Bureau when it calculates median family income, and affirming *In re Ortiz-Peredo*, 573 B.R. 703 (Bankr. W.D. Tex., July 18, 2017), the district court said that BAPCPA's statutory definition of "current monthly income" makes no mention of the categories excluded from income by the Census Bureau, but rather includes the average monthly income "from all sources that the debtor receives ... without regard to whether such income is taxable income." In the case of the BAPCPA definition of "current monthly income," the statutory language is plain: Quite simply, the term "all" means "all." Accordingly, a workers' compensation award received postpetition was included in the debtors' projected disposable income.

In re Charleston, 2018 WL 1174984 (Bankr. S.D. Tex., March 5, 2018)

(case no. 4:16-bk-32113; adv. proc. no. 4:16-ap-3236) (Bankruptcy Judge Karen K. Brown)

Text of opinion

- **Dischargeability of debt—Under Code § 523(a)(2)(A); Dischargeability of debt—For false financial statement under Code § 523(a)(2)(B):** The debtors' submission of personal financial statements to a lender showing that no federal income taxes were due while the debtors in fact owed federal income taxes was not done with an intent to deceive for the purpose of Code § 523(a)(2)(A) and § 523(a)(2)(B). The debtors had a complex personal and financial situation from 2013 to 2015, including the adoption of two children, the death of one parent and the support of another disabled parent, an audit by Medicare that dramatically reduced the debtor husband's income, a change of the husband's primary job, an audit by the IRS, failing restaurants, and a divorce. Each of these produced extreme demands on the debtors' time, and the court found persuasive the debtors' explanation of the circumstances surrounding preparation and submission of the financial statements to the lender.

In re Crocker, 2018 WL 1626245 (Bankr. S.D. Tex., March 26, 2018), direct appeal filed, Crocker v. Navient Solutions, L.L.C., Case No. 18-20254 (5th Cir., filed April 25, 2018)

(case no. 4:15-bk-35886; adv. proc. no. 4:16-ap-3175) (Chief Bankruptcy Judge David R. Jones)

Text of opinion

- **Dischargeability of debt—Student loan debt under Code § 523(a)(8)—Status of obligation as encompassed by provision:** To be excepted from discharge under Code § 523(a)(8)(A)(ii), which encompasses "an obligation to repay funds received as an educational benefit, scholarship, or stipend," a debtor must have taken on an obligation to repay funds that were given in the form of an educational benefit, a scholarship or a stipend; the provision does not encompass all loans used for educational purposes. Thus, here, a bar exam study loan owed by one debtor and a career training loan owed by a second debtor did not come within § 523(a)(8)(A)(ii).

In re Griffin, 585 B.R. 794 (Bankr. S.D. Miss., March 9, 2018)

(case no. 3:17-bk-1858; adv. proc. no. 3:17-ap-48) (Bankruptcy Judge Neil P. Olack)

Text of opinion

- **Adversary procedure—Motion to compel arbitration:** An arbitration agreement in the debtor's contract with a lender was enforceable in the debtor's adversary proceeding against the lender asserting claims under the Truth in Lending Act and Mississippi state law.

In re Kelly, 582 B.R. 905 (Bankr. S.D. Tex., March 23, 2018)

(case no. 4:17-bk-32295; adv. proc. no. 4:17-ap-3320) (Bankruptcy Judge Jeff Bohm)

Text of opinion

- **Dischargeability of debt—Student loan debt under Code § 523(a)(8)—Status of obligation as encompassed by provision:** Disagreeing with *In re Posner*, 434 B.R. 800 (Bankr. E.D. Mich. 2010), which held that a co-signer of the debtor's student loan was a co-borrower, rather than a lender, so that the debtor's debt to the co-signer after the co-signer was obligated to repay the loan was not within the coverage of Code § 523(a)(8), the court held that the debtor's debt to a friend who had co-signed and guaranteed the debtor's student loan debt, and had been obligated to pay the debt after the debtor's default, came within Code § 523(a)(8)(ii).

In re Pace, 2018 WL 1891311 (Bankr. N.D. Miss., March 22, 2018)

(case no. 1:13-bk-14017) (Chief Bankruptcy Judge Jason D. Woodard) Text of opinion

- **Chapter 7—Allowance of fees for trustee's attorney:** In determining reasonable compensation for the Chapter 7 trustee's attorney, bankruptcy courts must first calculate the amount of the lodestar, which is "equal to the number of hours reasonably expended multiplied by the prevailing hourly rate in the community for similar work." Bankruptcy courts then may adjust the lodestar up or down based on the factors contained in Code § 330 and consideration of the twelve factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). See *In re Pilgrim's Pride Corp.*, 690 F.3d 650 (5th Cir. 2012).

In re Standley, 2018 WL 1457242 (Bankr. S.D. Tex., March 20, 2018)

(case no. 4:14-bk-36711) (Bankruptcy Judge Marvin Isgur) Text of opinion

- **Chapter 13—Attorney's fees—Payment by creditor:** When a Chapter 13 debtor's attorney attempts to recover fees from a third party, *Baker Botts L.L.P. v. ASARCO LLC*, --- U.S. ---, 135 S. Ct. 2158, 192 L.Ed.2d 208 (2015) applies and, in the absence of explicit statutory authorization, the American Rule controls payment of attorney's fees, so that the attorney may not recover fees incurred in defense of the attorney's fee application.

In re Westen, 2018 WL 1174888 (Bankr. E.D. Tex., March 5, 2018)

(case no. 4:17-bk-40030) (Bankruptcy Judge Brenda T. Rhoades) Text of opinion

- **Property of the estate—Exemptions—Under state law:** Where the debtors sought to exempt "Collectibles," valued at $41,450 and consisting of one painting located at a storage facility as well as other artwork, including "[p]osters, prints, paintings, sculptures, figurines and [G]erman mugs," under Texas Prop. Code § 42.002(a)(1) as "home furnishings, including family heirlooms," the court held that, to the extent the artwork was actually used to furnish the debtors' home and was not being held for investment purposes, it could be claimed as exempt subject to the monetary cap on exemptions set forth in Texas Prop. Code § 42.001(a). See *In re Peters*, 91 B.R. 401 (Bankr. W.D. Tex. 1988) (personal artwork--artwork not held for speculative

purposes, investment or resale--fit within the "home furnishing" exemption). Compare *In re Clark*, 2017 WL 5505135 (Bankr. W.D. Tex., Nov. 13, 2017) (“baseball cards” and “NASCAR collectibles” did not fall within the scope of the “home furnishings” exemption); *In re Wilkinson*, 402 B.R. 756 (Bankr. W.D. Tex. 2009) (antique guns, each affixed to a wooden plaque bearing a brass plate describing the weapon and adorning the debtors' home, were not exempt as "home furnishings" because there is a specific exemption for firearms).

Sixth Circuit (23) R

Baechel v. Republic Storage Systems, LLC, 2018 WL 1243424 (N.D. Ohio, March 9, 2018)

(case no. 5:16-cv-1403) (District Judge Sara Lioi) Text of opinion

- **Automatic stay—Jurisdiction to determine application; Automatic stay—Extension to nondebtor:** Federal district courts have jurisdiction concurrent with the originating bankruptcy court to determine the applicability of the bankruptcy court's automatic stay, and the court concluded that it had authority to determine whether "unusual circumstances" existed warranting the extension of the automatic stay to non-debtor parties, although courts were divided on the question of whether it was appropriate for district courts to engage in the "unusual circumstances" analysis.

Fitzpatrick v. Law Solutions Chicago, LLC, 584 B.R. 203 (E.D. Tenn., March 21, 2018), appeal dismissed, Case No. 18-5349 (6th Cir., July 9, 2018)

(case nos. 3:17-cv-257, 3:17-cv-258) (District Judge J. Ronnie Greer) Text of opinion

- **Jurisdiction—Personal jurisdiction:** Under Bankruptcy Rule 7004(f), the bankruptcy court had personal jurisdiction over a law firm in Illinois and individuals who lived in Illinois and worked at the law firm, all of whom were defendants in an adversary proceeding.

- **Liability of debtor's attorney:** In a Chapter 7 trustee's adversary proceeding against UpRight Law, licensed attorneys associated with the firm, and non-attorney staff employees who assisted with the firm's legal operations, relating to bankruptcy cases filed in the district by local attorneys affiliated with the firm, the court held that the trustee did not establish (1) the adversary defendants' liability under a Tennessee statute prohibiting the unauthorized practice of law within the state, as the trustee did not establish that the debtors suffered a "loss" under the statute; (2) a cause of action for negligence per se; (3) professional negligence by the firm or one of its attorneys; or (4) fraud by certain of the defendants.

In re Poole, Case No. 4:17-cv-8 (E.D. Tenn., March 19, 2018)

(District Judge Harry S. Mattice, Jr.) Text of opinion

- **Chapter 13—Stripping unsecured lien:** Affirming *In re Poole*, 2017 WL 401799 (Bankr. E.D. Tenn., Jan. 30, 2017), the district court agreed that, where the Chapter 13 debtors had executed three notes in favor of a creditor, all of which were secured by the same deed of trust on the debtors' residence, each note was secured by a different lien, so that the debtors could strip the two lower-priority liens, as the amount due on the note secured by the highest-priority lien was greater than the value of the residence.

Midstate Finance Co., Inc. v. Peoples, --- B.R. ----, 2018 WL 1586138 (E.D. Tenn., March 31, 2018)

(case no. 4:17-cv-6) (District Judge Curtis L. Collier) Text of opinion

- **Valuation of property:** The bankruptcy court, which considered a wide range of evidence, did not commit clear error in valuing the Chapter 13 debtors' real property, consisting of five acres improved by the debtors' mobile home and shop, at $60,000, despite the fact that a creditor holding 80% of the debtors' unsecured debt had bid $66,000 for the property when the case had been proceeding under Chapter 7, given that the creditor would directly benefit from a higher valuation.

- **Chapter 13—Confirmation of plan—Treatment of unsecured claims—Best interests of creditors test:** In applying the best interests of the creditors' test in Code § 1325(a)(4), the bankruptcy court properly valued the Chapter 13 debtors' non-exempt property at its fair market value, but the court erred in failing to discount the payments under the debtors' proposed plan to present value when comparing the amount creditors would receive under that plan with the amount creditors would have received in a hypothetical Chapter 7 liquidation.

In re Blankenship, 2018 WL 1357360 (Bankr. W.D. Ky., March 14, 2018)

(case no. 3:17-bk-32785) (Bankruptcy Judge Joan A. Lloyd) Text of opinion

- **Property of the estate—Avoidance of lien impairing exemption:** The debtor could not use Code § 522(f) to remove judgment liens from real property titled solely in his name where the liens secured judgments against his nondebtor wife. Although the debtor asserted that the liens clouded his title, the court assumed that the debtor was referring to his wife's dower interest in the property. To the extent the debtor sought to avoid the liens on the interest of his nondebtor spouse, this was an impermissible use of § 522(f).

In re Bridges, 583 B.R. 696 (Bankr. W.D. Mich., March 24, 2018)

(case no. 1:17-bk-4455; adv. proc. no. 1:17-ap-80195) (Chief Bankruptcy Judge Scott W. Dales)

Text of opinion

- **Dischargeability of debt:** Although the debtor's debt to a creditor had been found nondischargeable under Code §§523(a)(2), (a)(4), and (a)(6) in the debtor's prior bankruptcy case, and bankruptcy courts generally give preclusive effect to prior judgments declaring debts non-dischargeable, the court granted the creditor's motion for a default judgment in the debtor's new case holding the debt nondischargeable under those provisions. The court said that, since the debtor failed to receive a discharge in the earlier case, the creditor was justifiably concerned about the applicability of Code § 523(c) and Bankruptcy Rule 4007. See also *In re Paine*, 283 B.R. 33 (9th Cir. B.A.P. 2002) (examining Code § 523(b)); *Young v. United States*, 535 U.S. 43, 122 S.Ct. 1036, 152 L.Ed.2d 79 (2002) (noting that Code § 523(b) does not apply where the debtor failed to receive a discharge in the prior case).

In re Brooks, 583 B.R. 443 (Bankr. W.D. Mich., March 23, 2018)

(case no. 1:17-bk-5050; adv. proc. no. 1:18-ap-80031) (Chief Bankruptcy Judge Scott W. Dales)

Text of opinion

- **Adversary procedure:** While a parent may sue on behalf of his minor child without resort to an appointment as next friend or guardian ad litem under Fed. R. Civ. P. 17(c)(2), he may not do so without counsel. Parents may not appear pro se on behalf of their minor children because a minor's personal cause of action is her own and does not belong to her parent or representative.

In re Drobney, 583 B.R. 700 (Bankr. W.D. Mich., March 26, 2018)

(case no. 1:17-bk-5028) (Chief Bankruptcy Judge Scott W. Dales) Text of opinion

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Valuation of claim; Adversary procedure—Service of process:** Under Bankruptcy Rule 3012, as amended on December 1, 2017, a Chapter 13 debtor may determine the amount of a creditor's secured claim in a plan, instead of filing a separate motion, as long as the plan is served on the holder of the claim in the manner provided for service of a summons and complaint by Rule 7004. Though Rule 7004(b) generally authorizes service by mail, this authority is subject to an important exception for service on an insured depository institution. Under Rule 7004(h), persons wishing to serve papers by mail on an insured depository institution, with certain exceptions, must use certified mail addressed to an officer of the institution. Here, a credit union that the debtor was attempting to serve was an insured depository institution within the meaning of Rule 7004(h). See Code § 101(34) (defining "insured credit union") and § 101(35) (defining "insured depository institution" to include "insured credit union").

- **Chapter 13—Allowance of attorney's fees:** Where the Chapter 13 debtor's attorney failed three times to properly serve a credit union whose secured claim was valued in the debtors' proposed Chapter 13 plan, the court said that, to ensure that the increased costs were borne by the party who was responsible for the costs, the court would not approve a "no-look" fee in the case, assuming the debtors again sought confirmation of their plan. The attorney could seek compensation through an itemized application—one that omitted any fees or expenses associated with inadequate service of the plan.

In re Forson, 583 B.R. 704 (Bankr. S.D. Ohio, March 21, 2018)

(case no. 2:08-bk-61001; adv. proc. no. 2:15-ap-2137) (Bankruptcy Judge C. Kathryn Preston)

Text of opinion

- **Violation of discharge injunction—By mortgage creditor:** In a proposed district-wide class action against a mortgage creditor, in which the court had not yet ruled on class certification, the court held that several written and oral communications by the creditor with the Chapter 13 debtor violated the discharge injunction.

In re Hayes, 581 B.R. 509 (Bankr. W.D. Mich., March 9, 2018)

(case no. 1:17-bk-489) (Bankruptcy Judge James W. Boyd) Text of opinion

- **Chapter 7—Waiver of filing fee:** In determining whether a Chapter 7 debtor is unable to pay the filing fee in installments, for the purpose of deciding whether to waive the filing fee under 28 U.S.C. § 1930(f), most courts consider the totality of the circumstances. Factors that may be considered in analyzing a debtor's ability to pay the filing fee include (1) discrepancies between a debtor's application and schedules based upon a review of those documents and the debtor's testimony and other pleadings; (2) collateral sources of income from family or friends from which the filing fee may be paid; (3) excessive or unreasonable expenses that could be directed to the payment of the filing fee; (4) whether the debtor agreed to pay a portion of her attorney's fee after the filing of the case; (5) whether the debtor has any property from which the filing fee could be paid; (6) the debtor's historical spending of disposable income; and (7) whether the debtor's current or anticipated income or expenses are the result of temporary or extraordinary circumstances. See *In re Stickney*, 370 B.R. 31 (Bankr. D. N.H. 2007). The debtor has the burden of proving, by a preponderance of the evidence, that her circumstances satisfy the statutory requirements for waiver of the filing fee. *In re Burr*, 344 B.R. 234 (Bankr. W.D. N.Y. 2006).

- **Chapter 7—Waiver of filing fee:** Where the court concluded that the Chapter 7 debtor had the ability to pay the filing fee in installments, but the debtor failed to make any of the payments, the court would exercise its discretion and close the case without discharge rather than dismissing it, as the debtor had participated in the case in good faith.

In re Lisowski, 2018 WL 1614756 (Bankr. N.D. Ohio, March 30, 2018)

(case no. 3:17-bk-32368) (Bankruptcy Judge John P. Gustafson) Text of opinion

- **Chapter 7—Determination of abuse—Under totality of circumstances:** Although it was a close case, and the debtor's budget reflected about $187.67 per month available to pay creditors once his spousal support obligation ended in June of 2018, the court concluded that granting the debtor a Chapter 7 discharge would not be an abuse under the totality of the circumstances. Factors weighing against a finding of abuse included the debtor's testimony that all three members of his household, his two daughters and himself, had suffered due to his marriage's traumatic dissolution and that they had incurred increased medical expenses as a result; the change in the debtor's insurance coverage from that of a traditional plan to an HSA plan increased the level of uncertainty in terms of the debtor's ability to pay medical costs in the future; the debtor's testimony that he did not expect to earn as much from his primary work as a firefighter as he had in prior years; the fact that much of the debtor's debt was accumulated prior to his divorce in an attempt to assist his then-wife in developing her business; and testimony that reflected that some uncomfortable belt-tightening had been undertaken.

In re McGinness, 586 B.R. 14 (Bankr. E.D. Tenn., March 2, 2018)

(case no. 4:17-bk-14746) (Bankruptcy Judge Shelley D. Rucker) Text of opinion

- **Chapter 13—Confirmation of plan—Treatment of secured claims—910-day car claims:** Agreeing with *In re Ozenkoski*, 417 B.R. 794 (Bankr. E.D. Mo. 2009), the court said it would apply the predominant-use test articulated in *In re Joseph*, 2007 WL 950267 (Bankr. W.D. La., March 20, 2007) to determine whether a vehicle was "acquired for the personal use of the debtor" within the meaning of the hanging paragraph of Code § 1325(a). The court distinguished courts applying at least two other tests. See *In re Hill*, 352 B.R. 69 (Bankr. W.D. La. 2006) (the appropriate test was "whether the acquisition of the vehicle enabled the debtor to make a significant contribution to the gross income of the family unit," in which case the vehicle was not acquired for personal use) and *In re Solis*, 356 B.R. 398 (Bankr. S.D. Tex. 2006) (a vehicle is acquired for personal use where "a significant, material portion of the use of the vehicle" was for personal use).

- **Chapter 13—Confirmation of plan—Treatment of secured claims—910-day car claims:** A vehicle purchased by the Chapter 13 debtor less than 910 days prepetition was predominantly used to perform the functions of her job, although the debtor also used the vehicle for personal uses, and therefore was not "acquired for the personal use of the debtor" within the meaning of the hanging paragraph of Code § 1325(a). Under the predominant-use test from *In re Joseph*, 2007 WL 950267 (Bankr. W.D. La., March 20, 2007), the court found that the debtor's business use of the vehicle predominated over her personal use. The debtor testified that she was required to have a vehicle during the course of her employment with a healthcare provider to pick up patients and transport them to various events and medical appointments, that this portion of her job consumed three and a half to six hours per day, and that her employer reimbursed her for mileage.

In re Morris, 2018 WL 1321343 (Bankr. N.D. Ohio, March 13, 2018)

(case no. 3:08-bk-36702) (Bankruptcy Judge John P. Gustafson) Text of opinion

- **Chapter 7—Abandonment of property of estate—Upon closing of case under Code § 554(c):** The Chapter 7 debtors' right to an inheritance was abandoned under Code § 554(c) when the case was closed because the inheritance was properly scheduled by the debtors and the Chapter 7 trustee fully administered the funds available while the case was pending. Accordingly, an additional inheritance amount that the debtors received following the closing of their case, after additional inheritance funds became available, was not property of the estate

In re Pfetzer, 586 B.R. 421 (Bankr. E.D. Ky., March 22, 2018)

(case no. 2:17-bk-20802) (Chief Bankruptcy Judge Tracey N. Wise) Text of opinion

- **Chapter 13—Dismissal of case under Code § 1307(c)—Bad faith filing:** Once the deadline to object to a proposed Chapter 13 plan under Code § 1325(a)(7) has passed, this precludes a creditor from seeking dismissal of the case under Code § 1307(c) based on the debtor's alleged bad faith in filing the petition. Otherwise, the deadline for filing an objection to confirmation would be meaningless in the context of anything other than a creditor's treatment under the debtor's plan. This conclusion

also served the purposes of equity; like other matters pertaining to eligibility in bankruptcy, it can and should be determined at the outset of a Chapter 13 case whether the debtor filed the petition in bad faith.

In re Powell, 583 B.R. 695 (Bankr. E.D. Mich., March 27, 2018)

(case no. 2:11-bk-68697) (Bankruptcy Judge Thomas J. Tucker) Text of opinion

- **Chapter 13—Modification of confirmed plan:** Although the Chapter 13 debtor, the Chapter 13 trustee, and the debtor's mortgage creditor agreed to a stipulated proposed order that would modify the debtor's confirmed Chapter 13 plan by, among other things, requiring monthly payments for several more months by the debtor to the mortgage creditor, the court could not approve the proposed modification because the debtor's 60-month plan expired more than a year ago, and, under Code § 1329(c), the court could not approve any plan modification that provided for payments by the debtor after that date.

In re Rosich, 582 B.R. 694 (Bankr. W.D. Mich., March 30, 2018)

(case no. 1306483; adv. proc. no. 1:15-ap-80203) (Chief Bankruptcy Judge Scott W. Dales)

Text of opinion

- **Property of the estate—Exemptions—Objection to exemption—Timeliness:** The prepetition transfer of the Chapter 7 debtor's and her non-filing husband's residence from a trust to the debtor and her husband as tenants by the entireties, which the Chapter 7 trustee subsequently avoided, did not render the debtor's claimed exemption of the residence as entireties property "fraudulently asserted" within the meaning of Bankruptcy Rule 4003(b)(2), so that the trustee did not have the longer period provided under that rule in which to object to the claimed exemption. Challenges to an exemption based on a fraudulent transfer theory must be brought within the 30-day time period prescribed in Rule 4003(b)(1).

In re Rush, 582 B.R. 729 (Bankr. E.D. Tenn., March 1, 2018)

(case no. 3:16-bk-30084) (Bankruptcy Judge Suzanne H. Bauknight) Text of opinion

- **Property of the estate—Existence of constructive trust:** Extensively citing caselaw and agreeing with the majority view, the court held that, under Tennessee law, a child support arrearage owed the debtor was held by the debtor in a constructive or resulting trust for her minor child and was not property of the bankruptcy estate.

In re Shoup, 2018 WL 1614188 (Bankr. N.D. Ohio, March 30, 2018), **appeal dismissed**, Shoup v. McDermott, 2018 WL 3328861 (N.D. Ohio, July 6, 2018)

(case no. 3:17-bk-32181) (Bankruptcy Judge John P. Gustafson) Text of opinion

- **Chapter 7—Determination of abuse—Under totality of circumstances:** Granting the debtors a Chapter 7 discharge would be an abuse under the totality of the circumstances, where the debtors spent $85,000 to acquire two motor vehicles prior to their bankruptcy filing, and adding the debtors' voluntary retirement contributions of $338 and $210.90 per month to their income yielded disposable income of $288

per month, which exceeded the $215 per month of disposable income that resulted in a presumption of abuse under Code § 707(b)(2).

In re Stackhouse, 582 B.R. 445 (Bankr. S.D. Ohio, March 6, 2018)

(case no. 2:17-bk-53498) (Bankruptcy Judge C. Kathryn Preston) Text of opinion

- **Chapter 7—Determination of abuse—Under totality of circumstances:** Granting the debtors a Chapter 7 discharge would be an abuse under the totality of the circumstances where (1) monthly student loan payments of $1,200, car payments of $265, and general financial assistance payments of $900 that the debtors made to their non-dependent 28-year-old daughter were not reasonable and necessary expenses; (2) the debtors' monthly voluntary retirement contribution of $455 was not a reasonable and necessary expense; and (3) the debtors' monthly storage unit fee of $169 was not a reasonable and necessary expense.

In re Thomas, 583 B.R. 385 (Bankr. E.D. Ky., March 1, 2018)

(case no. 2:17-bk-20527) (Chief Bankruptcy Judge Tracey N. Wise) Text of opinion

- **Restriction of public access to court documents:** There was no basis under Code § 107(b) to grant the parties' joint motion to restrict public access to settlement-related documents filed in the record in the debtor's adversary proceeding even though the parties suggested that the settlement would "blow up" if the court did not seal the documents.

In re Trammell, 584 B.R. 824 (Bankr. E.D. Tenn., March 19, 2018)

(case no. 3:17-bk-32873) (Bankruptcy Judge Suzanne H. Bauknight) Text of opinion

- **Relief from stay—Retroactive relief:** Even if the IRS violated the automatic stay, following the debtor's bankruptcy filing, by refusing to release its levy on the disability pension payable to the debtor by major league baseball, the IRS was entitled to retroactive relief from stay for cause under Code § 362(d)(1) in order to eliminate any such violation.

In re Turner, 583 B.R. 910 (Bankr. E.D. Mich., March 30, 2018)

(case no. 2:18-bk-44447) (Bankruptcy Judge Thomas J. Tucker) Text of opinion

- **Successive cases—Effect of Code § 109(g):** While courts hold various views on the issue, the present court agrees with the cases holding that (1) dismissal under Code § 109(g)(2) is mandatory, not discretionary, when that statute applies; and (2) it is irrelevant under § 109(g)(2) whether there is some causal link or nexus between the filing of a stay relief motion on the one hand, and the debtor's later voluntary dismissal of the case on the other hand. Section 109(g)(2) applies, and requires dismissal, in every situation in which, in a prior case pending within 180 days before the filing of the present case, a creditor filed a motion for relief from stay and the debtor later voluntarily dismissed the case, regardless of the debtor's good faith or whether there was any particular connection between the two events. See *In re Andersson*, 209 B.R. 76 (6th Cir. B.A.P. 1997); *In re Steele*, 319 B.R. 518 (Bankr. E.D. Mich. 2005) (Marci B. McIvor, J.).

In re Underwood, 583 B.R. 438 (Bankr. E.D. Mich., March 9, 2018)

(case no. 2:06-bk-55754) (Bankruptcy Judge Thomas J. Tucker) Text of opinion

- **Chapter 7—Sale of estate property by trustee:** A Chapter 7 debtor who did not demonstrate that there was a reasonable possibility of a surplus in the case lacked standing to object to the Chapter 7 trustee's motion to sell estate property for a price that the debtor contended was inadequate.

Seventh Circuit (14) R

Marshall v. Blake, 885 F.3d 1065 (7th Cir., March 22, 2018)

(case no. 17-2809) Text of opinion

- **Chapter 13—Confirmation of plan—Calculation of projected disposable income:** Affirming *In re Blake*, 565 B.R. 871 (Bankr. N.D. Ill., March 16, 2017), the Court of Appeals held that the approach adopted by the bankruptcy court to calculate the projected disposable income of a below-median Chapter 13 debtor complied with Code § 1325(b). Under this approach, the debtor prorated her annual tax refund (i.e., divided the annual tax refund by twelve) and added the resulting amount to her current monthly income. Then, the debtor prorated future expenses that the refund would be spent on over that 12-month period, thus partially or fully offsetting the tax refund income as long as her additional expenses were reasonably necessary. The bankruptcy court adopted this practice for a couple of reasons, the Court of Appeals explained. First, the court wanted to alleviate the burdens that the process of modifying confirmed Chapter 13 plan imposed on trustees, debtors' counsel, and the court. Second, the court sought to promote consistency among trustees who often had different practices as to whether a debtor could retain a portion of their tax refund. The Court of Appeals concluded that the reasoning of *Hamilton v. Lanning*, 560 U.S. 505 (2010), which adopted a forward-looking approach to the calculation of a Chapter 13 debtor's projected disposable income in a case involving an above-median debtor, applied with equal force to below-median Chapter 13 debtors.

- **Means test—Current monthly income:** Earned income tax credits are income under the Bankruptcy Code and are included in a debtor's calculation of "current monthly income." See *In re Morales*, 563 B.R. 867 (Bankr. N.D. Ill. 2017); *In re Forbish*, 414 B.R. 400 (Bankr. N.D. Ill. 2009); *In re Royal*, 397 B.R. 88 (Bankr. N.D. Ill. 2008). The earned income tax credit statute provides that the credit shall not be treated as income for the purposes of several other federal statutes that provide public assistance benefits, but the Bankruptcy Code is not one of the listed statutes, nor does the definition of "currently monthly income" in Code § 101(10A) exclude earned income tax credits.

Baines v. City of Chicago, 584 B.R. 723 (N.D. Ill., March 22, 2018)

(case nos. 1:17-cv-4926, 1:17-cv-4929) (District Judge Robert M. Dow, Jr.) Text of opinion

- **Violation of stay—Retention of property of estate:** A provision of the Chicago municipal code, which creates a statutory possessory lien in impounded vehicles for the amount due under unpaid traffic tickets, is not preempted by the Bankruptcy Code.

In re Hernandez, 2018 WL 1469000 (N.D. Ill., March 26, 2018), appeal filed, Case No. 18-1789 (7th Cir., filed April 13, 2018)

(case no. 1:17-cv-3230) (District Judge Jorge L. Alonso) Text of opinion

- **Property of the estate—Exemptions—Under state law:** Under Illinois law, the court may exempt property with respect to certain claims, without exempting it with respect to all claims. *In re Fisherman*, 241 B.R. 568 (Bankr. N.D. Ill. 1999). 820 Ill. Comp. Stat. 305/21 (section 21 of the Illinois Workers' Compensation Act), which states "[n]o payment, claim, award or decision under this Act shall be assignable or subject to any lien, attachment or garnishment, or be held liable in any way for any lien, debt, penalty or damages," exempts workers' compensation claims from any bankruptcy estate, even though it does not explicitly mention bankruptcy. *In re McClure*, 175 B.R. 21 (Bankr. N.D. Ill. 1994). However, 820 Ill. Comp. Stat. 305/8.2(e-20), which was added to the Workers' Compensation Act in 2005, provides that "[u]pon a final award or judgment by an Arbitrator or the [Illinois Workers' Compensation] Commission, or a settlement agreed to by the employer and the employee, a provider may resume any and all efforts to collect payment from the employee for the services rendered to the employee and the employee shall be responsible for payment of any outstanding bills for a procedure, treatment, or service rendered by a provider." The district court agreed with the bankruptcy court that, as a result of this amendment, section 21 does not provide a blanket exemption from the bankruptcy estate for workers' compensation claims; it exempts those claims as against general creditors, but not as against medical providers who treated the debtor's injury.

In re Johnson, 586 B.R. 449 (N.D. Ill., March 12, 2018)

(case no. 1:17-cv-5224) (District Judge Matthew F. Kennelly) Text of opinion

- **Appellate procedure—Finality of order:** Where the Social Security Administration filed a motion seeking (1) a determination that the automatic stay did not apply to its purported recoupment from the debtor and (2) relief from stay if the court determined that the stay did apply, the court's December 2016 decision holding that the automatic stay applied was not a final order. Rather, the court's denial of the motion to lift the stay, issued about six months later on June 29, 2017, was the court's final order.

- **Recoupment:** A significant body of authority holds that recoupment does not violate the automatic stay.

- **Recoupment:** When a creditor and debtor are mutually indebted, the creditor may recoup his or her debt from the debtor despite bankruptcy, but only if the debts arise from the same transaction. When analyzing whether two debts arise from the same transaction, the circuit courts are split between two approaches. The Third Circuit has asked whether the debts are part of a "single integrated transaction." See *Lee v. Schweiker*, 739 F.2d 870 (3d Cir. 1984); *In re University Medical Center*, 973 F.2d 1065 (3d Cir. 1992). By contrast, the First, Ninth and D.C. Circuits have determined whether action constitutes recoupment by asking whether the debts are "logically related." See *In re TLC Hospitals, Inc.*, 224 F.3d 1008 (9th Cir. 2000); *In re Holyoke Nursing Home, Inc.*, 372 F.3d 1 (1st Cir. 2004); *United States v. Consumer Health Services of America, Inc.*, 108 F.3d 390 (D.C. Cir. 1997).

- **Recoupment:** The court was not required to choose between the narrower "single integrated transaction" standard and the broader "logical relationship" standard for when a recoupment occurs for the purposes of bankruptcy, for, even under the broader standard, the Social Security Administration's attempt to recover the debtor's fraudulently-obtained Social Security retirement benefits by withholding his SSI disability benefits did not constitute recoupment, as the two debts were not logically related. While the government relied on a statute that authorized withholding of benefits under these circumstances, the existence of such a statute was insufficient, without more, to make two otherwise-unrelated debts part of the same transaction.

In re Bailey-Pfeiffer, 2018 WL 1896307 (Bankr. W.D. Wis., March 23, 2018)

(case no. 1:17-bk-13506) (Bankruptcy Judge Brett H. Ludwig) Text of opinion

- **Chapter 13—Eligibility—Debt limits:** Disagreeing with *In re Pratola*, 578 B.R. 414 (Bankr. N.D. Ill. 2017), the court said that, while the decision to dismiss or convert a case under Code § 1307 is discretionary, the court is bound to apply its discretion consistent with the plain terms of the Bankruptcy Code. Those plain terms precluded the court from allowing a person who was ineligible to be a Chapter 13 debtor from continuing in Chapter 13. Thus, the court dismissed the case, in which the debtor's unsecured debts totaled more than $870,000.

In re Cross, 2018 WL 1448669 (Bankr. E.D. Wis., March 22, 2018)

(case no. 2:13-bk-32933) (Bankruptcy Judge Brett H. Ludwig) Text of opinion

- **Dischargeability of debt—Student loan debt under Code § 523(a)(8)—Status of obligation as encompassed by provision:** The Chapter 7 debtor's debt to a technical college came within Code § 523(a)(8)(A)(ii) as "an obligation to repay funds received as an educational benefit, scholarship or stipend," where the debtor received a federal Pell grant to attend the college but then dropped out during the semester. Federal regulations provide that, when a student who received assistance under the federal Pell Grant program withdraws from school, the institution must calculate the portion of funds that the student has not earned, and the school must return the unearned funds to the U.S. Department of Education. The college did so for the unearned portion of the student's Pell grant and was then entitled to collect that amount from the student.

In re DeLay, 2018 WL 1596883 (Bankr. C.D. Ill., March 29, 2018), appeal filed, DeLay v. Bandy, Case No. 3:18-cv-3105 (C.D. Ill., May 9, 2018)

(case no. 3:14-bk-71512; adv. proc. no. 3:16-ap-7040) (Chief Bankruptcy Judge Mary P. Gorman)

Text of opinion

- **Violation of stay—Standing to recover:** The term "individual" in Code § 362(k) refers to both debtors and non-debtors. *St. Paul Fire & Marine Ins. Co. v. Labuzan*, 579 F.3d 533 (5th Cir. 2009). The automatic stay protects debtors from collection activities by creditors, and it protects creditors by preserving the estate and blocking efforts of other creditors from gaining an unfair advantage. Because the automatic stay is

meant, in part, to protect creditors, creditors are deemed individuals within the zone of interest of § 362(k) and thus have standing to enforce its provisions. A creditor's standing to enforce the provisions of the automatic stay is not, however, without limitation. The enforcing creditor must assert an injury in his capacity as a creditor of the estate. *In re Peeples*, 880 F.3d 1207 (10th Cir. 2018). And the creditor must assert his own direct injury and not a claim that any creditor could bring or a claim that belongs to the estate. If a claim could be asserted by any creditor, then that claim belongs to the estate, and only the trustee can bring the claim.

- **Violation of stay—Standing to recover:** Here, a creditor of the Chapter 7 debtor was asserting his own claim and an injury unique to him. He was not given notice of the filing of the debtor's bankruptcy case and incurred thousands of dollars in attorney's fees in a state court proceeding after the state court had lost jurisdiction over the debtor's property that was the subject of their dispute, as the property became property of the bankruptcy estate over which the bankruptcy court had jurisdiction. The debtor continued the state court action in violation of the automatic stay and without standing, all to the creditor's financial detriment. The resulting injuries from the debtor's conduct were suffered by the creditor alone and could not be prosecuted by other creditors or on behalf of the estate.

- **Violation of stay—By debtor:** The Chapter 7 debtor's continued prosecution, postpetition, of a counterclaim against a creditor in state court litigation commenced by the creditor prepetition, in combination with the debtor's failure to inform the creditor of the bankruptcy filing, resulted in the debtor's violating the automatic stay in two ways. While the continued prosecution of the counterclaim did not violate Code § 362(a)(1), the debtor's failure to inform the creditor of his bankruptcy filing facilitated the creditor's violation of § 362(a)(1), which prohibits the continued prosecution of a prepetition proceeding against the debtor. Moreover, since the counterclaim was property of the estate, the debtor's continued prosecution of the counterclaim violated § 362(a)(3) as an act to exercise control over property of the estate.

- **Violation of stay—By debtor:** As compensatory damages, the creditor would be given an opportunity to purchase all claims that were raised or that could have been raised in the debtor's counterclaim, as well as $5,000 in attorney's fees. The court also awarded the creditor $10,000 in punitive damages, finding that the debtor's conduct evidenced a "well-developed plan to keep [the creditor] in the dark while also cutting the Trustee out of any settlement proceeds."

In re Fishel, 583 B.R. 474 (Bankr. W.D. Wis., March 30, 2018)

(case no. 3:17-bk-14180) (Chief Bankruptcy Judge Catherine Furay) Text of opinion

- **Chapter 13—Eligibility—Debt limits:** Even if a Chapter 13 debtor has debt exceeding the debt limits in Code § 109(e), the court has discretion under Code § 1307(c) in deciding whether to dismiss the debtor's case, and, here, the court would decline to dismiss the case even though the debtor's unsecured debts may have exceeded the statutory limit of $394,725. The uncertainty arose because the debtor's schedules disclosed only $16,185 in student loans, in addition to several other student loans in unknown amounts, while the Chapter 13 trustee estimated that the debtor had $132,000 in scheduled student loans and the servicer for the U.S. Department of Education filed a claim for $341,136. The debtor's disposable income would render a Chapter 7 discharge an abuse, the court said, and requiring the debtor to proceed under Chapter 11 "would be absurd for this true consumer debtor." Based on the

facts, it was in the best interests of the debtor, the estate, and the creditors that the debtor be permitted to pursue confirmation of her Chapter 13 plan. To hold otherwise would effectively exclude this debtor from bankruptcy relief, and the congressional intent behind limiting the availability of Chapter 13 through § 109(e) was not applicable here. See also *In re Pratola*, 578 B.R. 414 (Bankr. N.D. Ill., Dec. 27, 2017) (the bankruptcy court was not required to dismiss a Chapter 13 case where the inclusion of student loan debt caused the debtor to exceed the unsecured debt limit).

In re Gibson, 582 B.R. 15 (Bankr. C.D. Ill., March 5, 2018)

(case no. 1:12-bk-81186) (Bankruptcy Judge Thomas L. Perkins) Text of opinion

- **Chapter 13—Entitlement to discharge:** A Chapter 13 debtor's direct payments on a nonmodifiable, nondischargeable residential mortgage loan, provided for in the debtor's plan under Code § 1322(b)(5), are not "payments under the plan" for purposes of Code 1328(a). Accordingly, a debtor's failure to complete all such direct payments is not grounds to dismiss the case without a discharge. The court observed that, in 17 years on the bench, it had never dismissed a Chapter 13 case without discharge, where the required payments to the trustee were completed, for the reason that the debtor failed to make all of the direct mortgage payments. Nor had the court's research uncovered any such cases in other jurisdictions prior to the decision in *In re Heinzle*, 511 B.R. 69 (Bankr. W.D. Tex. 2014). It was apparent that what triggered this recently-identified theory of dismissal without discharge was the adoption of Bankruptcy Rule 3002.1. It was equally clear that Rule 3002.1 was not intended to serve as the impetus for dismissal without discharge. Rather, it was universally recognized that the rule was intended to benefit debtors by better ensuring the fresh start to a Chapter 13 debtor who completed a plan, by providing a mechanism for review and a forum for resolving disputes over whether the debtor's obligations to the mortgage holder were current at the conclusion of the bankruptcy case.

- **Chapter 13—Modification of confirmed plan:** Code § 1329(a) permits modification of a Chapter 13 plan after confirmation but only "before the completion of payments under such plan." It is well settled that "completion of payments" under this provision occurs when the debtor pays to the Chapter 13 trustee the full amount required by the confirmed plan and is not dependant on the debtor's direct payments on a mortgage claim.

In re Gilliam, 582 B.R. 459 (Bankr. N.D. Ill., March 28, 2018)

(case no. 1:17-bk-18368) (Bankruptcy Judge Timothy A. Barnes) Text of opinion

- **Chapter 13—Allowance of attorney's fees:** Where a law firm, in multiple cases, proposed Chapter 13 plans in which the district's model plan was modified so as to either raise the priority of the firm's allowed fees or to temporarily reduce the plan's payments to secured creditors in order to allow concurrent fee payments to the firm, the firm needed to have agreements with the debtors permitting this accelerated payment of its fees, and those agreements were required to be in writing and disclosed to the court. Because the firm failed to disclose any such agreements, the firm would not be allowed the district's flat fee but would be required to file an itemized application in each case. Moreover, the firm's allowed fees would be reduced by $500 in each case as a sanction for the lack of disclosure, other than in those cases in which the firm's modification of the model plan led to the dismissal of the case, in which cases the firm's fee application would be disallowed in its entirety.

In re House, 2018 WL 1505572 (Bankr. E.D. Wis., March 26, 2018)

(case no. 2:17-bk-30434) (Bankruptcy Judge Beth E. Hanan) Text of opinion

- **Relief from stay—Under Code § 362(d)(4):** Where the debtor had filed five Chapter 13 cases (including her current one) in seven years, the court granted the mortgage creditor's motion for in rem stay relief under Code § 362(d)(4), where all four of the debtor's prior cases had been dismissed prior to discharge, although she had achieved plan confirmation in two of the four, and a close review of the facts revealed that the debtor's serial filings, some directly timed to foreclosure events, and some bearing unwarranted projections of rental income, compounded by disregard for her creditor's interests by failing to collect any rent from family members for several years, were all constituents of a scheme to delay or hinder the creditor from protecting its rights in the property.

In re Karim, 582 B.R. 193 (Bankr. N.D. Ill., March 9, 2018)

(case no. 1:17-bk-6548; adv. proc. no. 1:17-ap-380) (Bankruptcy Judge Deborah L. Thorne)

Text of opinion

- **Avoidable transfers—Date of transfer; Avoidable transfers—Preferential transfer under Code § 547:** A judgment creditor's citation lien attached to a check issued to the Chapter 11 debtors as their share of the proceeds from the prepetition sale of their real property, not at the time that the citation was served on the debtors, more than 90 days prior to their bankruptcy filing, but only when the property was sold and the check was issued to the debtors on the same day, during the 90-day preference period, so that the lien was avoidable as a preference.

In re Owens, 2018 WL 1616852 (Bankr. S.D. Ind., March 20, 2018)

(case no. 1:16-bk-7620; adv. proc. no. 1:17-ap-50002) (Bankruptcy Judge James M. Carr)

Text of opinion

- **Dischargeability of debt—Under Code § 523(a)(2)(A):** The Seventh Circuit has noted material differences among the three possible grounds for nondischargeability under Code § 523(a)(2)(A) and has formulated two different tests, one for both "false pretenses" and "false representation" and another for "actual fraud." To prevail on a nondischargeability claim under the "false pretenses" or "false representation" theories, a creditor must prove all of the following elements: "(1) the debtor made a false representation or omission, (2) that the debtor (a) knew was false or made with reckless disregard for the truth and (b) was made with the intent to deceive, (3) upon which the creditor justifiably relied." *Ojeda v. Goldberg*, 599 F.3d 712 (7th Cir. 2010). "Actual fraud" is broader than misrepresentation in that neither a debtor's misrepresentation nor a creditor's reliance is necessary to prove nondischargeability. "Actual fraud" is defined as "any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another," which includes "all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated." In such cases, a creditor must prove (1) a fraud occurred; (2) the debtor intended to defraud the creditor; and (3) the fraud created the debt that is the subject of the discharge dispute. *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000).

See also *Husky Int'l Elec., Inc. v. Ritz*, ––– U.S. ––––, 136 S.Ct. 1581, 1586, 194 L.Ed.2d 655 (2016). The focus of an "actual fraud" claim is on the debtor's state of mind at the time of his purportedly fraudulent conduct. *In re Wiszniewski*, 2010 WL 3488960 (Bankr. N.D. Ill. 2010).

- **Dischargeability of debt—Under Code § 523(a)(2)(A):** The debtor's statements on his unemployment benefit applications that he was not working, although false, were not made with fraudulent intent, where the debtor was coaching part-time at a school district and received two stipends during each sports season. Based on the debtor's understanding of a conversation with a staff member of the Indiana Department of Workforce Development, he thought his coaching did not count as "work." Accordingly, the debtor's liability to the department for repayment of benefits to which he was not entitled was dischargeable under Code § 523(a)(2)(A).

- **Dischargeability of debt—For governmental fine, penalty or forfeiture under Code § 523(a)(7):** Because intent is not an element of the nondischargeability of penalties under Code § 523(a)(7), penalties imposed on the debtor for receiving unemployment benefits to which he was not entitled were nondischargeable under Code § 523(a)(7), even though the debtor lacked fraudulent intent in applying for the benefits.

In re Williams-Hayes, 2018 WL 2207897 (Bankr. N.D. Ill., March 28, 2018)

(case no. 1:17-bk-27961) (Bankruptcy Judge Timothy A. Barnes) Text of opinion

- **Chapter 13—Allowance of attorney's fees:** Where the Chapter 13 debtor's attorney filed a Chapter 13 plan that modified the district's model plan so as to elevate the priority of payment of the attorney's fees, without disclosure to the court, the attorney would not be allowed the district's flat fee but would be required to file an itemized application. Moreover, the attorney's allowed fees would be reduced by $250 as a sanction for its nondisclosure. The court noted that the attorney in this case filed only a single case with the undisclosed modification to the model plan, in contrast to the law firm involved in *In re Gilliam*, 582 B.R. 459 (Bankr. N.D. Ill., March 28, 2018), above, which initially filed more than 50 cases with the higher priority of its payments, and thereafter continued to file case after case following the same approach.

Eighth Circuit (7) R

In re Wigley, 886 F.3d 681 (8th Cir., March 29, 2018)

(case no. 16-4075) Text of opinion

- **Appellate procedure—Standing to appeal:** Standing in a bankruptcy appeal is narrower than Article III standing. This circuit and others had adopted an "essentially prudential" limitation on standing in the bankruptcy context given that bankruptcy litigation almost always involved the interests of numerous persons who were not formally parties to the litigation. The interest in efficient judicial administration required that appellate review be limited to those persons whose interests were directly affected. Accordingly, only a "person aggrieved" has standing to bring a bankruptcy appeal. "Person aggrieved" is, of course, a term of art: almost by definition, all appellants may claim in some way to be "aggrieved," else they would not bother to prosecute their appeals? One is a "person aggrieved" with standing to bring a bankruptcy appeal only if she has been "directly and adversely affected pecuniarily" by an order of a bankruptcy court. A person has standing under this doctrine if a bankruptcy court order diminishes the person's property, increases the person's burdens, or impairs the person's rights.

- **Appellate procedure—Standing to appeal:** Here, the Chapter 11 debtor's nondebtor wife lacked standing to appeal denial of confirmation of the debtor's Chapter 11 plan. While the wife contended that the court's confirmation of the plan would have reduced her exposure to future litigation, alleged harm based on potential litigation was too indirect for bankruptcy standing.

Murray v. 3M Co., 297 F. Supp. 3d 869 (E.D. Ark., March 13, 2018)

(case no. 5:15-cv-101) (District Judge James M. Moody Jr.) Text of opinion

- **Property of the estate—Cause of action:** In determining whether a cause of action is property of the bankruptcy estate, courts in the Eighth Circuit have used both the "sufficiently rooted in the debtor's pre-bankruptcy past" test and the accrual under state law test. Compare *Fix v. First State Bank of Roscoe*, 559 F.3d 803 (8th Cir. 2009) (stating that "at least four of the five causes of action [the debtor] brought against the Bank in March 2006 ... have sufficient roots in [the debtor's] pre-bankruptcy activities to be considered property of the bankruptcy estate, even though the Bank's alleged breach of its promise occurred post-petition") with *In re Deer*, 266 B.R. 772 (8th Cir. B.A.P. 1999) (stating that "[t]o determine whether [the debtor] had a property interest in the cause of action at the time of the bankruptcy, we must look to whether the cause of action had accrued").

- **Judicial estoppel—Elements:** The Eighth Circuit recently listed three "non-exhaustive" factors that it is appropriate for a court to consider in deciding whether to apply judicial estoppel: (1) whether the party's later position is "clearly inconsistent" with its prior position; (2) whether a court was persuaded to accept a prior position, "so 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"; and (3) whether

the party claiming inconsistent positions "would derive an unfair advantage or impose an unfair detriment on the opposing party if not stopped." *Combs v. The Cordish Companies, Inc.*, 862 F.3d 671 (8th Cir. 2017).

- **Judicial estoppel—Application under circumstances:** While the debtor should have discovered his products liability cause of action prior to filing his Chapter 7 bankruptcy case in 2009, the district court was convinced that the debtor was not aware that he had a potential claim at the time he filed his bankruptcy case, so that he was not judicially estopped from now prosecuting the cause of action, which the debtor had not disclosed in his bankruptcy schedules.

In re Belew, Case No. 5:17-bk-71508 (Bankr. W.D. Ark., March 5, 2018), **appeal filed**, Case No. 18-6007 (8th Cir. B.A.P., filed March 16, 2018)

(Chief Bankruptcy Judge Ben T. Barry) Text of opinion

- **Property of the estate—Exemptions—Amendment of exemptions—Denial of amendment:** Under *Law v. Siegel*, 134 S. Ct. 1188 (2014), a bankruptcy court may no longer disallow a debtor's amended exemptions on the grounds of bad faith or prejudice to creditors under the rule articulated in *In re Kaelin*, 308 F.3d 885 (8th Cir. 2002).

In re Evans, 584 B.R. 20 (Bankr. E.D. Mo., March 12, 2018)

(case no. 4:16-bk-46322; adv. proc. no. 4:16-ap-4166) (Chief Bankruptcy Judge Kathy A. Surratt-States) Text of opinion

- **Dischargeability of debt—For misrepresentation under Code § 523(a)(2)(A):** A debt arising out of the overpayment of Social Security disability insurance benefits to the Chapter 7 debtor, who failed to report multiple periods of employment, was nondischargeable under Code § 523(a)(2)(A).

In re Kuper, 586 B.R. 309 (Bankr. N.D. Iowa, March 29, 2018)

(case no. 4:17-bk-267) (Chief Bankruptcy Judge Thad J. Collins) Text of opinion

- **Setoff—Existence of right:** Iowa law provides that, to establish a right of setoff, the demands must be mutual and must exist between the same parties, and be of the same grade and nature or due the same capacity or right. As a general rule, if a debt is owed, but not yet due at the time of the bankruptcy filing, it can still form a mutual debt for setoff purposes, although some courts disagree. For the purposes of the mutuality requirement, Iowa law allowed the creditor (an elevator cooperative) to deem the debt that it owed to the debtor "due" for setoff purposes at the time it exercised its right to setoff. Accordingly, the court found that the creditor had a right of setoff under the circumstances.

- **Proof of claim—Secured claim—Based on right of setoff:** Where a creditor had a right to setoff against $60,982.83 of the Chapter 7 debtor's assets, the creditor had a secured claim in this amount.

In re Page, Case No. 4:10-bk-50203, Adv. Proc. No. 4:17-ap-4062 (Bankr. E.D. Mo., March 22, 2018), **appeal filed**, Case No. 18-6011 (8th Cir. B.A.P., filed March 27, 2018)

(Bankruptcy Judge Charles E. Rendlen III) Text of opinion

- **Dischargeability of debt—Student loan debt under Code § 523(a)(8)—Status of obligation as encompassed by provision:** A loan was "made under any program funded in whole or in part by a . . . nonprofit institution" within the meaning of Code § 523(a)(8)(A)(i) where the only demonstrated involvement of The Educational Resources Institute, Inc. (TERI), a nonprofit organization, was to accept loan applications. The bankruptcy court reasoned that accepting mail necessitated the expenditure of funds, so that the "funding" element was satisfied.

In re Shields, 586 B.R. 315 (Bankr. W.D. Mo., March 15, 2018)

(case no. 3:17-bk-30321) (Bankruptcy Judge Brian T. Fenimore) Text of opinion

- **Property of the estate—Exemptions—Under state law:** Where the debtor husband received $2,285.06 each month under a Supplemental Executive Retirement Plan (SERP) that was a nonqualified deferred compensation plan under Internal Revenue Code § 409A, $1,285.06 of each SERP payment was reasonably necessary for the debtors' support and was exempt under Mo. Rev. Stat. § 513.430.1(10)(e), which was similar to Code § 522(d)(10)(e), while the remaining $1000 was not exempt.

- **Setoff—Against exempt property:** While the parties agreed that a creditor had a common law right of setoff under Missouri law against monthly payments the debtor husband received under a Supplemental Executive Retirement Plan, the creditor could exercise that right of setoff only against the nonexempt portion of each payment, as under Missouri law the creditor's right of setoff yielded to the debtor's exemption.

Ninth Circuit (13) R

In re Solano, 716 Fed. Appx. 637 (9th Cir., March 23, 2018)

(case no. 17-56393) Text of opinion

- **Appellate procedure—Finality of order:** An order denying a motion for withdrawal of reference is not an appealable final order.

In re Mancuso, 2018 WL 1354337 (9th Cir. B.A.P., March 12, 2018), appeal filed, Case No. 18-60022 (9th Cir., filed April 13, 2018)

(case no. 16-1387) Text of opinion

- **Property of the estate—Exemptions—Availability to debtor under Code § 522(b)(3)(A):** The debtor, who had moved from Florida to Nevada less than 730 days prepetition, could not claim a Florida homestead exemption in property located in Nevada, as (1) Florida law does not permit a debtor to claim a homestead exemption in property located outside of Florida, and (2) Code § 522(b)(3)(A) does not preempt residency requirements in state exemption laws. Accordingly, under the savings provision in § 522(b)(3), the debtor was required to apply the federal exemptions in § 522(d).

In re Romeo, 2018 WL 1463850 (9th Cir. B.A.P., March 23, 2018)

(case no. 17-1215) Text of opinion

- **Required schedules and information—Tax returns—Party's right of access:** Under Code § 521(f), a Chapter 13 debtor is required to file her postpetition federal income tax returns, or transcripts of such returns, with the court for the tax years during which the debtor's Chapter 13 case is pending. The Chapter 13 trustee could access those returns or transcripts upon the proper showing under § 521(g)(2), which provides that "[t]he tax returns, amendments, and statement of income and expenditures described in subsections (e)(2)(A) and (f) shall be available to the United States trustee (or the bankruptcy administrator, if any), the trustee, and any party in interest for inspection and copying, subject to the requirements of section 315(c) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005." Section 315(c) of BAPCPA mandates that the Director of the Administrative Office of the United States Courts establish procedures for safeguarding the confidentiality of tax information required to be produced under § 521. On September 20, 2005, the Judicial Conference approved interim guidance drafted to implement this statutory directive, effective October 17, 2005, the effective date of BAPCPA. In March 2015, the Director issued the Final Guidance for Protection of Tax Information, which established procedures for obtaining access to a debtor's tax information filed with the bankruptcy court and is available online at http://www.uscourts.gov/sites/default/files/vol04_ch08.pdf.

- **Required schedules and information—Tax returns—Party's right of access:** The bankruptcy court correctly held that, under the Final Guidance, the Chapter 13 trustee had to show more than his general statutory duty of investigating a debtor's financial

affairs to meet his burden of showing a "demonstrated need" for the debtor's federal income tax return transcripts. Concluding that the bankruptcy court's finding that the trustee had shown a "demonstrated need" for copies of the debtor's federal income tax return transcripts for 2015 and 2016 was not illogical, implausible, or without support in the record, the BAP said that the trustee established that the tax information would aid in the administration of the Chapter 13 case; it was not being obtained for an improper purpose, such as a discovery tool to assist a creditor with a nondischargeable judgment in aid of collection or to harass the debtor. See *In re Tomer*, 508 B.R. 641 (Bankr. W.D. Va. 2014) (creditor was not entitled to copies of the Chapter 13 debtor's federal tax returns and other documents); *In re Byrne*, 2007 WL 2580834 (Bankr. D. Vt. June 15, 2007) (same). However, utilizing a Chapter 13 debtor's tax information as a means for plan modification is proper and consistent with the Code. *In re Fridley*, 380 B.R. 538 (9th Cir. B.A.P. 2007).

- **Required schedules and information—Tax returns—Party's right of access:** Holding that the bankruptcy court erred in applying Code § 521(g)(2) to order turnover of the debtor's 2015 and 2016 state income tax returns to the Chapter 13 trustee, the BAP stated that Congress had been very clear as to when state income tax returns were required to be produced under the Code. The BAP pointed to Code § 1308—another BAPCPA provision—under which a Chapter 13 debtor is required to file all prepetition federal, state and local tax returns due for all of the taxable periods ending during the four-year period ending on the date the bankruptcy petition was filed.

In re Spielbauer, 2018 WL 1306274 (N.D. Cal., March 13, 2018), **appeal filed**, Case No. 18-15630 (9th Cir., filed April 11, 2018)

(case no. 5:17-cv-3071) (District Judge Beth Labson Freeman) Text of opinion

- **Dischargeability of debt—For willful and malicious injury under Code § 523(a)(6):** A California state court judgment for slander of title was entitled to issue-preclusive effect and was nondischargeable under Code § 523(a)(6).

In re Casillas, 2018 WL 1568919 (Bankr. D. Ariz., March 28, 2018)

(case no. 2:17-bk-12897) (Chief Bankruptcy Judge Daniel P. Collins) Text of opinion

- **Adversary procedure—Renewal of judgment:** A bankruptcy judgment registered in Arizona must be renewed in accordance with Arizona law in order to remain enforceable. Because, under Arizona law, the automatic stay in bankruptcy does not toll the time for renewing a judgment, a nondischargeability judgment obtained by the creditor in the debtors' prior bankruptcy case was no longer enforceable.

- **Examination of party:** Because a creditor failed to renew a judgment against the debtors, the judgment was no longer enforceable and the creditor was no longer a party in interest entitled to conduct an examination of the debtors under Bankruptcy Rule 2004.

In re Cowan, 586 B.R. 337 (Bankr. D. Idaho, March 14, 2018)

(case no. 1:08-bk-2083) (Bankruptcy Judge Jim D. Pappas) Text of opinion

- **Violation of discharge injunction:** An amendment to a prepetition commercial lease that the Chapter 7 debtor entered into following his discharge and that extended the term of the original lease was an unenforceable reaffirmation agreement where a material part of the consideration offered by the lessor to the debtor was its promise to forego collection of a rent increase provided for in the original lease in exchange for the extended lease term. The debtor's obligation to pay that rent to the lessor had been discharged, and an "agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable" amounts to an unenforceable reaffirmation agreement. And this was true despite the lessor's contention that the debtor, not the lessor, benefitted from the lessor's willingness to enter into the lease amendment.

- **Violation of discharge injunction:** A lessor's conduct in prosecuting a post-discharge action against the Chapter 7 debtor for his violation of both a prepetition lease and a post-discharge amendment to the lease that constituted an unenforceable reaffirmation agreement violated the discharge injunction. And, since the lessor was represented by counsel and the debtor informed the lessor of his bankruptcy discharge, the violation was willful even under the rule of *In re Taggart*, 548 B.R. 275 (9th Cir. B.A.P., April 12, 2016), aff'd 888 F.3d 438 (9th Cir., April 23, 2018).

In re Ecle Kees, 2018 WL 1226011 (Bankr. D. Or., March 8, 2018)

(case no. 6:16-bk-62660) (Bankruptcy Judge Thomas M. Renn) Text of opinion

- **Property of the estate—Exemptions—Under federal law:** The debtor's IRA, which was funded by transfers from her former husband's tax-qualified retirement accounts pursuant to a divorce decree, satisfied 26 U.S.C. § 408(b) and therefore was exempt under Code § 522(d)(12), despite the Chapter 7 trustee's contentions that the IRA was transferrable and partially forfeitable and that the funding of the IRA violated the applicable annual limit.

In re Evans, 584 B.R. 917 (Bankr. D. Or., March 8, 2018)

(case no. 6:17-bk-62302) (Bankruptcy Judge Thomas M. Renn) Text of opinion

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Direct payment by debtor:** Under *In re Lopez*, 372 B.R. 40 (9th Cir. B.A.P. 2007), opinion adopted, 550 F.3d 1202 (9th Cir. 2008), an "impaired" claim must be paid by the Chapter 13 trustee unless the court, in its discretion, determines that direct payment by the Chapter 13 debtor is appropriate. Defining impairment as any proposed alteration of the rights of a creditor that the debtor could not insist on but for the protections of the Bankruptcy Code, the court said that, under a proposed Chapter 13 plan that would pay all secured claims through escrow at the closing of the sale or refinance of certain real property, which was to occur by July 2020, the claims of two judicial lien creditors were impaired because the plan curtailed the creditors' rights to execute and foreclose on the liens for a three-year period. For similar reasons, a county's property tax arrearage claim was impaired under the plan. The court concluded that

it would permit direct payment by the debtors of these claims only if the debtors agreed to pay the Chapter 13 trustee's commission on the payments.

In re Galan, 2018 WL 1442243 (Bankr. D. Or., March 21, 2018)

(case no. 3:18-bk-30059) (Bankruptcy Judge David W. Hercher) Text of opinion

- **Authority of the court—Under Code § 105(a):** Where the automatic stay has expired under Code § 362(c)(3)(B), the court lacks authority to reimpose the stay under Code § 105(a). While the court did not rule out the possibility that the debtor might be able to obtain an injunction against a particular creditor that would approximate the automatic stay, such a request required an adversary proceeding.

In re Klave, 2018 WL 1214377 (Bankr. D. Ariz., March 7, 2018)

(case no. 2:16-bk-14246) (Chief Bankruptcy Judge Daniel P. Collins) Text of opinion

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Direct payment by debtor:** Under local rules, once the Chapter 13 debtors entered the court's Mortgage Modification Mediation Program, their home mortgage payments needed to be made through the Chapter 13 trustee until the mortgage creditor consented to elimination of the conduit mortgage payment arrangement.

In re Mailatyar, 2018 WL 1614142 (Bankr. D. Ariz., March 30, 2018)

(case no. 2:17-bk-13538) (Chief Bankruptcy Judge Daniel P. Collins) Text of opinion

- **Chapter 13—Eligibility—Debt limits:** A claim on which a Chapter 13 debtor is personally liable, but which is secured by property that is not property of the bankruptcy estate, is considered an unsecured claim for the purpose of the Chapter 13 debt limits in Code § 109(e).

- **Binding effect of Bankruptcy Appellate Panel decision:** The court continued to adhere to its position announced in *In re Sample*, 2013 WL 3759795 (Bankr. D. Ariz., July 15, 2013) that, so long as there is not a contrary published opinion from the District Court of Arizona, the court would follow the opinions of the Ninth Circuit BAP, whether or not the court agreed with the reasoning behind the particular BAP decision.

In re Stites, 2018 WL 1267837 (Bankr. D. Or., March 9, 2018)

(case nos. 3:14-bk-35071, 6:15-bk-62393, 6:15-bk-63116; adv. proc. nos. 3:16-ap-3013, 6:16-ap-6061, 6:16-ap-6062) (Bankruptcy Judge David W. Hercher) Text of opinion

- **BAPCPA—Liability of attorney:** While an attorney and his law firm violated Code § 526(a)(3) by making a misrepresentation to a client, the violation was neither intentional nor part of a clear pattern and practice of violations, so under § 526(c)(5), no remedy was available for that violation in a proceeding by the U.S. Trustee.

- **BAPCPA—Liability of attorney:** The law firm also violated § 526(a)(2) by advising or counseling a debtor to make untrue or misleading statements in her statement of financial affairs, and this warranted a penalty of $5,000 and an injunction against future violations in a proceeding by the U.S. Trustee.

In re Tollstrup, 2018 WL 1384378 (Bankr. D. Or., March 16, 2018)

(case no. 3:15-bk-33924) (Bankruptcy Judge David W. Hercher) Text of opinion

- **Chapter 13—Application of Bankruptcy Rule 3002.1:** Where a Notice of Mortgage Payment Change filed by the Chapter 13 debtor's mortgage creditor contained inaccurate information by misstating the debtor's escrow obligation, the debtor was entitled to recover the attorney's fees incurred in responding to the creditor's violation of Bankruptcy Rule 3002.1, but the court lacked authority to award either compensatory damages or monetary sanctions.

Tenth Circuit (9) R

In re Kim, 585 B.R. 881 (D. Colo., March 2, 2018), appeal filed, Case No. 18-1186 (10th Cir., filed May 3, 2018)

(case no. 1:16-cv-2928) (District Judge Philip A. Brimmer) Text of opinion

- **Proof of claim—Secured claim—Right to enforce note—Lost note:** A mortgage creditor could enforce the debtors' lost mortgage note under Colo. Rev. Stat. § 4-3-309.

In re Chapman, 2018 WL 1614152 (Bankr. D. Kan., March 30, 2018)

(case no. 6:17-bk-12138) (Bankruptcy Judge Dale L. Somers) Text of opinion

- **Chapter 7—Conversion by debtor—To Chapter 13:** Granting the Chapter 7 debtor's motion to convert to Chapter 13, the court said that the debtor's alleged bad faith was not so clear that converting the case to Chapter 13 would undoubtedly be a waste of everyone's time and effort. In addition, waiting to rule on the debtor's motion to convert would leave the Chapter 7 trustee in something of a quandary, uncertain if he should proceed to fulfill his duties as a Chapter 7 trustee, or wait to take any further action until the motion is decided.

In re Dollman, 582 B.R. 524 (Bankr. D. N.M., March 5, 2018), appeal filed, Case No. 18-30 (10th Cir. B.A.P., filed March 19, 2018)

(case no. 1:13-bk-13057) (Chief Bankruptcy Judge Robert H. Jacobvitz) Text of opinion

- **Property of the estate—Exemptions—Amendment of exemptions—In reopened case; Required schedules and information—Amendment:** After a case has been closed, a debtor must obtain leave of court to amend the debtor's schedules under Bankruptcy Rule 1009(a) consistent with the requirements of excusable neglect under Bankruptcy Rule 9006(b), even if the case is later reopened. Here, while the Chapter 7 debtors established neglect, they did not establish that the neglect was excusable. Accordingly, the debtors would not be permitted to amend their schedules in their reopened case so as to add an undisclosed cause of action and claim an exemption in that asset.

In re Galvin, 583 B.R. 262 (Bankr. D. Colo., March 2, 2018)

(case no. 1:17-bk-13786) (Bankruptcy Judge Joseph G. Rosania, Jr.) Text of opinion

- **Property of the estate—Exemptions—Under state law—Of homestead:** A recreational vehicle that the 76-year-old debtor and his wife utilized as their primary residence was in the nature of a "motor home," which was not exempt, rather than a "manufactured home," in which debtor might have claimed a homestead exemption, even though the vehicle had amenities similar to a home, including sleeping quarters with a queen-size bed, televisions, a dining area and kitchenette with a cooktop, a microwave oven, a refrigerator, a sink, a second bathroom sink, a shower and toilet, heating and air conditioning systems, and plumbing and electrical systems capable of being hooked up to external sources. See *In re Romero*, 533 B.R. 807 (Bankr. D.

Colo. 2015), aff'd, 579 B.R. 551 (D. Colo. 2016) (a Peterbuilt Truck used by the debtor, a long-haul truck driver, as his abode was not entitled to the protection of the Colorado homestead exemption because it did not meet the statutory definition of a "mobile home" or a "manufactured home."

In re Gimbel, 2018 WL 1229718 (Bankr. D. N.M., March 8, 2018)

(case no. 1:11-bk-12802; adv. proc. no. 1:17-ap-1048) (Chief Bankruptcy Judge Robert H. Jacobvitz) Text of opinion

- **Dischargeability of debt—Student loan debt under Code § 523(a)(8):** There is no deadline expressly imposed by the Bankruptcy Code or Rules for filing an adversary proceeding to determine whether a student loan debt may be discharged under § Code 523(a)(8) for undue hardship, and six years following a Chapter 7 discharge is not, as a matter of law, always too long for a debtor to wait to commence an adversary proceeding to discharge student loan debt.

- **Dischargeability of debt—Student loan debt under Code § 523(a)(8):** Where a Chapter 7 debtor files a proceeding to discharge the debtor's student loan debt under Code § 523(a)(8) some years after the debtor's discharge, the court did not need to decide whether the undue hardship must have existed at the time of the debtor's discharge, since the parties agreed that undue hardship must have existed at that time.

- **Dischargeability of debt—Student loan debt under Code § 523(a)(8):** The second requirement of the *Brunner* test for undue hardship under Code § 523(a)(8) is that additional circumstances exist indicating that the state of affairs demonstrating undue hardship is likely to persist for a significant portion of the repayment period of the student loans. It is irrelevant to the second prong whether the reasons for the hardship that prevent a debtor from repaying student loans while maintaining a minimal standard of living remain the same as the reasons for the initial hardship. For example, consistent with the purpose of the *Brunner* test, if a debtor was in dire financial straits when granted a Chapter 7 discharge because her business failed, but then the debtor got a job that she lost almost immediately as a result of contracting an incurable disease, the debtor's persisting undue hardship could prevent the debtor from repaying the student loans while maintaining a minimal standard of living even though the reasons for the hardship changed.

In re Hill, 2018 WL 1448750 (Bankr. N.D. Okla., March 22, 2018)

(case nos. 4:17-bk-11083, 4:17-bk-11503) (Chief Bankruptcy Judge Terrance L. Michael)

Text of opinion

- **Chapter 13—Disposition of funds held by trustee—Upon conversion of case:** Where a Chapter 13 case is converted to Chapter 7 without confirmation of a Chapter 13 plan, the Chapter 13 trustee may not pay the debtor's attorney's allowed fees from undistributed funds held by the trustee, as the funds belong to the debtor.

In re Koonce, 582 B.R. 239 (Bankr. W.D. Okla., March 26, 2018)

(case no. 5:14-bk-11375) (Chief Bankruptcy Judge Janice Loyd) Text of opinion

- **Chapter 7—Sale of estate property by trustee—Distribution of proceeds:** An exception to the general rule prohibiting a trustee's surcharge against encumbered property is Code § 506(c), which provides that "the trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property." The trustee bears the burden of proving (1) the expenditure was necessary, (2) the amounts expended were reasonable, and (3) the creditor benefitted from the expenses. However, expenses incurred contesting the validity of a secured creditor's lien cannot be said to provide a benefit to that secured creditor within the meaning of § 506(c). Additionally, § 506(c) provides for the recovery of "necessary costs and expenses"; it does not mention fees. Thus, even in those circumstances in which the trustee has expended time and money to preserve or dispose of a secured creditor's collateral, the trustee's recovery under § 506(a) is to reimburse the estate for the trustee's expenditure; it is not appropriate to pay him his statutory fees/commission.

- **Chapter 7—Allowance of fees for trustee's attorneys:** Insofar as allowance of the fees of the Chapter 7 trustee's attorneys was concerned, compensation for services and reimbursement of expenses of professional persons are governed by Code § 330. The normal "threshold issue" bearing on a professional's eligibility for compensation is whether the professional's services conferred a benefit on the bankruptcy estate. In the Tenth Circuit, an adjusted lodestar method is to be used in determining reasonable compensation for a professional's services. This method takes into account all of the factors specified by § 330(a)(3) and the additional factors prescribed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

In re Milliman, 2018 WL 1475937 (Bankr. D. Kan., March 23, 2018)

(case no. 6:17-bk-10393) (Bankruptcy Judge Robert E. Nugent) Text of opinion

- **Proof of claim—Imposition of sanctions for inaccuracy:** Where the Chapter 13 debtors' mortgage creditor filed a proof of claim and a mortgage proof of claim attachment that overstated the debtors' escrow shortage by over $4,000 despite what the creditor's escrow statement of account stated, the creditor failed to respond to both informal inquiries and formal discovery requests by the debtors' attorney, and the creditor failed to amend its proof of claim for over 200 days, the court imposed sanctions on the creditor, as provided for in Bankruptcy Rule 3001(c)(2)(D), in the amount of $5,875, representing the reasonable fees and expenses incurred by the debtors' attorney in her effort to get the creditor to properly state the amount of the debtors' escrow shortage.

In re Welker, Case No. 1:16-bk-15941, Adv. Proc. No. 1:16-ap-1330 (Bankr. D. Colo., March 22, 2018)

(Bankruptcy Judge Kimberley H. Tyson) Text of opinion

- **Dischargeability of debt—For misrepresentation under Code § 523(a)(2)(A):** Although the debtors' construction company failed to complete the work required under two contracts with the creditor, the creditor's judgment against the debtors for the cost of completing the projects was dischargeable under Code § 523(a)(a)(A). The matter was submitted to arbitration, the arbitrator found that, at the time the parties entered into the contracts, the debtor husband "intended to complete and deliver the barn and shed and thereby earn the bargained for contract amounts," and that finding was binding on the court under principles of collateral estoppel.

- **Dischargeability of debt—For defalcation by fiduciary under Code § 523(a)(4):** Although the debtors' construction company failed to complete the work required under two contracts with the creditor, the debtors' violation of the Colorado Trust Fund Statute did not amount to defalcation by a fiduciary that would render the resulting judgment nondischargeable under Code § 523(a)(4). Under prior precedent, the arbitrator's finding of a Trust Fund Statute violation would have been sufficient to establish a "defalcation" under § 523(a)(4). But the Supreme Court overruled that precedent in *Bullock v. BankChampaign, N.A.*, 569 U.S. 267 (2013), which held that a creditor seeking to have a debt declared nondischargeable under § 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity must establish that the debtor acted with a specific mental state, either actual knowledge of wrongdoing, or "reckless conduct of the kind that the criminal law often treats as the equivalent," including actions where the fiduciary "consciously disregards (or is willfully blind to) a substantial and unjustifiable risk that his conduct will turn out to violate a fiduciary duty." Here, the required culpable mental state was not established, where both debtors credibly testified that they were unaware of the existence of the Trust Fund Statute and the duties it placed upon them, and the court found that they had neither actual knowledge of wrongdoing nor conscious disregard of a risk of failing to account for the funds the creditor had paid to the debtors' company, nor did the debtors act recklessly.

- **Dischargeability of debt—For embezzlement under Code § 523(a)(4):** Embezzlement is "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *In re Wallace*, 840 F.2d 762 (10th Cir. 1988). A claim of embezzlement under Code § 523(a)(4) has five elements: (1) entrustment (property lawfully obtained originally); (2) of property; (3) of another; (4) that is misappropriated (used or consumed for a purpose other than that for which it was entrusted); (5) with fraudulent intent. *In re Ghaemi*, 492 B.R. 321 (Bankr. D. Colo. 2013).

- **Dischargeability of debt—For embezzlement under Code § 523(a)(4):** Here, where the debtors, who operated a construction company, took the creditor's money but did not complete the parties' construction contracts, the court found that the first four elements of embezzlement were actually litigated and necessarily adjudicated in the creditor's arbitration award against the debtors. The arbitration award, however, did not establish the fifth element because fraudulent intent was not required to show a violation of the Trust Fund Statute or civil theft under Colorado law. Since the court could not find that the debtors acted with fraudulent intent, or an intention to

steal the funds paid by the creditor, the debtors' conduct did not amount to embezzlement under § 523(a)(4).

Eleventh Circuit (17) R

Cadwell v. Kaufman, Englett & Lynd, PLLC, 886 F.3d 1153 (11th Cir., March 30, 2018)

(case no. 17-10810) Text of opinion

- **BAPCPA—Duties of attorney:** Code § 526(a)(4), which was added by BAPCPA, provides in relevant part that a debt relief agency--including a law firm that provides bankruptcy-related services--"shall not advise" a debtor "to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer a fee or charge for services performed as part of preparing for or representing a debtor" in a bankruptcy case. In *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), the Supreme Court unanimously concluded that the section's first prohibition--on advice to incur additional debt "in contemplation of" a bankruptcy filing--requires proof that the advice was given for an invalid purpose designed to manipulate the bankruptcy process. In a case presenting the question whether the statute's second prohibition--on advice to incur debt to pay for a lawyer's bankruptcy-related representation--likewise entails an invalid-purpose requirement, the Court of Appeals held that it does not and that an attorney violates § 526(a)(4) if the attorney instructs a client to pay his bankruptcy-related legal fees using a credit card. A bankruptcy attorney's advice that a potential client take on additional debt in order to pay the attorney's fee is inherently abusive in at least two respects: it puts the attorneys financial interest--getting paid in full--ahead of the clients, and it puts the attorney's own interests ahead of the creditors' in that, while ensuring the lawyer's full payment, it leaves a diminished estate on which creditors can draw. The Court of Appeals accordingly reversed *Cadwell v. Kaufman, Englett & Lynd, PLLC*, 2017 WL 5307898 (M.D. Fla., Jan. 24, 2017).

In re Serra, 2018 WL 1516624 (S.D. Fla., March 28, 2018)

(case no. 1:17-cv-22224) (District Judge Marcia G. Cooke) Text of opinion

- **Chapter 13—Dismissal of case under Code § 1307(c)—Procedural requirements; Authority of the court—Under Code § 105(a)—Dismissal of case:** The bankruptcy court erred in dismissing the pro se Chapter 13 debtor's case without notice to the debtor and a hearing. If the dismissal was under Code § 1307(c), that provision states that the court may dismiss a Chapter 13 case "on request of a party in interest or the United States trustee and after notice and a hearing." And, while a bankruptcy court may dismiss a case on its own motion, the Chapter 13 trustee cited to no caselaw indicating that a case may be dismissed without notice to the debtor and an opportunity for her to be heard.

Redstone Federal Credit Union v. Whited, 584 B.R. 71 (N.D. Ala., March 27, 2018), **appeal filed**, In re Whited, Case No. 18-11659 (11th Cir., filed April 20, 2018)

(case no. 5:17-cv-496) (District Judge Madeline Hughes Haikala) Text of opinion

- **Property of the estate—Avoidance of lien impairing exemption—Effect of change in law:** At least in a "mixed debt" case--one in which the debtor has debt that arose both before and after the increase in the exemption amount--the exemption amount in effect on the petition date, rather than the exemption amount in effect when the creditor's lien attached, is applied in determining, under Code § 522(f), whether the lien impairs the debtor's claimed exemption.

In re Bentley, 2018 WL 1318951 (Bankr. M.D. Fla., March 8, 2018)

(case no. 6:17-bk-294) (Bankruptcy Judge Karen S. Jennemann) Text of opinion

- **Appointment of guardian; Authority of the court—Under Code § 105(a):** Where the debtor was an elderly ailing woman who had been diagnosed with dementia, and the debtor's counsel had represented to the court on multiple occasions that the debtor might be incompetent or mentally incapacitated, the court, using its inherent authority under Code § 105(a) in conjunction with the principles outlined in Bankruptcy Rules 1004.1 and 7017, found it appropriate to appoint a guardian advocate, more akin to a special master, for the limited purpose of providing a specific report to the court. The guardian advocate would be appointed to render a preliminary opinion on whether the debtor needed a formal guardian appointed by a state court before litigation in the bankruptcy court could proceed. The court emphasized that it made no determination that the debtor was legally incompetent or legally incapacitated at this time, and that the guardian advocate had no authority to assume responsibility for the person, property, or finances of the debtor.

In re Brodgen, 583 B.R. 527 (Bankr. M.D. Ala., March 30, 2018)

(case no. 2:17-bk-30955; adv. proc. no. 2:17-ap-3029) (Chief Bankruptcy Judge William R. Sawyer) Text of opinion

- **Violation of stay—Retention of property of estate:** Even if the Chapter 13 debtor possessed a vehicle under a lease rather than a security agreement, the creditor's postpetition repossession of the vehicle violated the stay. Whether the underlying contract between the parties was in fact a lease or a security agreement was, at a minimum, a fact that was in dispute, and, even if the agreement was a lease, the only conclusion to be drawn was that the debtor's rights under the contract had not been terminated. Moreover, after repossessing the vehicle, the creditor returned it to the debtor upon receipt of $703—establishing that the purpose of its repossession was to extract money from the debtor, on its prepetition claim, and not to regain possession of the vehicle. The plain language of Code § 362(a)(6) requires only an act to collect a claim, irrespective of whether the act had any effect on property of the estate. Accordingly, the debtor stated claims under Code § 362(a)(3) and § 362(a)(6).

In re Doolittle, 2018 WL 1627152 (Bankr. S.D. Ga., March 30, 2018)

(case no. 1:16-bk-11048) (Bankruptcy Judge Susan D. Barrett) Text of opinion

- **Property of the estate—In Chapter 13 case—Effect of plan confirmation:** The Eleventh Circuit has adopted the estate transformation approach to the effect of Chapter 13 plan confirmation on property of the estate. See *In re Telfair*, 216 F.3d 1333 (11th Cir. 2000) (the estate transformation approach would be adopted to govern vesting and protection of Chapter 13 debtor's post-confirmation earnings, under which only that property necessary for execution of plan will remain property of estate after confirmation; the debtor's regular mortgage loan payments, made outside of plan, were no longer property of the estate after confirmation) and *In re Waldron*, 536 F.3d 1239 (11th Cir. 2008) (while some property of the estate revests in the Chapter 13 debtor at confirmation, property acquired later vests in the estate, until the case ends or is converted).

- **Property of the estate—In Chapter 13 case—Effect of plan confirmation:** Where the Chapter 13 debtor's mortgage creditor returned to the Chapter 13 trustee an escrow overage resulting from the debtor's prepetition payments, postpetition but pre-confirmation payments, and post-confirmation payments, all made directly to the creditor by the debtor, the overage resulting from post-confirmation payments was property of the estate that the trustee could retain, as it was similar to a tax refund. Under *In re Telfair*, 216 F.3d 1333 (11th Cir. 2000) and *In re Waldron*, 536 F.3d 1239 (11th Cir. 2008), the overage resulting from pre-confirmation payments was not necessary for the fulfillment of the debtor's plan and revested in the debtor upon plan confirmation. However, under *Thompson v. Quarles*, 392 B.R. 517 (S.D. Ga. 2008), that overage could not be returned to the debtor until he amended his schedules to disclose the overage.

In re England, 586 B.R. 795 (Bankr. M.D. Ala., March 30, 2018)

(case no. 1:17-bk-10197) (Chief Bankruptcy Judge William R. Sawyer) Text of opinion

- **Chapter 13—Application of Bankruptcy Rule 3002.1:** In identical opinions issued in two cases, the bankruptcy court, in resolving the Chapter 13 debtors' challenges to their mortgage creditors' notices of postpetition fees and expenses under Bankruptcy Rule 3002.1(c), held that the court must look to the underlying agreement and applicable nonbankruptcy law to determine if the amounts are permissible; the "reasonableness standard" applied under Code § 506(b) in the case of oversecured creditors does not apply.

- **Chapter 13—Application of Bankruptcy Rule 3002.1:** Here, both mortgages contain choice-of-law provisions naming Alabama state law as the applicable law. It is well-established law in Alabama that the parties to a mortgage may agree to the payment of reasonable fees if certain circumstances arise or actions are taken. Therefore, a mortgage creditor may recover fees incurred in connection with the enforcement of a mortgage only where the mortgage contractually imposes a duty on the mortgagor to pay those fees and only where the fees are reasonable. The reasonableness of fees is determined on a case-by-case basis by the trial court.

- **Chapter 13—Application of Bankruptcy Rule 3002.1:** In one case, the Chapter 13 debtor's mortgage clearly limited the collection of fees to two circumstances: (1) in a

foreclosure proceeding initiated under the power of sale or (2) when permitted by applicable law. As noted above, Alabama law only permits the recovery of reasonable fees relating to a mortgage when a provision in the mortgage unambiguously provides for the collection of such fees. Thus, the mortgage only permitted the recovery of fees incurred during a foreclosure proceeding initiated pursuant to a power of sale clause, and this did not include fees incurred in connection with a bankruptcy proceeding. Accordingly, the debtor's mortgage creditor was not entitled to recover postpetition fees.

- **Chapter 13—Application of Bankruptcy Rule 3002.1:** In contrast, the second debtor's mortgage permitted the creditor to collect fees if "there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy ...." This provision permitted the creditor to charge the debtor for fees incurred in the debtor's bankruptcy case. However, the fees still needed to be reasonable, and the fees—$500 in attorney's fees for filing a proof of claim and $400 in attorney's fees for reviewing the debtor's Chapter 13 plan—appeared to be unreasonable. Since the creditor provided little detail for the charges, the court would disallow the charges but permit the creditor to file an amendment to its response to provide further justification for the charges.

- **Chapter 13—Application of Bankruptcy Rule 3002.1:** Once a debtor files a Motion to Determine Fees pursuant to Bankruptcy Rule 3002.1(e), the burden shifts to the creditor to substantiate the fees, expenses, and charges stated in the creditor's notice filed under Rule 3002.1(c). *In re Lighty*, 513 B.R. 489 (Bankr. D. S.C. 2014); *In re Trudelle*, 2017 WL 4411004 (Bankr. S.D. Ga., Sept. 29, 2017); *In re Polly*, 2016 WL 3004439 (Bankr. W.D. Ky., May 17, 2016); *In re Hale*, 2015 WL 1263255 (Bankr. D. S.C., March 16, 2015).

In re Green, 2018 WL 1581635 (Bankr. S.D. Ga., March 27, 2018)

(case no. 1:17-bk-11119) (Bankruptcy Judge Susan D. Barrett) Text of opinion

- **Chapter 13—Confirmation of plan—Good faith—Effect of Social Security income:** Because the Chapter 13 debtor's exclusion of his Social Security income from his "projected disposable income" is expressly allowed by the Bankruptcy Code, the debtor's failure to devote any of his Social Security income to the payment of unsecured creditors could not alone constitute bad faith under Code § 1325(a)(3).

In re Hrachova, 582 B.R. 808 (Bankr. M.D. Fla., March 19, 2018)

(case no. 3:17-bk-698; adv. proc. no. 3:17-ap-169) (Bankruptcy Judge Paul M. Glenn)

Text of opinion

- **Abstention—Permissive:** Where the Chapter 13 debtor's claim that her mortgage creditor lacked the authority to enforce her mortgage had been pending for several years in a state court foreclosure proceeding, the bankruptcy court would permissively abstain under 28 U.S.C. § 1334(c)(1) from deciding the debtor's adversary proceeding against the creditor asserting the same claim.

In re Jordan, 2018 WL 1626052 (Bankr. S.D. Ga., March 30, 2018)

(case no. 1:15-bk-11081) (Bankruptcy Judge Susan D. Barrett) Text of opinion

- **Property of the estate—In Chapter 13 case—Effect of plan confirmation:** The court followed *In re Doolittle*, 2018 WL 1627152 (Bankr. S.D. Ga., March 30, 2018), above, with respect to the status, as property of the estate, of an escrow overage sent the Chapter 13 trustee by the Chapter 13 debtor's mortgage creditor.

In re Lovo, 584 B.R. 79 (Bankr. S.D. Fla., March 28, 2018)

(case no. 1:17-bk-14372) (Bankruptcy Judge Robert A. Mark) Text of opinion

- **Proof of claim—Timeliness—Allowance of untimely claim:** Lack of notice is not a basis to allow a late claim in a Chapter 13 case under Bankruptcy Rule 3002(c), and a bankruptcy court does not have the authority to judicially create a lack of notice exception to timely filing a proof of claim when that exception is not listed in the applicable rule.

In re McCallum, 2018 WL 1449147 (Bankr. M.D. Ga., March 22, 2018)

(case no. 5:17-bk-51487; adv. proc. no. 5:17-ap-5054) (Chief Bankruptcy Judge James P. Smith)

Text of opinion

- **Jurisdiction—"Related to" jurisdiction:** The court had "related to" jurisdiction over the Chapter 13 debtor's action to set aside the prepetition foreclosure on her residence. If the debtor was successful, title to the residence would revert to the debtor, her debt to the mortgage creditor would be reinstated and the debtor would have to provide for the debt in her Chapter 13 plan.

- **Violation of stay:** The postpetition recording of a foreclosure deed to the Chapter 13 debtor's residence did not violate the automatic stay because the debtor's equity of redemption under the deed to secure debt terminated when the mortgage creditor accepted the high bid at the non-judicial foreclosure sale prior to the debtor's bankruptcy filing.

- **Actions against mortgage creditor:** Under Georgia law, a foreclosure under a deed to secure debt is valid so long as notice of the foreclosure sale is mailed to the owner in compliance with Ga. Code Ann. § 44–14–162.2, even if the owner does not receive the notice.

In re Mitchell, 2018 WL 1442256 (Bankr. N.D. Ga., March 21, 2018)

(case no. 1:17-bk-68428) (Bankruptcy Judge Paul Baisier) Text of opinion

- **Property of the estate—Avoidance of security interest under Code § 522(f)(1)(B); Property of the estate—Exemptions—Under state law:** The debtor's motor vehicle, which she used to travel to work sites to meet with clients in her work as a law clerk and tutor, was not a "tool of the trade" under Ga. Code Ann. § 44-13-100(a)(7), so that the debtor could not avoid a creditor's nonpossessory, nonpurchase-money security interest in the vehicle under Code § 522(f)(1)(B)(ii).

In re Nunez, 2018 WL 1568524 (Bankr. S.D. Fla., March 28, 2018), **appeal filed**, Reverse Mortgage Solutions, Inc. v. Nunez, Case No. 1:18-cv-22204 (S.D. Fla., filed June 4, 2018)

(case no. 1:17-bk-21018) (Chief Bankruptcy Judge Laurel M. Isicoff) Text of opinion

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Cure of default:** The Chapter 13 debtor was a "Borrower" under a reverse mortgage executed by herself and her mother prior to her mother's death and, as such, was able to cure a default under the reverse mortgage in the debtor's Chapter 13 plan.

In re Ochab, 586 B.R. 803 (Bankr. M.D. Ala., March 30, 2018)

(case no. 1:16-bk-12205) (Chief Bankruptcy Judge William R. Sawyer) Text of opinion

The opinion is the same as that issued in *In re England*, 586 B.R. 795 (Bankr. M.D. Ala., March 30, 2018), above.

In re Steffen, 583 B.R. 284 (Bankr. M.D. Fla., March 30, 2018)

(case no. 8:01-bk-9988) (Chief Bankruptcy Judge Michael G. Williamson) Text of opinion

- **Property of the estate:** Under Code § 541, a tax refund is property of the estate only if it is attributable to wages earned and withholding payments made during the prepetition years. Here, the court was not convinced that the debtor's tax refund was attributable to prepetition wages and withholding payments. The debtor was entitled to a refund, if at all, because of a tax credit that only arose because the debtor disgorged money postpetition, giving rise to a postpetition credit for the debtor's postpetition tax return, even though the credit was based on income paid years before the debtor's bankruptcy case was filed.

In re Word, 2018 WL 1616837 (Bankr. M.D. Fla., March 30, 2018)

(case no. 6:15-bk-4736; adv. proc. no. 6:15-ap-120) (Bankruptcy Judge Cynthia C. Jackson)

Text of opinion

- **Dischargeability of debt—Tax debt under Code § 523(a)(1):** For purposes of Code § 523(a)(1)(B)(i), providing that a tax liability for which a return was not filed is not discharged, a federal tax return is filed when the IRS receives actual delivery of the return. Congress, however, created some exceptions to the actual delivery rule for federal income tax returns. The exceptions are found in Section 7502 of the Internal Revenue Code. A tax return sent by U.S. mail is deemed delivered to the IRS by the postmark date stamped on the envelope containing the tax return. If a tax return is sent to the IRS by registered mail, a registration receipt is prima facie evidence that the return was delivered to the IRS. By regulation authorized in Section 7502, a postmarked certified mail receipt of a tax return sent by certified mail is also prima facie evidence that a tax return was delivered to the IRS. A tax return filed electronically is deemed by regulation authorized in Section 7502 to be filed with the IRS on the date of the electronic postmark receipt. When the proof required by Section 7502 is unavailable, the court may not consider extrinsic evidence to prove the filing of a tax return.

- **Dischargeability of debt—Tax debt under Code § 523(a)(1):** Here, although the court found the testimony of the debtor wife credible, she did not establish that she and her now-deceased debtor husband filed their 2010 federal income tax return, where an IRS bankruptcy specialist testified that the IRS did not receive the 2010 tax return prior to the debtors' bankruptcy filing, and the debtor wife, who provided the court with an application for an automatic extension of time for filing the 2010 tax return and a signed copy of the 2010 tax return dated September 19, 2011, could only testify that the debtors routinely prepared and filed their federal income tax returns over the past 20 years and that, based on their consistent course of conduct, the debtor husband would have mailed the 2010 tax return to the IRS.

District of Columbia Circuit (2) R

In re Picket, 2018 WL 1513541 (Bankr. D. D.C., March 26, 2018)

(case no. 1:18-bk-121) (Bankruptcy Judge S. Martin Teel, Jr.) Text of opinion

- **Prepetition credit counseling—Waiver due to disability or incapacity:** Although the debtor had suffered a stroke, the debtor did not show that she was "incapacitated" for the purpose of Code § 109(h)(4), where the debtor represented that her stroke had affected her attention span, but not her ability to realize and make rational decisions with respect to her financial responsibilities, and the debtor conceded that she was able to take credit counseling once she received her Social Security check.

In re Singleton, 2018 WL 1517122 (Bankr. D. D.C., March 26, 2018)

(case no. 1:16-bk-610; adv. proc. no. 1:17-ap-10006) (Bankruptcy Judge S. Martin Teel, Jr.)

Text of opinion

- **Issue preclusion—Application under circumstances; Dischargeability of debt—For willful and malicious injury under Code § 523(a)(6):** Because Maryland's criminal code and the related case law demonstrate that a defendant may be convicted of second-degree assault for either willful or reckless applications of force against another, while, for a debt to be nondischargeable under Code § 523(a)(6), the debtor must have inflicted injury deliberately or intentionally, the debtor's Maryland state conviction for second-degree assault did not establish that a subsequent civil judgment against the debtor was nondischargeable under § 523(a)(6).

- **Issue preclusion—Based on default judgment:** Under Maryland law, a default judgment does not have collateral estoppel effect when the defendant did not participate in the litigation in any manner. Thus, here, a default judgment in civil litigation against the debtor to recover for injuries sustained in fight between the debtor and the plaintiff did not have collateral estoppel effect in the plaintiff's subsequent nondischargeability proceeding where there was no appearance or filing by the debtor at any point during the state-court litigation.

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

Automatic stay terminated by operation of law under § 362(e)(2):

The Chapter 13 debtor's mortgage creditor filed a motion for relief from stay on August 15, 2017, and the 60th day from that date fell on October 14, 2017. While the court held a hearing on the motion on October 4, 2017, the court did not issue a decision by October 14, so that, under Code § 362(e)(2), the automatic stay terminated by operation of law on October 15, 2017, as to the property with respect to which the creditor sought relief from stay. The record of the October 4 hearing did not support the debtor's assertion that the creditor waived the protection of § 362(e)(2), as the creditor's counsel specifically asked the court to issue a decision that day.

In re Peterson, 2018 WL 1172447 (Bankr. D. Conn., March 2, 2018)

(case no. 2:10-bk-23429; adv. proc. nos. 2:15-ap-2008, 2:17-ap-2081) (Bankruptcy Judge Ann M. Nevins)

Text of opinion

Reimposition of automatic stay following expiration of stay under Code § 362(c)(3)(B):

Where the automatic stay has expired under Code § 362(c)(3)(B), the court lacks authority to reimpose the stay under Code § 105(a). While the court did not rule out the possibility that the debtor might be able to obtain an injunction against a particular creditor that would approximate the automatic stay, such a request required an adversary proceeding.

In re Galan, 2018 WL 1442243 (Bankr. D. Or., March 21, 2018)

(case no. 3:18-bk-30059) (Bankruptcy Judge David W. Hercher)

Text of opinion

See also:

Baechel v. Republic Storage Systems, LLC, 2018 WL 1243424 (N.D. Ohio, March 9, 2018) (case no. 5:16-cv-1403) (District Judge Sara Lioi) (federal district courts have jurisdiction concurrent with the originating bankruptcy court to determine the applicability of the bankruptcy court's automatic stay, and the court concluded that it had authority to determine whether "unusual circumstances" existed warranting the extension of the automatic stay to non-debtor parties, although courts were divided on the question of whether it was appropriate for district courts to engage in the "unusual circumstances" analysis) (text of opinion)

R

Relief from Stay

Topical compilation: All topical compilations

PDF Word All circuit compilations

Debtor's serial unsuccessful Chapter 13 filings warranting granting of in rem stay relief:

Where the debtor had filed five Chapter 13 cases (including her current one) in seven years, the court granted the mortgage creditor's motion for in rem stay relief under Code § 362(d)(4), where all four of the debtor's prior cases had been dismissed prior to discharge, although she had achieved plan confirmation in two of the four, and a close review of the facts revealed that the debtor's serial filings, some directly timed to foreclosure events, and some bearing unwarranted projections of rental income, compounded by disregard for her creditor's interests by failing to collect any rent from family members for several years, were all constituents of a scheme to delay or hinder the creditor from protecting its rights in the property.

In re House, 2018 WL 1505572 (Bankr. E.D. Wis., March 26, 2018)

(case no. 2:17-bk-30434) (Bankruptcy Judge Beth E. Hanan)

Text of opinion

See also:

In re Trammell, 584 B.R. 824 (Bankr. E.D. Tenn., March 19, 2018) (case no. 3:17-bk-32873) (Bankruptcy Judge Suzanne H. Bauknight) (even if the IRS violated the automatic stay, following the debtor's bankruptcy filing, by refusing to release its levy on the disability pension payable to the debtor by major league baseball, the IRS was entitled to retroactive relief from stay for cause under Code § 362(d)(1) in order to eliminate any such violation) (text of opinion)

R

Violation of Stay

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Defendants in litigation by debtor lacked standing to assert debtor's stay violation:

While Code § 362 is intended to protect debtors, creditors, and assets of the estate, it is not intended to protect the defendants in litigation commenced by the debtor. Accordingly, the defendants lacked prudential standing to pursue remedies under Code § 362(k) for the debtor's alleged violation of the stay.

In re Taylor, 2018 WL 1413538 (Bankr. D. Conn., March 20, 2018), **motion for reconsideration filed** (March 23, 2018)

(case no. 3:15-bk-31208) (Bankruptcy Judge Ann M. Nevins)

Text of opinion

Creditor's repossession of vehicle, even if leased, and debt collection attempts violated stay:

Even if the Chapter 13 debtor possessed a vehicle under a lease rather than a security agreement, the creditor's postpetition repossession of the vehicle violated the stay. Whether the underlying contract between the parties was in fact a lease or a security agreement was, at a minimum, a fact that was in dispute, and, even if the agreement was a lease, the only conclusion to be drawn was that the debtor's rights under the contract had not been terminated. Moreover, after repossessing the vehicle, the creditor returned it to the debtor upon receipt of $703—establishing that the purpose of its repossession was to extract money from the debtor, on its prepetition claim, and not to regain possession of the vehicle. The plain language of Code § 362(a)(6) requires only an act to collect a claim, irrespective of whether the act had any effect on property of the estate. Accordingly, the debtor stated claims under Code § 362(a)(3) and § 362(a)(6).

In re Brodgen, 583 B.R. 527 (Bankr. M.D. Ala., March 30, 2018)

(case no. 2:17-bk-30955; adv. proc. no. 2:17-ap-3029) (Chief Bankruptcy Judge William R. Sawyer)

Text of opinion

Creditor's standing to assert stay violation, generally:

The term "individual" in Code § 362(k) refers to both debtors and non-debtors. *St. Paul Fire & Marine Ins. Co. v. Labuzan*, 579 F.3d 533 (5th Cir. 2009). The automatic stay protects debtors from collection activities by creditors, and it protects creditors by preserving the estate and blocking efforts of other creditors from gaining an unfair advantage. Because the automatic stay is meant, in part, to protect creditors, creditors are deemed individuals within the zone of interest of § 362(k) and thus have standing to enforce its provisions. A creditor's standing to enforce the provisions of the automatic stay is not, however, without limitation. The enforcing creditor must assert an injury in his capacity as a creditor of the estate. *In re Peeples*, 880 F.3d 1207 (10th Cir. 2018). And the creditor must assert his own direct injury and not a claim that any creditor could bring or a claim that belongs to the estate. If a claim could be asserted by any creditor, then that claim belongs to the estate, and only the trustee can bring the claim.

Creditor had standing to assert stay violation:

Here, a creditor of the Chapter 7 debtor was asserting his own claim and an injury unique to him. He was not given notice of the filing of the debtor's bankruptcy case and incurred thousands of dollars in attorney's fees in a state court proceeding after the state court had lost jurisdiction over the debtor's property that was the subject of their dispute, as the property became property of the bankruptcy estate over which the bankruptcy court had jurisdiction. The debtor continued the state court action in violation of the automatic stay and without standing, all to the creditor's financial detriment. The resulting injuries from the debtor's conduct were suffered by the creditor alone and could not be prosecuted by other creditors or on behalf of the estate.

Debtor violated stay by facilitating continued prosecution of prepetition litigation:

The Chapter 7 debtor's continued prosecution, postpetition, of a counterclaim against a creditor in state court litigation commenced by the creditor prepetition, in combination with the debtor's failure to inform the creditor of the bankruptcy filing, resulted in the debtor's violating the automatic stay in two ways. While the continued prosecution of the counterclaim did not violate Code § 362(a)(1), the debtor's failure to inform the creditor of his bankruptcy filing facilitated the creditor's violation of § 362(a)(1), which prohibits the continued prosecution of a prepetition proceeding against the debtor. Moreover, since the counterclaim was property of the estate, the debtor's continued prosecution of the counterclaim violated § 362(a)(3) as an act to exercise control over property of the estate.

Court awards creditor $10,000 in punitive damages, as well as compensatory damages, for debtor's stay violation:

As compensatory damages, the creditor would be given an opportunity to purchase all claims that were raised or that could have been raised in the debtor's counterclaim, as well as $5,000 in attorney's fees. The court also awarded the creditor $10,000 in punitive damages, finding that the debtor's conduct evidenced a "well-developed plan to keep [the creditor] in the dark while also cutting the Trustee out of any settlement proceeds."

In re DeLay, 2018 WL 1596883 (Bankr. C.D. Ill., March 29, 2018), appeal filed, DeLay v. Bandy, Case No. 3:18-cv-3105 (C.D. Ill., May 9, 2018)

(case no. 3:14-bk-71512; adv. proc. no. 3:16-ap-7040) (Chief Bankruptcy Judge Mary P. Gorman)

Text of opinion

See also:

Baines v. City of Chicago, 584 B.R. 723 (N.D. Ill., March 22, 2018) (case nos. 1:17-cv-4926, 1:17-cv-4929) (District Judge Robert M. Dow, Jr.) (a provision of the Chicago municipal code, which creates a statutory possessory lien in impounded vehicles for the amount due under unpaid traffic tickets, is not preempted by the Bankruptcy Code) (text of opinion)

In re McCallum, 2018 WL 1449147 (Bankr. M.D. Ga., March 22, 2018) (case no. 5:17-bk-51487; adv. proc. no. 5:17-ap-5054) (Chief Bankruptcy Judge James P. Smith) (the postpetition recording of a foreclosure deed to the Chapter 13 debtor's residence did not violate the automatic stay because the debtor's equity of redemption under the deed to secure debt terminated when the mortgage creditor accepted the high bid at the non-judicial foreclosure sale prior to the debtor's bankruptcy filing) (text of opinion)

R

Part B

Dischargeability

Domestic Support Obligations; Other Marital or Support Debts

Debt for overpayment of child support was not DSO:

The debtor's debt for repayment of excess child support paid to her by her former husband was not a DSO because the debt was not in the nature of support; the debt was merely reimbursement owed by the debtor for an overpayment made by the former husband.

Debt for overpayment of child support was nondischargeable under Code § 523(a)(15):

The debtor's debt for repayment of excess child support paid to her by her former husband was nondischargeable under Code § 523(a)(15) because the repayment obligation arose from a court order issued in furtherance of the parties' divorce decree.

In re Viruet, 2018 WL 1568921 (Bankr. D. N.J., March 29, 2018)

(case no. 2:15-bk-22851; adv. proc. no. 2:15-ap-2429) (Bankruptcy Judge Stacey L. Meisel)

Text of opinion

R

Student Loan Debts

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Six years after discharge was not too late for Chapter 7 debtor to commence proceeding to discharge student loan debt:

There is no deadline expressly imposed by the Bankruptcy Code or Rules for filing an adversary proceeding to determine whether a student loan debt may be discharged under § Code 523(a)(8) for undue hardship, and six years following a Chapter 7 discharge is not, as a matter of law, always too long for a debtor to wait to commence an adversary proceeding to discharge student loan debt.

In student loan discharge proceeding filed six years after debtor's discharge, court did not need to decide whether undue hardship must have existed at time of discharge:

Where a Chapter 7 debtor files a proceeding to discharge the debtor's student loan debt under Code § 523(a)(8) some years after the debtor's discharge, the court did not need to decide whether the undue hardship must have existed at the time of the debtor's discharge, since the parties agreed that undue hardship must have existed at that time.

Reasons for undue hardship over period of time encompassed by second prong of *Brunner* test may change over time:

The second requirement of the *Brunner* test for undue hardship under Code § 523(a)(8) is that additional circumstances exist indicating that the state of affairs demonstrating undue hardship is likely to persist for a significant portion of the repayment period of the student loans. It is irrelevant to the second prong whether the reasons for the hardship that prevent a debtor from repaying student loans while maintaining a minimal standard of living remain the same as the reasons for the initial hardship. For example, consistent with the purpose of the *Brunner* test, if a debtor was in dire financial straits when granted a Chapter 7 discharge because her business failed, but then the debtor got a job that she lost almost immediately as a result of contracting an incurable disease, the debtor's persisting undue hardship could prevent the debtor from repaying the student loans while maintaining a minimal standard of living even though the reasons for the hardship changed.

In re Gimbel, 2018 WL 1229718 (Bankr. D. N.M., March 8, 2018)

(case no. 1:11-bk-12802; adv. proc. no. 1:17-ap-1048) (Chief Bankruptcy Judge Robert H. Jacobvitz)

Text of opinion

Debtor's obligation to father to repay college loans did not come within Code § 523(a)(8)(A)(i) or § 523(a)(8)(B):

The debtor's obligation under a promissory note to pay her father for the principal sum of all Parent PLUS loans taken out by him on her behalf to attend college did not come within Code § 523(a)(8). The obligation did not fit within § 523(a)(8)(A)(i) because it was not made, insured or guaranteed by a governmental unit or nonprofit institution. Nor did the obligation fit within § 523(a)(8)(B), as the loan was not a "qualified educational loan" as defined by IRC § 221(d)(1). The IRC made clear, in 26 U.S.C. § 267(b) and § 707(b)(1), that qualified educational loans do not include debts owed to "related persons."

Broad and narrow views on meaning of "educational benefit" in Code § 523(a)(8)(A)(ii):

This left § 523(a)(8)(A)(ii), applying to an "obligation to repay funds received as an educational benefit," as the only possible ground for excepting the loan from discharge. There was a split of authority on the question of whether the term "educational benefit" in § 523(a)(8)(A)(ii) included a loan such as the one under consideration in the present case. Generally speaking, this split broke down into those cases finding that, so long as the purpose of a loan was to provide for education, it could constitute an "educational benefit" under § 523(a)(8(A)(ii) (which the court called the "Broad View"), and those cases finding that an "educational benefit" is something distinct from a loan, and therefore that a loan in and of itself cannot be an "educational benefit" under § 523(a)(8)(A)(ii) (which the court called the "Narrow View").

Debtor's obligation to father to repay college loans did not come within Code § 523(a)(8)(A)(ii):

Agreeing with the narrow view, the court reasoned that interpreting § 523(a)(8)(A)(ii) to include loans used for educational purposes renders § 523(a)(8)(A)(i) and § 523(a)(8)(B) largely meaningless. See generally *In re Essangui*, 573 B.R. 614 (Bankr. D. Md. 2017); *In re Dufrane*, 566 B.R. 28 (Bankr. C.D. Cal. 2017); *In re Campbell*, 547 B.R. 49 (Bankr. E.D. N.Y. 2016). Here, if the court were to determine that an "educational benefit" included a loan between a father and daughter, the specific exclusion of loans between family members from the definition of a "qualified educational loan" in § 523(a)(8)(B) would be rendered ineffectual and superfluous. Moreover, the fact that Congress amended § 523(a)(8) in 2005 to contain three disjunctive subsections more likely indicated that Congress intended § 523(a)(8)(A)(ii) to cover debts totally different from the other two subsections.

In re Nypaver, 581 B.R. 431 (Bankr. W.D. Pa., March 7, 2018)

(case no. 2:16-bk-23381) (Bankruptcy Judge Thomas P. Agresti)

Text of opinion

Organization's acceptance of mail brought student loan within Code § 523(a)(8):

A loan was "made under any program funded in whole or in part by a . . . nonprofit institution" within the meaning of Code § 523(a)(8)(A)(i) where the only demonstrated involvement of The Educational Resources Institute, Inc. (TERI), a nonprofit organization, was to accept loan applications. The bankruptcy court reasoned that accepting mail necessitated the expenditure of funds, so that the "funding" element was satisfied.

In re Page, Case No. 4:10-bk-50203, Adv. Proc. No. 4:17-ap-4062 (Bankr. E.D. Mo., March 22, 2018), appeal filed, Case No. 18-6011 (8th Cir. B.A.P., filed March 27, 2018)

(Bankruptcy Judge Charles E. Rendlen III)

Text of opinion

Debtor's obligation to repay portion of Pell grant after she dropped out from college came within Code § 523(a)(8)(A)(ii):

The Chapter 7 debtor's debt to a technical college came within Code § 523(a)(8)(A)(ii) as "an obligation to repay funds received as an educational benefit, scholarship or stipend," where the debtor received a federal Pell grant to attend the college but then dropped out during the semester. Federal regulations provide that, when a student who received assistance under the federal Pell Grant program withdraws from school, the institution must calculate the portion of funds that the student has not earned, and the school must return the unearned funds to the U.S. Department of Education. The college did so for the unearned portion of the student's Pell grant and was then entitled to collect that amount from the student.

In re Cross, 2018 WL 1448669 (Bankr. E.D. Wis., March 22, 2018)

(case no. 2:13-bk-32933) (Bankruptcy Judge Brett H. Ludwig)

Text of opinion

Court limits coverage of Code § 523(a)(8)(A)(ii):

To be excepted from discharge under Code § 523(a)(8)(A)(ii), which encompasses "an obligation to repay funds received as an educational benefit, scholarship, or stipend," a debtor must have taken on an obligation to repay funds that were given in the form of an educational benefit, a scholarship or a stipend; the provision does not encompass all loans used for educational purposes. Thus, here, a bar exam study loan owed by one debtor and a career training loan owed by a second debtor did not come within § 523(a)(8)(A)(ii).

In re Crocker, 2018 WL 1626245 (Bankr. S.D. Tex., March 26, 2018), **direct appeal filed**, Crocker v. Navient Solutions, L.L.C., Case No. 18-20254 (5th Cir., filed April 25, 2018)

(case no. 4:15-bk-35886; adv. proc. no. 4:16-ap-3175) (Chief Bankruptcy Judge David R. Jones)

Text of opinion

Debt owed to guarantor of debtor's student loan debt came within Code § 523(a)(8)(ii):

Disagreeing with *In re Posner*, 434 B.R. 800 (Bankr. E.D. Mich. 2010), which held that a co-signer of the debtor's student loan was a co-borrower, rather than a lender, so that the debtor's debt to the co-signer after the co-signer was obligated to repay the loan was not within the coverage of Code § 523(a)(8), the court held that the debtor's debt to a friend who had co-signed and guaranteed the debtor's student loan debt, and had been obligated to pay the debt after the debtor's default, came within Code § 523(a)(8)(ii).

In re Kelly, 582 B.R. 905 (Bankr. S.D. Tex., March 23, 2018)

(case no. 4:17-bk-32295; adv. proc. no. 4:17-ap-3320) (Bankruptcy Judge Jeff Bohm)

Text of opinion

R

Other Debts

Scope note: Coverage is quite selective.

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

State court decision did not establish defense to creditor's nondischargeability claim under Code § 523(a)(2)(A):

Although the Massachusetts state court stated, in the creditor's prepetition lawsuit against the debtor, that the court could not find, with respect to alleged misrepresentations made by the debtor to the creditor, that the debtor knew the representations to be false at the time he made them, or that the debtor made the representations with the intent to mislead, these findings did not establish, under Massachusetts law of issue preclusion, a defense to the creditor's nondischargeability claim under Code § 523(a)(2)(A). A claim under § 523(a)(2)(A) requires proof that the debtor either made a knowingly false representation or made a misrepresentation in reckless disregard of the truth and, while the state court ruled that the evidence did not establish that the debtor knew the representations to be false, the state court did not address the possibility of a reckless misrepresentation. Moreover, while intent to defraud is an element of a claim under § 523(a)(2)(A), and the state court found that the creditor had not established such an intent, this finding was not essential to the state court's judgment and therefore was not entitled to issue-preclusive effect.

State court decision did not establish elements of nondischargeability under Code § 523(a)(6):

A state court decision for the creditor against the debtor for unfair trade practices under Massachusetts law did not establish the elements of nondischargeability under Code § 523(a)(6).

In re Murphy, 2018 WL 1508729 (Bankr. D. N.H., March 26, 2018)

(case no. 1:17-bk-10500; adv. proc. no. 1:17-ap-1055) (Chief Bankruptcy Judge Bruce A. Harwood)

Text of opinion

Construction debt was dischargeable under Code § 523(a)(2)(A):

Although the debtors' construction company failed to complete the work required under two contracts with the creditor, the creditor's judgment against the debtors for the cost of completing the projects was dischargeable under Code § 523(a)(a)(A). The matter was submitted to arbitration, the arbitrator found that, at the time the parties entered into the contracts, the debtor husband "intended to complete and deliver the barn and shed and thereby earn the bargained for contract amounts," and that finding was binding on the court under principles of collateral estoppel.

Debtors' violation of construction trust fund statute was not defalcation by fiduciary:

Although the debtors' construction company failed to complete the work required under two contracts with the creditor, the debtors' violation of the Colorado Trust Fund Statute did not amount to defalcation by a fiduciary that would render the resulting judgment nondischargeable under Code § 523(a)(4). Under prior precedent, the arbitrator's finding of a Trust Fund Statute violation would have been sufficient to establish a "defalcation" under § 523(a)(4). But the Supreme Court overruled that precedent in *Bullock v. BankChampaign, N.A.*, 569 U.S. 267 (2013), which held that a creditor seeking to have a debt declared nondischargeable under § 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity must establish that the debtor acted with a specific mental state, either actual knowledge of wrongdoing, or "reckless conduct of the kind that the criminal law often treats as the equivalent," including actions where the fiduciary "consciously disregards (or is willfully blind to) a substantial and unjustifiable risk that his conduct will turn out to violate a fiduciary duty." Here, the required culpable mental state was not established, where both debtors credibly testified that they were unaware of the existence of the Trust Fund Statute and the duties it placed upon them, and the court found that they had neither actual knowledge of wrongdoing nor conscious disregard of a risk of failing to account for the funds the creditor had paid to the debtors' company, nor did the debtors act recklessly.

Elements of embezzlement under Code § 523(a)(4):

Embezzlement is "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *In re Wallace*, 840 F.2d 762 (10th Cir. 1988). A claim of embezzlement under Code § 523(a)(4) has five elements: (1) entrustment (property lawfully obtained originally); (2) of property; (3) of another; (4) that is misappropriated (used or consumed for a purpose other than that for which it was entrusted); (5) with fraudulent intent. *In re Ghaemi*, 492 B.R. 321 (Bankr. D. Colo. 2013).

Debtors did not commit embezzlement under Code § 523(a)(4):

Here, where the debtors, who operated a construction company, took the creditor's money but did not complete the parties' construction contracts, the court found that the first four elements of embezzlement were actually litigated and necessarily adjudicated in the creditor's arbitration award against the debtors. The arbitration award, however, did not establish the fifth element because fraudulent intent was not required to show a violation of the Trust Fund Statute or civil theft under Colorado law. Since the court could not find that the debtors acted with fraudulent intent, or an intention to steal the funds paid by the creditor, the debtors' conduct did not amount to embezzlement under § 523(a)(4).

[continued on the next page]

In re Welker, Case No. 1:16-bk-15941, Adv. Proc. No. 1:16-ap-1330 (Bankr. D. Colo., March 22, 2018)

(Bankruptcy Judge Kimberley H. Tyson)

Text of opinion

Tax returns filed after IRS had issued assessments were not "returns" under Code § 523(a)(1):

Reversing *In re Davis*, 2015 WL 5734332 (Bankr. D. N.J., Sept. 29, 2015), the district court held that, under *In re Giacchi*, 856 F.3d 244 (3d Cir. 2017), which adopted the majority version of the *Beard* test, tax returns filed by the debtor after the IRS has assessed the debtor's tax liability for the tax years involved did not constitute "returns" for the purpose of Code § 523(a)(1), so that the debtor's tax liabilities for those years were nondischargeable under § 523(a)(1)(B)(i), which excepts from discharge any debt for a tax with respect to which "a return ... if required, was not filed or given."

IRS v. Davis, 2018 WL 1440323 (D. N.J., March 22, 2018)

(case no. 3:15-cv-7601) (District Judge Michael A. Shipp)

Text of opinion

Court grants judgment reaffirming that debt found nondischargeable in debtor's prior bankruptcy case remained nondischargeable in debtor's new case:

Although the debtor's debt to a creditor had been found nondischargeable under Code §§523(a)(2), (a)(4), and (a)(6) in the debtor's prior bankruptcy case, and bankruptcy courts generally give preclusive effect to prior judgments declaring debts nondischargeable, the court granted the creditor's motion for a default judgment in the debtor's new case holding the debt nondischargeable under those provisions. The court said that, since the debtor failed to receive a discharge in the earlier case, the creditor was justifiably concerned about the applicability of Code § 523(c) and Bankruptcy Rule 4007. See also *In re Paine*, 283 B.R. 33 (9th Cir. B.A.P. 2002) (examining Code § 523(b)); *Young v. United States*, 535 U.S. 43, 122 S.Ct. 1036, 152 L.Ed.2d 79 (2002) (noting that Code § 523(b) does not apply where the debtor failed to receive a discharge in the prior case).

In re Bridges, 583 B.R. 696 (Bankr. W.D. Mich., March 24, 2018)

(case no. 1:17-bk-4455; adv. proc. no. 1:17-ap-80195) (Chief Bankruptcy Judge Scott W. Dales)

Text of opinion

Distinctions between bases of nondischargeability under Code § 523(a)(2)(A):

The Seventh Circuit has noted material differences among the three possible grounds for nondischargeability under Code § 523(a)(2)(A) and has formulated two different tests, one for both "false pretenses" and "false representation" and another for "actual fraud." To prevail on a nondischargeability claim under the "false pretenses" or "false representation" theories, a creditor must prove all of the following elements: "(1) the debtor made a false representation or omission, (2) that the debtor (a) knew was false or made with reckless disregard for the truth and (b) was made with the intent to deceive, (3) upon which the creditor justifiably relied." *Ojeda v. Goldberg*, 599 F.3d 712 (7th Cir. 2010). "Actual fraud" is broader than misrepresentation in that neither a debtor's misrepresentation nor a creditor's reliance is necessary to prove nondischargeability. "Actual fraud" is defined as "any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another," which includes "all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated." In such cases, a creditor must prove (1) a fraud occurred; (2) the debtor intended to defraud the creditor; and (3) the fraud created the debt that is the subject of the discharge dispute. *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000). See also *Husky Int'l Elec., Inc. v. Ritz*, ––– U.S. ––––, 136 S.Ct. 1581, 1586, 194 L.Ed.2d 655 (2016). The focus of an "actual fraud" claim is on the debtor's state of mind at the time of his purportedly fraudulent conduct. *In re Wiszniewski*, 2010 WL 3488960 (Bankr. N.D. Ill. 2010).

Debtor's liability for repayment of unemployment benefits to which he was not entitled was dischargeable under Code § 523(a)(2)(A):

The debtor's statements on his unemployment benefit applications that he was not working, although false, were not made with fraudulent intent, where the debtor was coaching part-time at a school district and received two stipends during each sports season. Based on the debtor's understanding of a conversation with a staff member of the Indiana Department of Workforce Development, he thought his coaching did not count as "work." Accordingly, the debtor's liability to the department for repayment of benefits to which he was not entitled was dischargeable under Code § 523(a)(2)(A).

Penalties imposed on debtor for receiving unemployment benefits to which he was not entitled were nondischargeable under Code § 523(a)(7):

Because intent is not an element of the nondischargeability of penalties under Code § 523(a)(7), penalties imposed on the debtor for receiving unemployment benefits to which he was not entitled were nondischargeable under Code § 523(a)(7), even though the debtor lacked fraudulent intent in applying for the benefits.

In re Owens, 2018 WL 1616852 (Bankr. S.D. Ind., March 20, 2018)

(case no. 1:16-bk-7620; adv. proc. no. 1:17-ap-50002) (Bankruptcy Judge James M. Carr)

Text of opinion

Federal tax return is filed when IRS receives actual delivery of return:

For purposes of Code § 523(a)(1)(B)(i), providing that a tax liability for which a return was not filed is not discharged, a federal tax return is filed when the IRS receives actual delivery of the return. Congress, however, created some exceptions to the actual delivery rule for federal income tax returns. The exceptions are found in Section 7502 of the Internal Revenue Code. A tax return sent by U.S. mail is deemed delivered to the IRS by the postmark date stamped on the envelope containing the tax return. If a tax return is sent to the IRS by registered mail, a registration receipt is prima facie evidence that the return was delivered to the IRS. By regulation authorized in Section 7502, a postmarked certified mail receipt of a tax return sent by certified mail is also prima facie evidence that a tax return was delivered to the IRS. A tax return filed electronically is deemed by regulation authorized in Section 7502 to be filed with the IRS on the date of the electronic postmark receipt. When the proof required by Section 7502 is unavailable, the court may not consider extrinsic evidence to prove the filing of a tax return.

Debtor did not establish that federal tax return was filed with IRS:

Here, although the court found the testimony of the debtor wife credible, she did not establish that she and her now-deceased debtor husband filed their 2010 federal income tax return, where an IRS bankruptcy specialist testified that the IRS did not receive the 2010 tax return prior to the debtors' bankruptcy filing, and the debtor wife, who provided the court with an application for an automatic extension of time for filing the 2010 tax return and a signed copy of the 2010 tax return dated September 19, 2011, could only testify that the debtors routinely prepared and filed their federal income tax returns over the past 20 years and that, based on their consistent course of conduct, the debtor husband would have mailed the 2010 tax return to the IRS.

In re Word, 2018 WL 1616837 (Bankr. M.D. Fla., March 30, 2018)

(case no. 6:15-bk-4736; adv. proc. no. 6:15-ap-120) (Bankruptcy Judge Cynthia C. Jackson)

Text of opinion

Debtors' submission of inaccurate personal financial statements was not done with intent to deceive:

The debtors' submission of personal financial statements to a lender showing that no federal income taxes were due while the debtors in fact owed federal income taxes was not done with an intent to deceive for the purpose of Code § 523(a)(2)(A) and § 523(a)(2)(B). The debtors had a complex personal and financial situation from 2013 to 2015, including the adoption of two children, the death of one parent and the support of another disabled parent, an audit by Medicare that dramatically reduced the debtor husband's income, a change of the husband's primary job, an audit by the IRS, failing restaurants, and a divorce. Each of these produced extreme demands on the debtors' time, and the court found persuasive the debtors' explanation of the circumstances surrounding preparation and submission of the financial statements to the lender.

In re Charleston, 2018 WL 1174984 (Bankr. S.D. Tex., March 5, 2018)

(case no. 4:16-bk-32113; adv. proc. no. 4:16-ap-3236) (Bankruptcy Judge Karen K. Brown)

Text of opinion

See also:

In re Singleton, 2018 WL 1517122 (Bankr. D. D.C., March 26, 2018) (case no. 1:16-bk-610; adv. proc. no. 1:17-ap-10006) (Bankruptcy Judge S. Martin Teel, Jr.) (because Maryland's criminal code and the related case law demonstrate that a defendant may be convicted of second-degree assault for either willful or reckless applications of force against another, while, for a debt to be nondischargeable under Code § 523(a)(6), the debtor must have inflicted injury deliberately or intentionally, the debtor's Maryland state conviction for second-degree assault did not establish that a subsequent civil judgment against the debtor was nondischargeable under § 523(a)(6)) (text of opinion)

In re Bergman, 2018 WL 1393728 (Bankr. E.D. Pa., March 19, 2018) (case no. 2:11-bk-17320) (Bankruptcy Judge Eric L. Frank) (in a Chapter 7 case, postpetition condominium assessments are nondischargeable under Code § 523(a)(16) even though the debtor stated the intention to surrender the condominium unit) (text of opinion)

In re Evans, 584 B.R. 20 (Bankr. E.D. Mo., March 12, 2018) (case no. 4:16-bk-46322; adv. proc. no. 4:16-ap-4166) (Chief Bankruptcy Judge Kathy A. Surratt-States) (a debt arising out of the overpayment of Social Security disability insurance benefits to the Chapter 7 debtor, who failed to report multiple periods of employment, was nondischargeable under Code § 523(a)(2)(A)) (text of opinion)

In re Spielbauer, 2018 WL 1306274 (N.D. Cal., March 13, 2018), appeal filed, Case No. 18-15630 (9th Cir., filed April 11, 2018) (case no. 5:17-cv-3071) (District Judge Beth Labson Freeman) (a California state court judgment for slander of title was entitled to issue-preclusive effect and was nondischargeable under Code § 523(a)(6)) (text of opinion)

R

Other Issues

Extension of time for filing nondischargeability complaint on basis of motion by another party:

The Bankruptcy Rules do not expressly limit an extension of time for filing a nondischargeability complaint to only the specific creditor who filed the motion. See *Burger King Corp. v. B-K of Kansas, Inc.*, 73 B.R. 671 (D. Kan. 1987) (holding that the bankruptcy court's order granting extensions of time to file objections to discharge of debt to two moving creditors did not enlarge the time for a nonmoving creditor). The lack of an express limitation, however, does not imply a broad grant of discretion to allow an extension to all creditors based on the motion of just one. In cases in which courts have held that an extension of the bar date can extend to nonmoving creditors, the court have found that three elements were met: (1) the surrounding circumstances provided notice to the court and the debtor that a general extension was requested; (2) the surrounding circumstances demonstrated that cause existed for a general extension; and (3) the subsequent order indicated that a general extension was granted. See *In re Kneis*, 2009 WL 1750101 (Bankr. D. N.J., June 15, 2009); *In re Watkins*, 365 B.R. 574 (Bankr. W.D. Pa. 2007). See also *In re Brady*, 101 F.3d 1165 (6th Cir. 1996) (the Chapter 7 had standing to request an extension of time on behalf of any creditor to file a nondischargeability complaint); *In re Demos*, 57 F.3d 1037 (11th Cir. 1995) (a creditor was entitled to rely on the bankruptcy court's order granting the Chapter 7 trustee's motion to the extend deadline for filing nondischargeability complaints, though the creditor had not joined in the trustee's motion). But see *Matter of Farmer*, 786 F.2d 618 (4th Cir. 1986) (the Chapter 7 trustee was not a "party in interest" permitted to move for an extension of time within which creditors could object to the dischargeability of specific debts).

Court erred in extending time for one creditor's filing nondischargeability complaint on basis of motion for extension of time filed by another creditor:

Applying these three factors, and finding two of them absent, the district court held that there was no basis in the record on which the bankruptcy court could extend the deadline for filing a nondischargeability complaint for any party other than the one creditor who had moved for an extension of time to file a complaint.

In re Wijewickrama, 2018 WL 2212983 (W.D. N.C., March 15, 2018)

(case no. 1:16-cv-347) (District Judge Martin Reidinger)

Text of opinion

See also:

In re Gianopolous, 584 B.R. 598 (Bankr. S.D. N.Y., March 15, 2018) (case no. 1:10-bk-14817) (Bankruptcy Judge James L. Garrity, Jr.) (state courts have concurrent jurisdiction to determine whether a debt is nondischargeable under Code § 523(a)(3)(B)) (text of opinion)

R

Part C

Jurisdiction and Procedure

Bankruptcy court properly declined to order arbitration of discharge violation claim:

Affirming *In re Anderson*, 553 B.R. 221 (S.D. N.Y., June 14, 2016), the Court of Appeals held that the bankruptcy court did not err in refusing to compel arbitration in the debtor's proposed class action to recover for the defendant credit card issuer's alleged violation of the discharge injunction in continuing to report, as charged off, credit card debt that had been discharged in bankruptcy. Concluding that arbitration of a claim based on an alleged violation of Code § 524(a)(2) would seriously jeopardize a core bankruptcy proceeding, the Court of Appeals reasoned that (1) the discharge injunction was integral to the bankruptcy court's ability to provide debtors with the fresh start that was the very purpose of the Bankruptcy Code; (2) the claim involved an ongoing bankruptcy matter that required continuing court supervision; and (3) the equitable powers of the bankruptcy court to enforce its own injunctions were central to the structure of the Code. The fact that the debtor's claim came in the form of a putative class action did not undermine this conclusion.

In re Anderson, 884 F.3d 382 (2nd Cir., March 7, 2018), pet. for cert. filed, Credit One Bank, N.A. v. Anderson, Case No. 17-1652 (U.S. Sup. Ct., June 5, 2018)

(case no. 16-2496)

Text of opinion

Court would decide matter that should have been raised by motion rather than adversary proceeding:

While the creditor's request that the Chapter 7 debtor's case be dismissed under Code § 521(e)(2)(C) for the debtor's failure to provide the creditor with a copy of the debtor's most recently filed tax return should have been filed as a motion, the court would permit the matter to be raised in the creditor's adversary proceeding, as the dispute was squarely before the court and no party in interest would be prejudiced by the court's ruling on it. To do otherwise would be an inefficient use of judicial resources and a senseless exercise that would result in yet more legal fees being incurred.

In re Jeffery, 2018 WL 1605307 (Bankr. E.D. Pa., March 29, 2018)

(case no. 4:16-bk-15037; adv. proc. no. 2:17-ap-28) (Bankruptcy Judge Jean K. FitzSimon)

Text of opinion

Court denies arbitration in debtor's adversary proceeding against debt adjustment firm:

Denying, in a Chapter 7 debtor's adversary proceeding against a debt adjustment firm and a related company, the firm's motion to compel arbitration of the debtor's claims against the firm, which arose from the firm's prepetition debt adjustment services for the debtor, the bankruptcy court concluded that the arbitration provisions in the debtor's agreements with the firm were invalid because they denied the debtor the ability to assert her rights under North Carolina law, and, even if the agreements were valid, the court would decline to order arbitration because sending the debtor's claims under state law and Code § 548 to arbitration would have a significant adverse effect upon the adjudication of the claims and upon the fundamental purposes of the Bankruptcy Code.

In re Erwin, 2018 WL 1614160 (Bankr. E.D. N.C., March 30, 2018), appeal dismissed, ClearOne Advantage, LLC v. Lischwe, Case No. 5:18-cv-158 (E.D. N.C., August 7, 2018)

(case no. 5:15-bk-6713; adv. proc. no. 5:17-ap-55) (Bankruptcy Judge David M. Warren)

Text of opinion

Nondischargeability judgment against debtors was not renewed and therefore was no longer enforceable:

A bankruptcy judgment registered in Arizona must be renewed in accordance with Arizona law in order to remain enforceable. Because, under Arizona law, the automatic stay in bankruptcy does not toll the time for renewing a judgment, a nondischargeability judgment obtained by the creditor in the debtors' prior bankruptcy case was no longer enforceable.

In re Casillas, 2018 WL 1568919 (Bankr. D. Ariz., March 28, 2018)

(case no. 2:17-bk-12897) (Chief Bankruptcy Judge Daniel P. Collins)

Text of opinion

Parent may represent minor child but may not do so without counsel:

While a parent may sue on behalf of his minor child without resort to an appointment as next friend or guardian ad litem under Fed. R. Civ. P. 17(c)(2), he may not do so without counsel. Parents may not appear pro se on behalf of their minor children because a minor's personal cause of action is her own and does not belong to her parent or representative.

In re Brooks, 583 B.R. 443 (Bankr. W.D. Mich., March 23, 2018)

(case no. 1:17-bk-5050; adv. proc. no. 1:18-ap-80031) (Chief Bankruptcy Judge Scott W. Dales)

Text of opinion

See also:

In re Griffin, 585 B.R. 794 (Bankr. S.D. Miss., March 9, 2018) (case no. 3:17-bk-1858; adv. proc. no. 3:17-ap-48) (Bankruptcy Judge Neil P. Olack) (an arbitration agreement in the debtor's contract with a lender was enforceable in the debtor's adversary proceeding against the lender asserting claims under the Truth in Lending Act and Mississippi state law) (text of opinion).

In re Drobney, 583 B.R. 700 (Bankr. W.D. Mich., March 26, 2018) (case no. 1:17-bk-5028) (Chief Bankruptcy Judge Scott W. Dales) (a credit union was an insured depository institution within the meaning of Rule 7004(h); see Code § 101(34) (defining "insured credit union") and § 101(35) (defining "insured depository institution" to include "insured credit union")) (text of opinion)

In re Hrachova, 582 B.R. 808 (Bankr. M.D. Fla., March 19, 2018) (case no. 3:17-bk-698; adv. proc. no. 3:17-ap-169) (Bankruptcy Judge Paul M. Glenn) (where the Chapter 13 debtor's claim that her mortgage creditor lacked the authority to enforce her mortgage had been pending for several years in a state court foreclosure proceeding, the bankruptcy court would permissively abstain under 28 U.S.C. § 1334(c)(1) from deciding the debtor's adversary proceeding against the creditor asserting the same claim) (text of opinion)

R

Appellate Procedure

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Application of judicial estoppel is reviewed for abuse of discretion:

Putting to rest uncertainty in the Second Circuit, the court held that the invocation of judicial estoppel is reviewed only for abuse of discretion. Nearly every other circuit has likewise held that abuse of discretion is the appropriate standard, and even the one holdout--the Sixth Circuit--has recently "questioned the continuing viability" of de novo review

Clark v. AII Acquisition, LLC, 886 F.3d 261 (2d Cir., March 30, 2018)

(case no. 17-1727)

Text of opinion

Order extending time for creditor to file nondischargeability claim was interlocutory:

A bankruptcy court order extending the time for a creditor to file a nondischargeability claim was interlocutory. See *Matter of Aucoin*, 35 F.3d 167 (5th Cir. 1994) (explaining that an order granting a motion to extend time to object to discharge is an interlocutory order because "the bankruptcy court will still have to determine whether to grant or deny those objections."). However, construing the debtor's timely-filed notice of appeal as a motion for leave to appeal, the district court granted the motion and allowed the appeal.

District court's authority to hear interlocutory appeal:

In determining whether to grant leave to appeal an interlocutory order of the bankruptcy court, a district court employs an analysis similar to that employed by the Court of Appeals in certifying interlocutory review under 28 U.S.C. § 1292(b). *Atlantic Textile Group, Inc. v. Neal*, 191 B.R. 652 (E.D. Va. 1996). Under that analysis, leave to appeal an interlocutory order should be granted only when (1) it involves a controlling question of law, (2) as to which there is substantial ground for a difference of opinion, and (3) and an immediate appeal would materially advance the termination of the litigation.

In re Wijewickrama, 2018 WL 2212983 (W.D. N.C., March 15, 2018)

(case no. 1:16-cv-347) (District Judge Martin Reidinger)

Text of opinion

Bankruptcy standing, generally:

Standing in a bankruptcy appeal is narrower than Article III standing. This circuit and others had adopted an "essentially prudential" limitation on standing in the bankruptcy context given that bankruptcy litigation almost always involved the interests of numerous persons who were not formally parties to the litigation. The interest in efficient judicial administration required that appellate review be limited to those persons whose interests were directly affected. Accordingly, only a "person aggrieved" has standing to bring a bankruptcy appeal. "Person aggrieved" is, of course, a term of art: almost by definition, all appellants may claim in some way to be "aggrieved," else they would not bother to prosecute their appeals? One is a "person aggrieved" with standing to bring a bankruptcy appeal only if she has been "directly and adversely affected pecuniarily" by an order of a bankruptcy court. A person has standing under this doctrine if a bankruptcy court order diminishes the person's property, increases the person's burdens, or impairs the person's rights.

Debtor's wife lacked standing to appeal denial of confirmation of Chapter 11 plan:

Here, the Chapter 11 debtor's nondebtor wife lacked standing to appeal denial of confirmation of the debtor's Chapter 11 plan. While the wife contended that the court's confirmation of the plan would have reduced her exposure to future litigation, alleged harm based on potential litigation was too indirect for bankruptcy standing.

In re Wigley, 886 F.3d 681 (8th Cir., March 29, 2018)

(case no. 16-4075)

Text of opinion

Decision holding automatic stay applicable was not appealable final order:

Where the Social Security Administration filed a motion seeking (1) a determination that the automatic stay did not apply to its purported recoupment from the debtor and (2) relief from stay if the court determined that the stay did apply, the court's December 2016 decision holding that the automatic stay applied was not a final order. Rather, the court's denial of the motion to lift the stay, issued about six months later on June 29, 2017, was the court's final order.

In re Johnson, 586 B.R. 449 (N.D. Ill., March 12, 2018)

(case no. 1:17-cv-5224) (District Judge Matthew F. Kennelly)

Text of opinion

Factors relevant to granting leave to appeal interlocutory order from bankruptcy court:

28 U.S.C. § 158(a) authorizes a district court to grant leave to appeal an interlocutory order from a bankruptcy court, but does not indicate the standard a district court uses in determining whether to grant leave to appeal. Moreover, the Fifth Circuit has not provided a hard and fast rule for determining when an interlocutory appeal should be allowed. However, guided by the comments in *Ichinose v. Homer Nat'l. Bank*, 946 F.2d 1169 (5th Cir. 1991), district courts in the Fifth Circuit have relied on the standard under 28 U.S.C. § 1292(b) for interlocutory appeals from district court orders in considering whether to grant leave to appeal an interlocutory order of a bankruptcy court.

Hobby v. Parker, 2018 WL 1528225 (W.D. La., March 28, 2018)

(case no. 5:17-cv-920) (Chief District Judge S. Maurice Hicks, Jr.)

Text of opinion

Doctrine of equitable mootness applies to appeals in Chapter 7 cases:

The doctrine of equitable mootness was developed in response to the particular problems presented by the consummation of plans of reorganization under Chapter 11. However, several circuits have applied the doctrine of equitable mootness to appeals in Chapter 7 cases. See *ANR Co. v. Rushton*, 2012 WL 1556236 (D. Utah, May 2, 2012). The present court was persuaded that equitable mootness should apply in Chapter 7 cases.

Appeal of orders approving compromises was equitably moot:

The Fifth Circuit has articulated three factors courts should apply when considering equitable mootness: (1) whether a stay has been obtained, (2) whether the plan has been substantially consummated, and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan. *In re Block Shim Dev. Co.*, 939 F.2d 289 (5th Cir. 1991). Here, an appeal by the Chapter 7 debtor's wife and two adult daughters from the bankruptcy court's orders approving two compromises involving property and litigation in which the wife and daughters claimed an interest was equitably moot, where neither the wife nor the daughters ever sought a stay of the bankruptcy court's orders approving the compromises, the compromises had all been substantially consummated, and the court could not fashion an equitable remedy without unraveling the compromises and affecting the interests of third parties.

Hoa Dao v. Sommers, 2018 WL 1139157 (S.D. Tex., March 1, 2018), appeal filed, Case No. 18-20444 (5th Cir., filed July 12, 2018)

(case no. 4:16-cv-1381) (District Judge Melinda Harmon)

Text of opinion

Appeal from final judgment encompassed appeals of interlocutory orders merged into judgment:

Where the bankruptcy court entered an order sustaining the Chapter 13 trustee's objections to confirmation of the debtors' proposed Chapter 13 plan on July 18, 2017, an order denying confirmation of the plan on August 1, 2017, and an order dismissing the case on August 4, 2017, and the debtors filed a notice of appeal as to all three orders on August 18, 2017, the notice of appeal was timely as to all three orders. The court's first two orders were interlocutory, and when a party elects not to seek leave to appeal an interlocutory order, that order merges in the final judgment and may be challenged in an appeal from that judgment.

Ortiz-Peredo v. Viegelahn, 587 B.R. 321 (W.D. Tex., March 29, 2018)

(case no. 5:17-cv-796) (Chief District Judge Orlando L. Garcia)

Text of opinion

See also:

In re Solano, 716 Fed. Appx. 637 (9th Cir., March 23, 2018) (case no. 17-56393) (an order denying a motion for withdrawal of reference is not an appealable final order) (text of opinion)

R

Other Procedural Issues

Court orders dismissal with prejudice where Chapter 13 debtors dissipated proceeds that should have been paid to creditors:

Where the Chapter 13 debtors, prior to moving to voluntarily dismiss their case under Code § 1307(b), failed to remit to the Chapter 13 trustee for distribution to creditors, as required under their confirmed plan, $50,000 that the debtors received from the sale of certain real property in which the debtors held a 1/6 interest, the court, acting under the authority of Code § 349(a), imposed a six-month filing ban and ordered that all debts that would have been discharged if the debtors had received a Chapter 13 discharge would be non-dischargeable in any subsequent case filed by the debtors jointly or separately. While the debtors asserted that a ruling of this nature was unduly harsh and draconian, the court said it was necessary because, due to the debtors' dissipation of the sale proceeds, creditors would not receive the dividend that they anticipated in this case.

In re Macomber, 2018 WL 1582626 (Bankr. D. Me., March 27, 2018)

(case no. 1:12-bk-10720) (Bankruptcy Judge Michael A. Fagone)

Text of opinion

Code § 109(g)(2) is mandatory and requires dismissal where statute applies:

While courts hold various views on the issue, the present court agrees with the cases holding that (1) dismissal under Code § 109(g)(2) is mandatory, not discretionary, when that statute applies; and (2) it is irrelevant under § 109(g)(2) whether there is some causal link or nexus between the filing of a stay relief motion on the one hand, and the debtor's later voluntary dismissal of the case on the other hand. Section 109(g)(2) applies, and requires dismissal, in every situation in which, in a prior case pending within 180 days before the filing of the present case, a creditor filed a motion for relief from stay and the debtor later voluntarily dismissed the case, regardless of the debtor's good faith or whether there was any particular connection between the two events. See *In re Andersson*, 209 B.R. 76 (6th Cir. B.A.P. 1997); *In re Steele*, 319 B.R. 518 (Bankr. E.D. Mich. 2005) (Marci B. McIvor, J.).

In re Turner, 583 B.R. 910 (Bankr. E.D. Mich., March 30, 2018)

(case no. 2:18-bk-44447) (Bankruptcy Judge Thomas J. Tucker)

Text of opinion

Elements of judicial estoppel:

The party asserting judicial estoppel must show (1) that the party against whom the estoppel is asserted took an inconsistent position in a prior proceeding and (2) that that position was adopted by the first tribunal in some manner, such as by rendering a favorable judgment. However, while these may be necessary conditions for judicial estoppel to be imposed, they are not sufficient ones. Before applying judicial estoppel, a court must inquire into whether the particular factual circumstances of a case "tip the balance of equities in favor" of doing so; judicial estoppel is not a mechanical rule.

District court erred in holding Chapter 13 debtors to be judicially estopped:

Vacating *Clark v. Advanced Composites Group*, 2017 WL 2266981 (S.D. N.Y., April 28, 2017), the Court of Appeals held that the district court abused its discretion in applying judicial estoppel where the Chapter 13 debtors failed to disclose that, shortly before the debtors made their final plan payment, the debtor husband was diagnosed with mesothelioma, a cancer caused by the inhalation of asbestos fibers. Because the debtors' plan already required the debtors to repay their creditors in full, disclosing the husband's diagnosis to the bankruptcy court would have affected the couple's bankruptcy proceeding only if their creditors were able to convince the bankruptcy court to raise the applicable interest rate under the plan. Given that the debtors were mere weeks away from completing repayment at the time of the husband's diagnosis, and were already paying interest at a standard rate, this scenario seemed more than implausible. While there might be unusual circumstances in which the need to safeguard the integrity of the courts might tip the equities in favor of judicial estoppel even when the inconsistency in question made no material difference, this case was surely not of that sort.

Clark v. AII Acquisition, LLC, 886 F.3d 261 (2d Cir., March 30, 2018)

(case no. 17-1727)

Text of opinion

Factors relevant to application of judicial estoppel:

The Eighth Circuit recently listed three "non-exhaustive" factors that it is appropriate for a court to consider in deciding whether to apply judicial estoppel: (1) whether the party's later position is "clearly inconsistent" with its prior position; (2) whether a court was persuaded to accept a prior position, "so 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"; and (3) whether the party claiming inconsistent positions "would derive an unfair advantage or impose an unfair detriment on the opposing party if not stopped." *Combs v. The Cordish Companies, Inc.*, 862 F.3d 671 (8th Cir. 2017).

Chapter 7 debtor was not judicially estopped from prosecuting undisclosed cause of action:

While the debtor should have discovered his products liability cause of action prior to filing his Chapter 7 bankruptcy case in 2009, the district court was convinced that the debtor was not aware that he had a potential claim at the time he filed his bankruptcy case, so that he was not judicially estopped from now prosecuting the cause of action, which the debtor had not disclosed in his bankruptcy schedules.

Murray v. 3M Co., 297 F. Supp. 3d 869 (E.D. Ark., March 13, 2018)

(case no. 5:15-cv-101) (District Judge James M. Moody Jr.)

Text of opinion

Court appoints "guardian advocate" to determine whether debtor needed appointment of formal guardian:

Where the debtor was an elderly ailing woman who had been diagnosed with dementia, and the debtor's counsel had represented to the court on multiple occasions that the debtor might be incompetent or mentally incapacitated, the court, using its inherent authority under Code § 105(a) in conjunction with the principles outlined in Bankruptcy Rules 1004.1 and 7017, found it appropriate to appoint a guardian advocate, more akin to a special master, for the limited purpose of providing a specific report to the court. The guardian advocate would be appointed to render a preliminary opinion on whether the debtor needed a formal guardian appointed by a state court before litigation in the bankruptcy court could proceed. The court emphasized that it made no determination that the debtor was legally incompetent or legally incapacitated at this time, and that the guardian advocate had no authority to assume responsibility for the person, property, or finances of the debtor.

In re Bentley, 2018 WL 1318951 (Bankr. M.D. Fla., March 8, 2018)

(case no. 6:17-bk-294) (Bankruptcy Judge Karen S. Jennemann)

Text of opinion

See also:

In re Singleton, 2018 WL 1517122 (Bankr. D. D.C., March 26, 2018) (case no. 1:16-bk-610; adv. proc. no. 1:17-ap-10006) (Bankruptcy Judge S. Martin Teel, Jr.) (under Maryland law, a default judgment does not have collateral estoppel effect when the defendant did not participate in the litigation in any manner; thus, here, a default judgment in civil litigation against the debtor to recover for injuries sustained in fight between the debtor and the plaintiff did not have collateral estoppel effect in the plaintiff's subsequent nondischargeability proceeding where there was no appearance or filing by the debtor at any point during the state-court litigation) (text of opinion)

Nwachukwu v. Vinfen Corp., 2018 WL 1409795 (D. Mass., March 21, 2018) (case no. 1:16-cv-11815) (Magistrate Judge M. Page Kelley) (the Chapter 13 debtor was not judicially estopped from prosecuting his employment discrimination lawsuit, although he initially failed to disclose the lawsuit in his later-filed bankruptcy case, where the debtor subsequently amended his bankruptcy schedules to disclose the lawsuit, and the bankruptcy court did not "accept" his prior representation that no such lawsuit existed) (text of opinion)

In re Gianopolous, 584 B.R. 598 (Bankr. S.D. N.Y., March 15, 2018) (case no. 1:10-bk-14817) (Bankruptcy Judge James L. Garrity, Jr.) (the bankruptcy court denied the Chapter 7 debtor's motion to reopen his case for the purpose of asserting a creditor's violation of the discharge injunction where the creditor asserted that the debt was excepted from the debtor's discharge under Code § 523(a)(3)(B) and the matter had already been raised in the creditor's state court action against the debtor, as state courts have concurrent jurisdiction to determine whether a debt is nondischargeable under Code § 523(a)(3)(B)) (text of opinion)

In re Casillas, 2018 WL 1568919 (Bankr. D. Ariz., March 28, 2018) (case no. 2:17-bk-12897) (Chief Bankruptcy Judge Daniel P. Collins) (because a creditor failed to renew a judgment against the debtors, the judgment was no longer enforceable and the creditor was no longer a party in interest entitled to conduct an examination of the debtors under Bankruptcy Rule 2004) (text of opinion)

In re Mailatyar, 2018 WL 1614142 (Bankr. D. Ariz., March 30, 2018) (case no. 2:17-bk-13538) (Chief Bankruptcy Judge Daniel P. Collins) (the court continued to adhere to its position announced in *In re Sample*, 2013 WL 3759795 (Bankr. D. Ariz., July 15, 2013) that, so long as there is not a contrary published opinion from the District Court of Arizona, the court would follow the opinions of the Ninth Circuit BAP, whether or not the court agreed with the reasoning behind the particular BAP decision) (text of opinion)

In re Thomas, 583 B.R. 385 (Bankr. E.D. Ky., March 1, 2018) (case no. 2:17-bk-20527) (Chief Bankruptcy Judge Tracey N. Wise) (there was no basis under Code § 107(b) to grant the parties' joint motion to restrict public access to settlement-related documents filed in the record in the debtor's adversary proceeding even though the parties suggested that the settlement would "blow up" if the court did not seal the documents) (text of opinion)

R

Jurisdiction

Topical compilation: All topical compilations

PDF Word All circuit compilations

See also:

In re Zaid, 582 B.R. 370 (Bankr. E.D. Pa., March 6, 2018) (case no. 2:16-bk-17095; adv. proc. no. 2:17-ap-368) (Bankruptcy Judge Eric L. Frank) (the *Rooker-Feldman* doctrine barred an adversary proceeding by the Chapter 7 debtor, an attorney, seeking to modify or set aside an arbitration award in favor of his former clients on their legal malpractice claim, as well as the state court judgment confirming the award, on the ground that the award and judgment were obtained by false representations) (text of opinion)

Fitzpatrick v. Law Solutions Chicago, LLC, 584 B.R. 203 (E.D. Tenn., March 21, 2018), appeal dismissed, Case No. 18-5349 (6th Cir., July 9, 2018) (case nos. 3:17-cv-257, 3:17-cv-258) (District Judge J. Ronnie Greer) (under Bankruptcy Rule 7004(f), the bankruptcy court had personal jurisdiction over a law firm in Illinois and individuals who lived in Illinois and worked at the law firm, all of whom were defendants in an adversary proceeding) (text of opinion)

In re McCallum, 2018 WL 1449147 (Bankr. M.D. Ga., March 22, 2018) (case no. 5:17-bk-51487; adv. proc. no. 5:17-ap-5054) (Chief Bankruptcy Judge James P. Smith) (the court had "related to" jurisdiction over the Chapter 13 debtor's action to set aside the prepetition foreclosure on her residence; if the debtor was successful, title to the residence would revert to the debtor, her debt to the mortgage creditor would be reinstated and the debtor would have to provide for the debt in her Chapter 13 plan) (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

Party challenging debtor's current monthly income has burden of proof:

The party moving to dismiss a Chapter 7 case on the basis of abuse has the burden to demonstrate the extent to which funds received the debtor from other persons should be considered part of the debtor's current monthly income. *In re Justice*, 404 B.R. 506 (Bankr. W.D. Ark. 2009).

Contributions by debtor's mother and daughter were part of debtor's current monthly income:

The $300 annual contribution to the debtor's household by her daughter, plus the $6,480 annual contribution to the debtor's household by her mother, increased the debtor's annualized current monthly income to $77,778.

In re Consiglio, 2018 WL 1162869 (Bankr. D. Conn., March 2, 2018)

(case no. 3:15-bk-31915; adv. proc. no. 3:16-ap-3013) (Bankruptcy Judge Ann M. Nevins)

Text of opinion

Earned income tax credits are income under the Bankruptcy Code:

Earned income tax credits are income under the Bankruptcy Code and are included in a debtor's calculation of "current monthly income." See *In re Morales*, 563 B.R. 867 (Bankr. N.D. Ill. 2017); *In re Forbish*, 414 B.R. 400 (Bankr. N.D. Ill. 2009); *In re Royal*, 397 B.R. 88 (Bankr. N.D. Ill. 2008). The earned income tax credit statute provides that the credit shall not be treated as income for the purposes of several other federal statutes that provide public assistance benefits, but the Bankruptcy Code is not one of the listed statutes, nor does the definition of "currently monthly income" in Code § 101(10A) exclude earned income tax credits.

Marshall v. Blake, 885 F.3d 1065 (7th Cir., March 22, 2018)

(case no. 17-2809)

Text of opinion

"Current monthly income" is not limited to income items employed by Census Bureau:

Rejecting the Chapter 13 debtors' contention that, because the statutory definition of "median family income" incorporates calculations reported by the Bureau of the Census, Congress must have intended "income" to be defined for purposes of Code § 1325 subject to the same exclusions used by the Census Bureau when it calculates median family income, and affirming *In re Ortiz-Peredo*, 573 B.R. 703 (Bankr. W.D. Tex., July 18, 2017), the district court said that BAPCPA's statutory definition of "current monthly income" makes no mention of the categories excluded from income by the Census Bureau, but rather includes the average monthly income "from all sources that the debtor receives ... without regard to whether such income is taxable income." In the case of the BAPCPA definition of "current monthly income," the statutory language is plain: Quite simply, the term "all" means "all." Accordingly, a workers' compensation award received postpetition was included in the debtors' projected disposable income.

Ortiz-Peredo v. Viegelahn, 587 B.R. 321 (W.D. Tex., March 29, 2018)

(case no. 5:17-cv-796) (Chief District Judge Orlando L. Garcia)

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

Recoupment does not violate automatic stay:

A significant body of authority holds that recoupment does not violate the automatic stay.

Two approaches for determining where debts arise from same transaction, permitting recoupment:

When a creditor and debtor are mutually indebted, the creditor may recoup his or her debt from the debtor despite bankruptcy, but only if the debts arise from the same transaction. When analyzing whether two debts arise from the same transaction, the circuit courts are split between two approaches. The Third Circuit has asked whether the debts are part of a "single integrated transaction." See *Lee v. Schweiker*, 739 F.2d 870 (3d Cir. 1984); *In re University Medical Center*, 973 F.2d 1065 (3d Cir. 1992). By contrast, the First, Ninth and D.C. Circuits have determined whether action constitutes recoupment by asking whether the debts are "logically related." See *In re TLC Hospitals, Inc.*, 224 F.3d 1008 (9th Cir. 2000); *In re Holyoke Nursing Home, Inc.*, 372 F.3d 1 (1st Cir. 2004); *United States v. Consumer Health Services of America, Inc.*, 108 F.3d 390 (D.C. Cir. 1997).

Social Security Administration's attempt to recover debtor's fraudulently-obtained Social Security retirement benefits by withholding SSI disability benefits did not constitute recoupment:

The court was not required to choose between the narrower "single integrated transaction" standard and the broader "logical relationship" standard for when a recoupment occurs for the purposes of bankruptcy, for, even under the broader standard, the Social Security Administration's attempt to recover the debtor's fraudulently-obtained Social Security retirement benefits by withholding his SSI disability benefits did not constitute recoupment, as the two debts were not logically related. While the government relied on a statute that authorized withholding of benefits under these circumstances, the existence of such a statute was insufficient, without more, to make two otherwise-unrelated debts part of the same transaction.

In re Johnson, 586 B.R. 449 (N.D. Ill., March 12, 2018)

(case no. 1:17-cv-5224) (District Judge Matthew F. Kennelly)

Text of opinion

Creditor had right to setoff under Iowa law:

Iowa law provides that, to establish a right of setoff, the demands must be mutual and must exist between the same parties, and be of the same grade and nature or due the same capacity or right. As a general rule, if a debt is owed, but not yet due at the time of the bankruptcy filing, it can still form a mutual debt for setoff purposes, although some courts disagree. For the purposes of the mutuality requirement, Iowa law allowed the creditor (an elevator cooperative) to deem the debt that it owed to the debtor "due" for setoff purposes at the time it exercised its right to setoff. Accordingly, the court found that the creditor had a right of setoff under the circumstances.

In re Kuper, 586 B.R. 309 (Bankr. N.D. Iowa, March 29, 2018)

(case no. 4:17-bk-267) (Chief Bankruptcy Judge Thad J. Collins)

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

Merger doctrine limited mortgage creditor's claim after prepetition foreclosure judgment:

Where the Chapter 13 debtor's mortgage creditor had obtained a judgment of $49,516.62 in a prepetition mortgage foreclosure proceeding, the court allowed the creditor's claim in the amount of $51,719.13, rather than the $59,280 sought. Under the doctrine of merger under Pennsylvania law, as articulated in *In re Stendardo*, 991 F.2d 1089 (3d Cir. 1993), after the entry of a foreclosure, the terms of a mortgage are merged into the foreclosure judgment and the mortgage no longer provides a basis for determining the respective rights and obligations of the parties. However, a provision of a mortgage may survive the entry of judgment if the mortgage clearly evidences the parties' intent to preserve the effectiveness of that provision even after the entry of judgment. *In re Cohen–Harvin*, 571 B.R. 672 (Bankr. E.D. Pa. 2017); *In re Smith*, 463 B.R. 756 (Bankr. E.D. Pa. 2012). Here, the court concluded, (1) the mortgage authorized the creditor to charge post-judgment interest at the 11.25% contract rate, and this was sufficient to establish the parties' intent that the contract interest rate survive the merger of the mortgage into the judgment; (2) claimed legal costs of $152.79 would be disallowed in the absence of evidence in the record that the costs were actually incurred; (3) $600 in legal fees, rather than the $1,455 sought, would be allowed because some attorney time was necessary after the entry of the foreclosure judgment to schedule the sheriff's sale and to obtain two postponements of the sale; (4) a $433.50 insurance charge which presumably was a request for reimbursement of a disbursement made for hazard insurance was not allowable; and (5) charges for satisfaction of a lien against the property ($1,629.91), property preservation ($141.00) and corporate advances ($10.05) were disallowed under the merger doctrine.

In re Culler, 584 B.R. 516 (Bankr. E.D. Pa., March 19, 2018)

(case no. 2:17-bk-14554) (Bankruptcy Judge Eric L. Frank)

Text of opinion

Underlying agreement and applicable nonbankruptcy law determine allowability of charges claimed in mortgage creditor's notice of postpetition fees and expenses under Bankruptcy Rule 3002.1(c) in Chapter 13 case:

In identical opinions issued in two cases, the bankruptcy court, in resolving the Chapter 13 debtors' challenges to their mortgage creditors' notices of postpetition fees and expenses under Bankruptcy Rule 3002.1(c), held that the court must look to the underlying agreement and applicable nonbankruptcy law to determine if the amounts are permissible; the "reasonableness standard" applied under Code § 506(b) in the case of oversecured creditors does not apply.

Here, both mortgages contain choice-of-law provisions naming Alabama state law as the applicable law. It is well-established law in Alabama that the parties to a mortgage may agree to the payment of reasonable fees if certain circumstances arise or actions are taken. Therefore, a mortgage creditor may recover fees incurred in connection with the enforcement of a mortgage only where the mortgage contractually imposes a duty on the mortgagor to pay those fees and only where the fees are reasonable. The reasonableness of fees is determined on a case-by-case basis by the trial court.

Mortgage did not permit creditor to collect postpetition charges in one case:

In one case, the Chapter 13 debtor's mortgage clearly limited the collection of fees to two circumstances: (1) in a foreclosure proceeding initiated under the power of sale or (2) when permitted by applicable law. As noted above, Alabama law only permits the recovery of reasonable fees relating to a mortgage when a provision in the mortgage unambiguously provides for the collection of such fees. Thus, the mortgage only permitted the recovery of fees incurred during a foreclosure proceeding initiated pursuant to a power of sale clause, and this did not include fees incurred in connection with a bankruptcy proceeding. Accordingly, the debtor's mortgage creditor was not entitled to recover postpetition fees.

Mortgage creditor's postpetition charges appeared to be unreasonable in second case:

In contrast, the second debtor's mortgage permitted the creditor to collect fees if "there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy ...." This provision permitted the creditor to charge the debtor for fees incurred in the debtor's bankruptcy case. However, the fees still needed to be reasonable, and the fees--$500 in attorney's fees for filing a proof of claim and $400 in attorney's fees for reviewing the debtor's Chapter 13 plan—appeared to be unreasonable. Since the creditor provided little detail for the charges, the court would disallow the charges but permit the creditor to file an amendment to its response to provide further justification for the charges.

Creditor has ultimate burden of proving entitlement to charges claimed in notice of postpetition fees and expenses:

Once a debtor files a Motion to Determine Fees pursuant to Bankruptcy Rule 3002.1(e), the burden shifts to the creditor to substantiate the fees, expenses, and charges stated in the creditor's notice filed under Rule 3002.1(c). *In re Lighty*, 513 B.R. 489 (Bankr. D. S.C. 2014); *In re Trudelle*, 2017 WL 4411004 (Bankr. S.D. Ga., Sept. 29, 2017); *In re Polly*, 2016 WL 3004439 (Bankr. W.D. Ky., May 17, 2016); *In re Hale*, 2015 WL 1263255 (Bankr. D. S.C., March 16, 2015).

[continued on the next page]

In re Ochab, 586 B.R. 803 (Bankr. M.D. Ala., March 30, 2018)

(case no. 1:16-bk-12205) (Chief Bankruptcy Judge William R. Sawyer)

Text of opinion

In re England, 586 B.R. 795 (Bankr. M.D. Ala., March 30, 2018)

(case no. 1:17-bk-10197) (Chief Bankruptcy Judge William R. Sawyer)

Text of opinion

Court sanctions mortgage creditor for errors in its proof of claim:

Where the Chapter 13 debtors' mortgage creditor filed a proof of claim and a mortgage proof of claim attachment that overstated the debtors' escrow shortage by over $4,000 despite what the creditor's escrow statement of account stated, the creditor failed to respond to both informal inquiries and formal discovery requests by the debtors' attorney, and the creditor failed to amend its proof of claim for over 200 days, the court imposed sanctions on the creditor, as provided for in Bankruptcy Rule 3001(c)(2)(D), in the amount of $5,875, representing the reasonable fees and expenses incurred by the debtors' attorney in her effort to get the creditor to properly state the amount of the debtors' escrow shortage.

In re Milliman, 2018 WL 1475937 (Bankr. D. Kan., March 23, 2018)

(case no. 6:17-bk-10393) (Bankruptcy Judge Robert E. Nugent)

Text of opinion

R

Proof of Claim: By Secured Creditor: Ownership of Claim

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

See also:

In re Kim, 585 B.R. 881 (D. Colo., March 2, 2018), appeal filed, Case No. 18-1186 (10th Cir., filed May 3, 2018) (case no. 1:16-cv-2928) (District Judge Philip A. Brimmer) (a mortgage creditor could enforce the debtors' lost mortgage note under Colo. Rev. Stat. § 4-3-309) (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

See also:

In re Kuper, 586 B.R. 309 (Bankr. N.D. Iowa, March 29, 2018) (case no. 4:17-bk-267) (Chief Bankruptcy Judge Thad J. Collins) (where a creditor had a right to setoff against $60,982.83 of the Chapter 7 debtor's assets, the creditor had a secured claim in this amount) (text of opinion)

R

Proof of Claim: Other Issues

Topical compilation: All topical compilations

PDF Word All circuit compilations

Chapter 13 plan confirmation did not bar subsequent objection to unsecured claim:

The confirmation of a Chapter 13 plan that addresses distributions to general unsecured creditors in a collective manner and does not assign individual values to, or allow, any particular unsecured claims does not preclude the debtor's subsequent objection to an unsecured claim, even if it was filed prior to plan confirmation. *LVNV Funding, LLC v. Harling*, 852 F.3d 367 (4th Cir. 2017); *In re Haskins*, 563 B.R. 177 (Bankr. W.D. Va. 2017).

In re Chorba, 582 B.R. 380 (Bankr. D. Md., March 8, 2018)

(case no. 1:17-bk-16032; adv. proc. no. 1:17-ap-380) (Bankruptcy Judge Michelle M. Harner)

Text of opinion

See also:

In re Lovo, 584 B.R. 79 (Bankr. S.D. Fla., March 28, 2018) (case no. 1:17-bk-14372) (Bankruptcy Judge Robert A. Mark) (lack of notice is not a basis to allow a late claim in a Chapter 13 case under Bankruptcy Rule 3002(c), and a bankruptcy court does not have the authority to judicially create a lack of notice exception to timely filing a proof of claim when that exception is not listed in the applicable rule) (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: PDF Word

All topical compilations
All circuit compilations

The Eleventh Circuit has adopted estate transformation approach as to effect of Chapter 13 plan confirmation on property of estate:

The Eleventh Circuit has adopted the estate transformation approach to the effect of Chapter 13 plan confirmation on property of the estate. See *In re Telfair*, 216 F.3d 1333 (11th Cir. 2000) (the estate transformation approach would be adopted to govern vesting and protection of Chapter 13 debtor's post-confirmation earnings, under which only that property necessary for execution of plan will remain property of estate after confirmation; the debtor's regular mortgage loan payments, made outside of plan, were no longer property of the estate after confirmation) and *In re Waldron*, 536 F.3d 1239 (11th Cir. 2008) (while some property of the estate revests in the Chapter 13 debtor at confirmation, property acquired later vests in the estate, until the case ends or is converted).

Mortgage escrow overage resulting from payments made prior to plan confirmation belonged to Chapter 13 debtor, while overage due to post-confirmation payments was property of estate:

Where the Chapter 13 debtor's mortgage creditor sent to the Chapter 13 trustee an escrow overage resulting from the debtor's prepetition payments, postpetition but pre-confirmation payments, and post-confirmation payments, all made directly to the creditor by the debtor, the overage resulting from post-confirmation payments was property of the estate that the trustee could retain, as it was similar to a tax refund. Under *In re Telfair*, 216 F.3d 1333 (11th Cir. 2000) and *In re Waldron*, 536 F.3d 1239 (11th Cir. 2008), the overage resulting from pre-confirmation payments was not necessary for the fulfillment of the debtor's plan and revested in the debtor upon plan confirmation. However, under *Thompson v. Quarles*, 392 B.R. 517 (S.D. Ga. 2008), that overage could not be returned to the debtor until he amended his schedules to disclose the overage.

In re Doolittle, 2018 WL 1627152 (Bankr. S.D. Ga., March 30, 2018)

(case no. 1:16-bk-11048) (Bankruptcy Judge Susan D. Barrett)

Text of opinion

See also: *In re Jordan*, 2018 WL 1626052 (Bankr. S.D. Ga., March 30, 2018) (case no. 1:15-bk-11081) (Bankruptcy Judge Susan D. Barrett) (text of opinion), in which the court followed *In re Doolittle*, above.

Cause of action as property of estate, generally:

In determining whether a cause of action is property of the bankruptcy estate, courts in the Eighth Circuit have used both the "sufficiently rooted in the debtor's pre-bankruptcy past" test and the accrual under state law test. Compare *Fix v. First State Bank of Roscoe*, 559 F.3d 803 (8th Cir. 2009) (stating that "at least four of the five causes of action [the debtor] brought against the Bank in March 2006 ... have sufficient roots in [the debtor's] pre-bankruptcy activities to be considered property of the bankruptcy estate, even though the Bank's alleged breach of its promise occurred post-petition") with *In re Deer*, 266 B.R. 772 (8th Cir. B.A.P. 1999) (stating that "[t]o determine whether [the debtor] had a property interest in the cause of action at the time of the bankruptcy, we must look to whether the cause of action had accrued").

Murray v. 3M Co., 297 F. Supp. 3d 869 (E.D. Ark., March 13, 2018)

(case no. 5:15-cv-101) (District Judge James M. Moody Jr.)

Text of opinion

Tax refund based on postpetition tax credit was not property of estate:

Under Code § 541, a tax refund is property of the estate only if it is attributable to wages earned and withholding payments made during the prepetition years. Here, the court was not convinced that the debtor's tax refund was attributable to prepetition wages and withholding payments. The debtor was entitled to a refund, if at all, because of a tax credit that only arose because the debtor disgorged money postpetition, giving rise to a postpetition credit for the debtor's postpetition tax return, even though the credit was based on income paid years before the debtor's bankruptcy case was filed.

In re Steffen, 583 B.R. 284 (Bankr. M.D. Fla., March 30, 2018)

(case no. 8:01-bk-9988) (Chief Bankruptcy Judge Michael G. Williamson)

Text of opinion

See also:

In re Rush, 582 B.R. 729 (Bankr. E.D. Tenn., March 1, 2018) (case no. 3:16-bk-30084) (Bankruptcy Judge Suzanne H. Bauknight) (extensively citing caselaw and agreeing with the majority view, the court held that, under Tennessee law, a child support arrearage owed the debtor was held by the debtor in trust for her minor child and was not property of the bankruptcy estate) (text of opinion)


R

Exclusions from Property of the Estate

Topical compilation: All topical compilations

PDF Word All circuit compilations

See also:

In re Todd, 585 B.R. 297 (Bankr. N.D. N.Y., March 23, 2018), appeal filed, *Todd v. Endurance American Insurance Company*, Case No. 1:18-cv-420 (N.D. N.Y., filed April 5, 2018) (case no. 1:15-bk-11083) (Bankruptcy Judge Robert E. Littlefield, Jr.) (the debtor's inherited IRA was not excluded from property of the estate under Code § 541(c)(2) because the inherited IRA was not a trust, as the debtor maintained exclusive control over the IRA) (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

Debtor who moved less than 730 days prepetition was required to use federal exemptions:

The debtor, who had moved from Florida to Nevada less than 730 days prepetition, could not claim a Florida homestead exemption in property located in Nevada, as (1) Florida law does not permit a debtor to claim a homestead exemption in property located outside of Florida, and (2) Code § 522(b)(3)(A) does not preempt residency requirements in state exemption laws. Accordingly, under the savings provision in § 522(b)(3), the debtor was required to use the federal exemptions in § 522(d).

In re Mancuso, 2018 WL 1354337 (9th Cir. B.A.P., March 12, 2018), **appeal filed**, Case No. 18-60022 (9th Cir., filed April 13, 2018)

(case no. 16-1387)

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

Debtor may not use Code § 522(f) to remove judgment lien from dower interest of nondebtor wife:

The debtor could not use Code § 522(f) to remove judgment liens from real property titled solely in his name where the liens secured judgments against his nondebtor wife. Although the debtor asserted that the liens clouded his title, the court assumed that the debtor was referring to his wife's dower interest in the property. To the extent the debtor sought to avoid the liens on the interest of his nondebtor spouse, this was an impermissible use of § 522(f).

In re Blankenship, 2018 WL 1357360 (Bankr. W.D. Ky., March 14, 2018)

(case no. 3:17-bk-32785) (Bankruptcy Judge Joan A. Lloyd)

Text of opinion

Increased exemption amount controls lien avoidance under Code § 522(f), at least in "mixed debt" case:

At least in a "mixed debt" case--one in which the debtor has debt that arose both before and after the increase in the exemption amount--the exemption amount in effect on the petition date, rather than the exemption amount in effect when the creditor's lien attached, is applied in determining, under Code § 522(f), whether the lien impairs the debtor's claimed exemption.

Redstone Federal Credit Union v. Whited, 584 B.R. 71 (N.D. Ala., March 27, 2018), **appeal filed**, In re Whited, Case No. 18-11659 (11th Cir., filed April 20, 2018)

(case no. 5:17-cv-496) (District Judge Madeline Hughes Haikala)

Text of opinion

See also:

In re Mitchell, 2018 WL 1442256 (Bankr. N.D. Ga., March 21, 2018) (case no. 1:17-bk-68428) (Bankruptcy Judge Paul Baisier) (the debtor's motor vehicle, which she used to travel to work sites to meet with clients in her work as a law clerk and tutor, was not a "tool of the trade" under Ga. Code Ann. § 44-13-100(a)(7), so that the debtor could not avoid a creditor's nonpossessory, nonpurchase-money security interest in the vehicle under Code § 522(f)(1)(B)(ii)) (text of opinion)

R

Property of the Estate: Exemptions: Debtor Who Applies Federal Exemptions

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

See also:

In re Shields, 586 B.R. 315 (Bankr. W.D. Mo., March 15, 2018) (case no. 3:17-bk-30321) (Bankruptcy Judge Brian T. Fenimore) (where the debtor husband received $2,285.06 each month under a Supplemental Executive Retirement Plan (SERP) that was a nonqualified deferred compensation plan under Internal Revenue Code § 409A, $1,285.06 of each SERP payment was reasonably necessary for the debtors' support and was exempt under Mo. Rev. Stat. § 513.430.1(10)(e), which was similar to Code § 522(d)(10)(e), while the remaining $1000 was not exempt) (text of opinion)

In re Ecle Kees, 2018 WL 1226011 (Bankr. D. Or., March 8, 2018) (case no. 6:16-bk-62660) (Bankruptcy Judge Thomas M. Renn) (the debtor's IRA, which was funded by transfers from her former husband's tax-qualified retirement accounts pursuant to a divorce decree, satisfied 26 U.S.C. § 408(b) and therefore was exempt under Code § 522(d)(12), despite the Chapter 7 trustee's contentions that the IRA was transferrable and partially forfeitable and that the funding of the IRA violated the applicable annual limit) (text of opinion)

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R

Property of the Estate: Exemptions: Debtor Who Applies State Exemptions

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Colorado law: Motor home did not come within homestead exemption:

A recreational vehicle that the 76-year-old debtor and his wife utilized as their primary residence was in the nature of a "motor home," which was not exempt, rather than a "manufactured home," in which debtor might have claimed a homestead exemption, even though the vehicle had amenities similar to a home, including sleeping quarters with a queen-size bed, televisions, a dining area and kitchenette with a cooktop, a microwave oven, a refrigerator, a sink, a second bathroom sink, a shower and toilet, heating and air conditioning systems, and plumbing and electrical systems capable of being hooked up to external sources. See *In re Romero*, 533 B.R. 807 (Bankr. D. Colo. 2015), aff'd, 579 B.R. 551 (D. Colo. 2016) (a Peterbuilt Truck used by the debtor, a long-haul truck driver, as his abode was not entitled to the protection of the Colorado homestead exemption because it did not meet the statutory definition of a "mobile home" or a "manufactured home."

In re Galvin, 583 B.R. 262 (Bankr. D. Colo., March 2, 2018)

(case no. 1:17-bk-13786) (Bankruptcy Judge Joseph G. Rosania, Jr.)

Text of opinion

Georgia law: Motor vehicle used for transportation to work sites was not "tool of trade":

The debtor's motor vehicle, which she used to travel to work sites to meet with clients in her work as a law clerk and tutor, was not a "tool of the trade" under Ga. Code Ann. § 44-13-100(a)(7), which does not define the term. Although the vehicle was undoubtedly important to the debtor's ability to travel to and from these work sites and conduct her business with clients, the debtor made no showing that her occupation was uniquely dependent on the vehicle, or that the vehicle was integral to her occupation.

In re Mitchell, 2018 WL 1442256 (Bankr. N.D. Ga., March 21, 2018)

(case no. 1:17-bk-68428) (Bankruptcy Judge Paul Baisier)

Text of opinion

Illinois law: Workers' compensation award is not exempt as to claims by medical providers who treated the debtor's injury:

Under Illinois law, the court may exempt property with respect to certain claims, without exempting it with respect to all claims. *In re Fisherman*, 241 B.R. 568 (Bankr. N.D. Ill. 1999). 820 Ill. Comp. Stat. 305/21 (section 21 of the Illinois Workers' Compensation Act), which states "[n]o payment, claim, award or decision under this Act shall be assignable or subject to any lien, attachment or garnishment, or be held liable in any way for any lien, debt, penalty or damages," exempts workers' compensation claims from any bankruptcy estate, even though it does not explicitly mention bankruptcy. *In re McClure*, 175 B.R. 21 (Bankr. N.D. Ill. 1994). However, 820 Ill. Comp. Stat. 305/8.2(e-20), which was added to the Workers' Compensation Act in 2005, provides that "[u]pon a final award or judgment by an Arbitrator or the [Illinois Workers' Compensation] Commission, or a settlement agreed to by the employer and the employee, a provider may resume any and all efforts to collect payment from the employee for the services rendered to the employee and the employee shall be responsible for payment of any outstanding bills for a procedure, treatment, or service rendered by a provider." The district court agreed with the bankruptcy court that, as a result of this amendment, section 21 does not provide a blanket exemption from the bankruptcy estate for workers' compensation claims; it exempts those claims as against general creditors, but not as against medical providers who treated the debtor's injury.

In re Hernandez, 2018 WL 1469000 (N.D. Ill., March 26, 2018), appeal filed, Case No. 18-1789 (7th Cir., filed April 13, 2018)

(case no. 1:17-cv-3230) (District Judge Jorge L. Alonso)

Text of opinion

Missouri law: Portion of payments received under nonqualified deferred compensation plan was exempt:

Where the debtor husband received $2,285.06 each month under a Supplemental Executive Retirement Plan (SERP) that was a nonqualified deferred compensation plan under Internal Revenue Code § 409A, $1,285.06 of each SERP payment was reasonably necessary for the debtors' support and was exempt under Mo. Rev. Stat. § 513.430.1(10)(e), which was similar to Code § 522(d)(10)(e), while the remaining $1000 was not exempt.

In re Shields, 586 B.R. 315 (Bankr. W.D. Mo., March 15, 2018)

(case no. 3:17-bk-30321) (Bankruptcy Judge Brian T. Fenimore)

Text of opinion

New York law: Inherited IRA was not exempt:

An IRA funded by funds inherited by the debtor from her mother's IRA (which the court referred to as an "inherited IRA") was not exempt under N.Y. C.P.L.R. § 5205(c). The property was not held in trust because the debtor maintained exclusive control over the inherited IRA; therefore, the IRA was not exempt under § 5205(c)(1), which exempts "all property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor." Nor was the inherited IRA exempt under § 5205(c)(2), which exempts "all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either any trust or plan, which is qualified as an individual retirement account under section four hundred eight or section four hundred eight A of the United States Internal Revenue Code of 1986." Because neither § 5205(c)(2) nor IRC § 408 defined "qualified," the court turned to legislative history and concluded that exempting funds that had not been saved by individuals for their retirement would be fundamentally inconsistent with the statute's purpose.

In re Todd, 585 B.R. 297 (Bankr. N.D. N.Y., March 23, 2018), appeal filed, Todd v. Endurance American Insurance Company, Case No. 1:18-cv-420 (N.D. N.Y., filed April 5, 2018)

(case no. 1:15-bk-11083) (Bankruptcy Judge Robert E. Littlefield, Jr.)

Text of opinion

Texas law: Proceeds of postpetition sale of exempt homestead remain exempt in Chapter 7 case:

Reinstating *In re DeBerry*, 2015 WL 6528024 (Bankr. W.D. Tex., Oct. 28, 2015), which the district court had reversed, the Court of Appeals held that, in a Chapter 7 case, proceeds of the debtor's postpetition sale of the debtor's homestead do not lose their exempt status if they are not reinvested in a new homestead within six months, where the homestead itself was properly exempted. The Court of Appeals saw no reason to depart from the reasoning of *In re Hawk*, 871 F.3d 287 (5th Cir. 2017), which held that funds withdrawn from an exempted retirement account after the filing of a Chapter 7 bankruptcy do not lose their exempt status even if the money is not redeposited in a similar account within 60 days pursuant to Texas's proceeds rule. The court distinguished *In re Frost*, 744 F.3d 384 (5th Cir. 2014), which required reinvestment of homestead sale proceeds in a Chapter 13 case, on the ground that newly-acquired property interests become part of a Chapter 13 bankruptcy estate under Code § 1306(a)(1).

In re DeBerry, 884 F.3d 526 (5th Cir., March 7, 2018)

(case no. 17-50315)

Text of opinion

Texas law: Artwork used to furnish debtors' home was exempt as "home furnishings":

Where the debtors sought to exempt "Collectibles," valued at $41,450 and consisting of one painting located at a storage facility as well as other "[p]osters, prints, paintings, sculptures, figurines and [G]erman mugs," under Texas Prop. Code § 42.002(a)(1) as "home furnishings, including family heirlooms," the court held that, to the extent the artwork was actually used to furnish the debtors' home and was not being held for investment purposes, it could be claimed as exempt subject to the monetary cap on exemptions set forth in Texas Prop. Code § 42.001(a). See *In re Peters*, 91 B.R. 401 (Bankr. W.D. Tex. 1988) (personal artwork--artwork not held for speculative purposes, investment or resale--fit within the "home furnishing" exemption). Compare *In re Clark*, 2017 WL 5505135 (Bankr. W.D. Tex., Nov. 13, 2017) ("baseball cards" and "NASCAR collectibles" did not fall within the scope of the "home furnishings" exemption); *In re Wilkinson*, 402 B.R. 756 (Bankr. W.D. Tex. 2009) (antique guns, each affixed to a wooden plaque bearing a brass plate describing the weapon and adorning the debtors' home, were not exempt as "home furnishings" because there is a specific exemption for firearms).

In re Westen, 2018 WL 1174888 (Bankr. E.D. Tex., March 5, 2018)

(case no. 4:17-bk-40030) (Bankruptcy Judge Brenda T. Rhoades)

Text of opinion

R

Property of the Estate: Exemptions: Procedure

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Objection to exemption based on valuation of asset must do more than merely challenge debtor's valuation:

To deny the debtor an exemption that is based upon a dollar limitation, the objecting party cannot carry its burden of proof by merely impeaching the debtor's valuation. Competent evidence that affirmatively demonstrates a higher valuation by a preponderance of the evidence is required. *In re Woerner*, 483 B.R. 106 (Bankr. W.D. Tex. 2012) (quoting *In re Shurley*, 163 B.R. 286 (Bankr. W.D. Tex. 1993).

In re Consiglio, 2018 WL 1162869 (Bankr. D. Conn., March 2, 2018)

(case no. 3:15-bk-31915; adv. proc. no. 3:16-ap-3013) (Bankruptcy Judge Ann M. Nevins)

Text of opinion

Debtors did not establish excusable neglect permitting amendment of exemptions in reopened case:

After a case has been closed, a debtor must obtain leave of court to amend the debtor's schedules under Bankruptcy Rule 1009(a) consistent with the requirements of excusable neglect under Bankruptcy Rule 9006(b), even if the case is later reopened. Here, while the Chapter 7 debtors established neglect, they did not establish that the neglect was excusable. Accordingly, the debtors would not be permitted to amend their schedules in their reopened case so as to add an undisclosed cause of action and claim an exemption in that asset.

In re Dollman, 582 B.R. 524 (Bankr. D. N.M., March 5, 2018), appeal filed, Case No. 18-30 (10th Cir. B.A.P., filed March 19, 2018)

(case no. 1:13-bk-13057) (Chief Bankruptcy Judge Robert H. Jacobvitz)

Text of opinion

Neither debtor's alleged bad faith, nor asserted prejudice to creditors, is basis for disallowing amended claim of exemptions:

After *Law v. Siegel*, 571 U.S. 415, 134 S.Ct. 1188, 188 L.Ed.2d 146 (2014), neither a debtor's alleged bad faith, nor asserted prejudice to creditors, is a basis for disallowing a debtor's amended claim of exemptions.

Debtor may amend exemptions in reopened case without showing excusable neglect:

Relying in part on *Law v. Siegel*, 571 U.S. 415, 134 S.Ct. 1188, 188 L.Ed.2d 146 (2014), the court said that it was compelled to follow those cases that had held that the debtor, under Bankruptcy Rule 1009, may amend schedules, including claimed exemptions, without limitation of whether the case is open or reopened after closing. See *In re Martin*, 157 B.R. 268 (Bankr. W.D. Va. 1993); *In re Boyd*, 243 B.R. 756 (N.D. Cal. 2000); *In re Goswami*, 304 B.R. 386 (9th Cir. B.A.P. 2003); *In re Jordan*, 276 B.R. 434 (Bankr. N.D. Miss. 2000). The court said it acknowledged but rejected those decisions that had held that, in a reopened case, a debtor may amend the exemption schedule only upon a showing of excusable neglect sufficient to satisfy the requirements of Bankruptcy Rule 9006(b). See, e.g., *In re Benjamin*, 580 B.R. 115 (Bankr. D. N.J. 2018) and *In re Dollman*, 583 B.R. 268 (Bankr. D. N.M. 2017).

In re Muscato, 582 B.R. 599 (Bankr. W.D. N.Y., March 22, 2018)

(case no. 1:98-bk-14386) (Chief Bankruptcy Judge Carl L. Bucki)

Text of opinion

Prepetition fraudulent transfer of property claimed as exempt did not render exemption "fraudulently asserted" under Bankruptcy Rule 4003(b)(2):

The prepetition transfer of the Chapter 7 debtor's and her non-filing husband's residence from a trust to the debtor and her husband as tenants by the entireties, which the Chapter 7 trustee subsequently avoided, did not render the debtor's claimed exemption of the residence as entireties property "fraudulently asserted" within the meaning of Bankruptcy Rule 4003(b)(2), so that the trustee did not have the longer period provided under that rule in which to object to the claimed exemption. Challenges to an exemption based on a fraudulent transfer theory must be brought within the 30-day time period prescribed in Rule 4003(b)(1).

In re Rosich, 582 B.R. 694 (Bankr. W.D. Mich., March 30, 2018)

(case no. 1306483; adv. proc. no. 1:15-ap-80203) (Chief Bankruptcy Judge Scott W. Dales)

Text of opinion

See also:

In re Belew, Case No. 5:17-bk-71508 (Bankr. W.D. Ark., March 5, 2018), appeal filed, Case No. 18-6007 (8th Cir. B.A.P., filed March 16, 2018) (Chief Bankruptcy Judge Ben T. Barry) (under *Law v. Siegel*, 134 S. Ct. 1188 (2014), a bankruptcy court may no longer disallow a debtor's amended exemptions on the grounds of bad faith or prejudice to creditors under the rule articulated in *In re Kaelin*, 308 F.3d 885 (8th Cir. 2002)) (text of opinion)

In re Libbus, 2018 WL 1470513 (Bankr. E.D. N.C., March 23, 2018) (case no. 5:15-bk-5128) (Bankruptcy Judge David M. Warren) (a debtor may amend his claimed exemptions in a reopened case only upon a showing of excusable neglect, and here the Chapter 7 debtors failed to make that showing) (text of opinion)

R

Property of the Estate: Exemptions: Other Issues

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

See also:

In re Shields, 586 B.R. 315 (Bankr. W.D. Mo., March 15, 2018) (case no. 3:17-bk-30321) (Bankruptcy Judge Brian T. Fenimore) (while the parties agreed that a creditor had a common law right of setoff under Missouri law against monthly payments the debtor husband received under a Supplemental Executive Retirement Plan, the creditor could exercise that right of setoff only against the nonexempt portion of each payment, as under Missouri law the creditor's right of setoff yielded to the debtor's exemption) (text of opinion)

R

Part G

Other Issues

Authority of the Court

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

See also:

Fitzpatrick v. Law Solutions Chicago, LLC, 584 B.R. 203 (E.D. Tenn., March 21, 2018), appeal dismissed, Case No. 18-5349 (6th Cir., July 9, 2018) (case nos. 3:17-cv-257, 3:17-cv-258) (District Judge J. Ronnie Greer) (in a Chapter 7 trustee's adversary proceeding against UpRight Law, licensed attorneys associated with the firm and non-attorney staff employees who assisted with the firm's legal operations, relating to bankruptcy cases filed in the district by local attorneys affiliated with the firm, the court held that the trustee did not establish (1) the adversary defendants' liability under a Tennessee statute prohibiting the unauthorized practice of law within the state, as the trustee did not establish that the debtors suffered a "loss" under the statute; (2) a cause of action for negligence per se; (3) professional negligence by the firm or one of its attorneys; or (4) fraud by certain of the defendants) (text of opinion)

In re Serra, 2018 WL 1516624 (S.D. Fla., March 28, 2018) (case no. 1:17-cv-22224) (District Judge Marcia G. Cooke) (while a bankruptcy court may dismiss a case on its own motion, the Chapter 13 trustee cited to no caselaw indicating that a case may be dismissed without notice to the debtor and an opportunity for her to be heard) (text of opinion)

In re Bentley, 2018 WL 1318951 (Bankr. M.D. Fla., March 8, 2018) (case no. 6:17-bk-294) (Bankruptcy Judge Karen S. Jennemann) (where the debtor was an elderly ailing woman who had been diagnosed with dementia, and the debtor's counsel had represented to the court on multiple occasions that the debtor might be incompetent or mentally incapacitated, the court, using its inherent authority under Code § 105(a) in conjunction with the principles outlined in Bankruptcy Rules 1004.1 and 7017, found it appropriate to appoint a guardian advocate, more akin to a special master, for the limited purpose of providing a report to the court as to whether the debtor needed a formal guardian appointed by a state court before litigation in the bankruptcy court could proceed) (text of opinion)

R

Debtor's tuition payments to universities were not avoidable because universities were not initial transferees of payments:

Prepetition and postpetition payments made by the debtor to two universities and a law school for tuition for the debtor's children while his case was proceeding under Chapter 11 were not avoidable by the Chapter 7 trustee following the conversion of the debtor's case, as the three schools established the defense available under Code § 550(b)(1) to a transferee from the initial transferee that took the transfer for value, in good faith, and without knowledge of the voidability of the transfer. The trustee sought to avoid the prepetition transfers under Code § 544(b) (applying New York law) and § 548(a)(1)(B) as constructively fraudulent transfers, and the postpetition transfers under § 549 as unauthorized postpetition transfers. The court held that, as to all the payments, the debtor's children, not the schools, were the initial transferees because the payments were made to the children's accounts on the schools' electronic platforms. The children then transferred the payments to the schools when the children made their tuition payments from their accounts. At each school, the student's account belonged to the student, and the student's parents had no rights in or to the account. After the debtor transferred the funds to those accounts, the debtor was not able to access the account absent the account holder's authorization, nor was the school authorized to utilize the funds. Rather, the school did not obtain dominion and control of those funds until the student registered for classes for that semester, at which point the funds would be applied towards the tuition amount due. In the event the student decided to withdraw from the program, the student, and not the debtor or the school, was entitled to any funds remaining in the account. Put simply, the student maintained dominion and control over the funds in the account upon the debtor's transfer because it was the student's decision whether to enroll in classes and have the funds applied towards tuition or to withdraw from the program and have the funds refunded directly to him or her. While the accounts were maintained in an electronic platform provided by each school, the school was a "mere conduit" of the debtor's transfers of the funds to the children. The trustee did not dispute that the schools provided value to the children, in the form of enrollment in classes and education, in good faith in exchange for the tuition payments. To the extent the trustee contended that, in order to invoke the good faith defense under § 550(b), value must have been provided to the debtor, this was incorrect. All of the courts that had considered this question had held or implied that value to the transferor (i.e., the child) was sufficient.

In re Adamo, 582 B.R. 267 (Bankr. E.D. N.Y., March 28, 2018), appeal filed, Pergament v. Brooklyn Law School, Case No. 1:18-cv-2204 (E.D. N.Y., filed April 13, 2018)

(case no. 8:14-bk-73640; adv. proc. nos. 8:16-ap-8122, 8:16-ap-8123, 8:16-ap-8124) (Chief Bankruptcy Judge Carla E. Craig)

Text of opinion

Tax foreclosure sale was avoidable as preference under Code § 547(b):

Affirming *In re Hackler*, 571 B.R. 662 (Bankr. D. N.J., August 28, 2017), the district court agreed that the prepetition transfer of the Chapter 13 debtors' real property, with an estimated value of $335,000, in satisfaction of a tax debt of roughly $45,000 clearly enabled the tax sale purchaser's transferee to receive more than it would otherwise have received in a hypothetical Chapter 7 liquidation, and thus was avoidable as a preference under Code § 547(b), even though the tax sale was regularly conducted in accordance with state law. The court said that *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994), which held that the consideration received from a non-collusive real estate mortgage foreclosure sale conducted in conformance with applicable state law was conclusively presumed to constitute "reasonably equivalent value" for the purpose of Code § 548(a)(2), was distinguishable for several reasons. First, *BFP* discussed fraudulent transfers under § 548 and the underlying federalism issues that arose when a federal court set aside a long-observed state remedy of foreclosure. Here, a different section of the Bankruptcy Code, § 547(b), was at issue, and the distinction between the two sections was significant. Moreover, in New Jersey, there were significant procedural differences between a mortgage foreclosure and a tax sale certificate foreclosure.

In re Hackler, --- B.R. ----, 2018 WL 1440326 (D. N.J., March 22, 2018), appeal filed, Case No. 18-1650 (3rd Cir., filed March 30, 2018)

(case no. 3:17-cv-6589) (District Judge Peter G. Sheridan)

Text of opinion

Derivative standing in Chapter 13 case to prosecute a transfer avoidance action requires benefit to bankruptcy estate:

Derivative standing may be conferred in a Chapter 13 case to prosecute a transfer avoidance action under the Bankruptcy Code only if the action would benefit the bankruptcy estate. See *In re Weyandt*, 544 Fed. Appx. 107 (3d Cir. 2013); *In re Stewart*, 473 B.R. 612 (Bankr. W.D. Pa. 2012), aff'd 2013 WL 4041963 (W.D. Pa., August 8, 2013) (debtors failed to establish conditions for derivative standing); *In re Rosenblum*, 545 B.R. 846 (Bankr. E.D. Pa. 2016) (creditors established conditions for derivative standing); *In re Skinner*, 519 B.R. 613 (Bankr. E.D. Pa. 2014), aff'd 532 B.R. 599 (E.D. Pa. 2015), aff'd 636 Fed. Appx. 868 (3d Cir. 2016) (a creditor was not entitled to derivative standing). Here, a creditor in a Chapter 13 case was not entitled to derivative standing to prosecute a fraudulent transfer action where the action would not benefit the bankruptcy estate.

In re Demeza, 582 B.R. 868 (Bankr. M.D. Pa., March 1, 2018)

(case no. 1:16-bk-2789) (Chief Bankruptcy Judge Robert N. Opel II)

Text of opinion

See also:

In re White, 2018 WL 1352680 (Bankr. N.D. W. Va., March 14, 2018) (case no. 1:16-bk-1240; adv. proc. no. 1:17-ap-16) (Bankruptcy Judge Patrick M. Flatley) (where the Chapter 13 debtors' mortgage creditor did not record its deed of trust until after the debtors filed their bankruptcy petition, the Chapter 13 trustee could set aside the creditor's security interest under Code § 544(a)(3), which grants the trustee the power to "avoid a transfer of property that is voidable by a hypothetical bona fide purchaser of Debtors' real estate for value and without notice of the transfer") (text of opinion)

In re Karim, 582 B.R. 193 (Bankr. N.D. Ill., March 9, 2018) (case no. 1:17-bk-6548; adv. proc. no. 1:17-ap-380) (Bankruptcy Judge Deborah L. Thorne) (a judgment creditor's citation lien attached to a check issued to the Chapter 11 debtors as their share of the proceeds from the prepetition sale of their real property, not at the time that the citation was served on the debtors, more than 90 days prior to their bankruptcy filing, but only when the property was sold and the check was issued to the debtors on the same day, during the 90-day preference period, so that the lien was avoidable as a preference) (text of opinion)

R

Required Documentation

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Court denies creditor's claim to dismiss debtor's case for failure to provide tax return:

The creditor's claim to dismiss the Chapter 7 debtor's case under Code § 521(e)(2)(C) failed for two reasons: The creditor asserted that the debtor failed to provide the creditor with a copy of the debtor's 2015 tax return, but the debtor had not filed his 2015 tax return when he commenced his bankruptcy case, and the creditor's request for a copy of the debtor's tax return was not "timely" under Bankruptcy Rule 4002(b)(4), as the request was not submitted at least 14 days before the first date set for the meeting of creditors

In re Jeffery, 2018 WL 1605307 (Bankr. E.D. Pa., March 29, 2018)

(case no. 4:16-bk-15037; adv. proc. no. 2:17-ap-28) (Bankruptcy Judge Jean K. FitzSimon)

Text of opinion

Access to debtor's federal tax returns under Code § 521(g), generally:

Under Code § 521(f), a Chapter 13 debtor is required to file her postpetition federal income tax returns, or transcripts of such returns, with the court for the tax years during which the debtor's Chapter 13 case is pending. The Chapter 13 trustee could access those returns or transcripts upon the proper showing under § 521(g)(2), which provides that "[t]he tax returns, amendments, and statement of income and expenditures described in subsections (e)(2)(A) and (f) shall be available to the United States trustee (or the bankruptcy administrator, if any), the trustee, and any party in interest for inspection and copying, subject to the requirements of section 315(c) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005." Section 315(c) of BAPCPA mandates that the Director of the Administrative Office of the United States Courts establish procedures for safeguarding the confidentiality of tax information required to be produced under § 521. On September 20, 2005, the Judicial Conference approved interim guidance drafted to implement this statutory directive, effective October 17, 2005, the effective date of BAPCPA. In March 2015, the Director issued the Final Guidance for Protection of Tax Information, which established procedures for obtaining access to a debtor's tax information filed with the bankruptcy court and is available online at http://www.uscourts.gov/sites/default/files/vol04_ch08.pdf.

Chapter 13 trustee established right to copies of debtor's federal tax returns under Code § 521(g):

The bankruptcy court correctly held that, under the Final Guidance, the Chapter 13 trustee had to show more than his general statutory duty of investigating a debtor's financial affairs to meet his burden of showing a "demonstrated need" for the debtor's federal income tax return transcripts. Concluding that the bankruptcy court's finding that the trustee had shown a "demonstrated need" for copies of the debtor's federal income tax return transcripts for 2015 and 2016 was not illogical, implausible, or without support in the record, the BAP said that the trustee established that the tax information would aid in the administration of the Chapter 13 case; it was not being obtained for an improper purpose, such as a discovery tool to assist a creditor with a nondischargeable judgment in aid of collection or to harass the debtor. See *In re Tomer*, 508 B.R. 641 (Bankr. W.D. Va. 2014) (creditor was not entitled to copies of the Chapter 13 debtor's federal tax returns and other documents); *In re Byrne*, 2007 WL 2580834 (Bankr. D. Vt. June 15, 2007) (same). However, utilizing a Chapter 13 debtor's tax information as a means for plan modification is proper and consistent with the Code. *In re Fridley*, 380 B.R. 538 (9th Cir. B.A.P. 2007).

Chapter 13 trustee was not entitled to copies of debtor's state tax returns under Code § 521(g):

Holding that the bankruptcy court erred in applying Code § 521(g)(2) to order turnover of the debtor's 2015 and 2016 state income tax returns to the Chapter 13 trustee, the BAP stated that Congress had been very clear as to when state income tax returns were required to be produced under the Code. The BAP pointed to Code § 1308—another BAPCPA provision—under which a Chapter 13 debtor is required to file all prepetition federal, state and local tax returns due for all of the taxable periods ending during the four-year period ending on the date the bankruptcy petition was filed.

In re Romeo, 2018 WL 1463850 (9th Cir. B.A.P., March 23, 2018)

(case no. 17-1215)

Text of opinion

See also:

In re Picket, 2018 WL 1513541 (Bankr. D. D.C., March 26, 2018) (case no. 1:18-bk-121) (Bankruptcy Judge S. Martin Teel, Jr.) (although the debtor had suffered a stroke, the debtor did not show that she was "incapacitated" for the purpose of Code § 109(h)(4), where the debtor represented that her stroke had affected her attention span, but not her ability to realize and make rational decisions with respect to her financial responsibilities, and the debtor conceded that she was able to take credit counseling once she received her Social Security check) (text of opinion)

R

Scope and Violation of Discharge Injunction

Post-discharge amendment to prepetition lease was unenforceable reaffirmation agreement:

An amendment to a prepetition commercial lease that the Chapter 7 debtor entered into following his discharge and that extended the term of the original lease was an unenforceable reaffirmation agreement where a material part of the consideration offered by the lessor to the debtor was its promise to forego collection of a rent increase provided for in the original lease in exchange for the extended lease term. The debtor's obligation to pay that rent to the lessor had been discharged, and an "agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable" amounts to an unenforceable reaffirmation agreement. And this was true despite the lessor's contention that the debtor, not the lessor, benefitted from the lessor's willingness to enter into the lease amendment.

Lessor's attempt to enforce prepetition lease and post-discharge amendment of lease was willful violation of discharge injunction:

A lessor's conduct in prosecuting a post-discharge action against the Chapter 7 debtor for his violation of both a prepetition lease and a post-discharge amendment to the lease that constituted an unenforceable reaffirmation agreement violated the discharge injunction. And, since the lessor was represented by counsel and the debtor informed the lessor of his bankruptcy discharge, the violation was willful even under the rule of *In re Taggart*, 548 B.R. 275 (9th Cir. B.A.P., April 12, 2016), aff'd 888 F.3d 438 (9th Cir., April 23, 2018).

In re Cowan, 586 B.R. 337 (Bankr. D. Idaho, March 14, 2018)

(case no. 1:08-bk-2083) (Bankruptcy Judge Jim D. Pappas)

Text of opinion

See also:

In re Forson, 583 B.R. 704 (Bankr. S.D. Ohio, March 21, 2018) (case no. 2:08-bk-61001; adv. proc. no. 2:15-ap-2137) (Bankruptcy Judge C. Kathryn Preston) (in a proposed district-wide class action against a mortgage creditor, in which the court had not yet ruled on class certification, the court held that several written and oral communications by the creditor with the Chapter 13 debtor violated the discharge injunction) (text of opinion)

Court values residence in Cary, North Carolina at $620,000:

Valuing the Chapter 13 debtors' home at 105 Chalon Drive in Cary, Wake County, North Carolina, at $620,000 on the basis of the debtor husband's testimony, the court said that it found the husband to be a credible witness with a strong knowledge of the real estate market in his neighborhood specifically. He competently compared the residence to four properties situated within a mile of the residence; three of the comparison properties had sold in 2017, while the other was under contract and projected to sell in March 2018. In contrast, the court said, the creditor's appraiser performed calculations in an effort to estimate the value of the residence on the basis of averages across the county as a whole, and a reliable value could not be ascertained from this methodology. The appraiser's testimony was unlike any the court had ever received, and while potentially novel, the testimony was neither credible nor helpful.

In re Helms, 2018 WL 1465796 (Bankr. E.D. N.C., March 23, 2018)

(case no. 5:17-bk-3266) (Bankruptcy Judge David M. Warren)

Text of opinion

See also:

In re Blackwell, 2018 WL 1189257 (Bankr. S.D. W. Va., March 5, 2018) (case no. 2:17-bk-20203) (Chief Bankruptcy Judge Frank W. Volk) (the court valued the Chapter 13 debtors' 2009 Fleetwood manufactured home at its $5,000 salvage value provided by the debtors' appraiser given that the home, with its many deficiencies, would not satisfy even the minimal warranty of habitability as required by W. Va. Code § 37–6–30) (text of opinion)

Midstate Finance Co., Inc. v. Peoples, --- B.R. ----, 2018 WL 1586138 (E.D. Tenn., March 31, 2018) (case no. 4:17-cv-6) (District Judge Curtis L. Collier) (the bankruptcy court, which considered a wide range of evidence, did not commit clear error in valuing the Chapter 13 debtors' real property, consisting of five acres improved by the debtors' mobile home and shop, at $60,000, despite the fact that a creditor holding 80% of the debtors' unsecured debt had bid $66,000 for the property when the case had been proceeding under Chapter 7, given that the creditor would directly benefit from a higher valuation) (text of opinion)

BAPCPA prohibits bankruptcy attorneys from advising clients to pay attorney's fee using credit:

Code § 526(a)(4), which was added by BAPCPA, provides in relevant part that a debt relief agency--including a law firm that provides bankruptcy-related services--"shall not advise" a debtor "to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer a fee or charge for services performed as part of preparing for or representing a debtor" in a bankruptcy case. In *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), the Supreme Court unanimously concluded that the section's first prohibition--on advice to incur additional debt "in contemplation of" a bankruptcy filing--requires proof that the advice was given for an invalid purpose designed to manipulate the bankruptcy process. In a case presenting the question whether the statute's second prohibition--on advice to incur debt to pay for a lawyer's bankruptcy-related representation--likewise entails an invalid-purpose requirement, the Court of Appeals held that it does not and that an attorney violates § 526(a)(4) if the attorney instructs a client to pay his bankruptcy-related legal fees using a credit card. A bankruptcy attorney's advice that a potential client take on additional debt in order to pay the attorney's fee is inherently abusive in at least two respects: it puts the attorneys financial interest--getting paid in full--ahead of the clients, and it puts the attorney's own interests ahead of the creditors' in that, while ensuring the lawyer's full payment, it leaves a diminished estate on which creditors can draw. The Court of Appeals accordingly reversed *Cadwell v. Kaufman, Englett & Lynd, PLLC*, 2017 WL 5307898 (M.D. Fla., Jan. 24, 2017).

Cadwell v. Kaufman, Englett & Lynd, PLLC, 886 F.3d 1153 (11th Cir., March 30, 2018)

(case no. 17-10810)

Text of opinion

Remedy was not available to U.S. Trustee for attorney's violation of Code § 526(a)(3):

While an attorney and his law firm violated Code § 526(a)(3) by making a misrepresentation to a client, the violation was neither intentional nor part of a clear pattern and practice of violations, so under § 526(c)(5), no remedy was available for that violation in a proceeding by the U.S. Trustee.

$5,000 penalty imposed on law firm for violation of Code § 526(a)(2):

The law firm also violated Code § 526(a)(2) by counseling a debtor to make untrue or misleading statements in her statement of financial affairs, and this warranted a penalty of $5,000 and an injunction against future violations in a proceeding by the U.S. Trustee.

In re Stites, 2018 WL 1267837 (Bankr. D. Or., March 9, 2018)

(case nos. 3:14-bk-35071, 6:15-bk-62393, 6:15-bk-63116; adv. proc. nos. 3:16-ap-3013, 6:16-ap-6061, 6:16-ap-6062) (Bankruptcy Judge David W. Hercher)

Text of opinion

See also:

In re Cho, 581 B.R. 452 (Bankr. D. Md., March 13, 2018) (case nos. 1:17-bk-22057, 1:17-bk-22058) (Bankruptcy Judge Michelle M. Harner) (a prepetition settlement agreement reached in a state court suit by the former owners of the Chapter 11 debtors' business asserting claims for fraud and fraudulent conveyance, among others, against the debtors was an executory contract subject to rejection in the debtors' Chapter 11 cases where both parties unquestionably had unperformed obligations under the agreement) (text of opinion)

R

Section Two:
Chapter 7 Issues

Abuse

Topical compilations: All topical compilations

PDF Word (in general) All circuit compilations

PDF Word (under totality of circumstances)

Chapter 7 discharge would not be abuse under totality of circumstances:

Although it was a close case, and the debtor's budget reflected about $187.67 per month available to pay creditors once his spousal support obligation ended in June of 2018, the court concluded that granting the debtor a Chapter 7 discharge would not be an abuse under the totality of the circumstances. Factors weighing against a finding of abuse included the debtor's testimony that all three members of his household, his two daughters and himself, had suffered due to his marriage's traumatic dissolution and that they had incurred increased medical expenses as a result; the change in the debtor's insurance coverage from that of a traditional plan to an HSA plan increased the level of uncertainty in terms of the debtor's ability to pay medical costs in the future; the debtor's testimony that he did not expect to earn as much from his primary work as a firefighter as he had in prior years; the fact that much of the debtor's debt was accumulated prior to his divorce in an attempt to assist his then-wife in developing her business; and testimony that reflected that some uncomfortable belt-tightening had been undertaken.

In re Lisowski, 2018 WL 1614756 (Bankr. N.D. Ohio, March 30, 2018)

(case no. 3:17-bk-32368) (Bankruptcy Judge John P. Gustafson)

Text of opinion

See also:

In re Consiglio, 2018 WL 1162869 (Bankr. D. Conn., March 2, 2018) (case no. 3:15-bk-31915; adv. proc. no. 3:16-ap-3013) (Bankruptcy Judge Ann M. Nevins) (because the Chapter 7 debtor's annualized current monthly income of $77,778 was substantially less than the median income for a household of three, $91,131, for the state of Connecticut as of the petition date, the debtor qualified for the safe harbor of Code § 707(b)(7) and, as such, there was no presumption of abuse) (text of opinion)

In re Shoup, 2018 WL 1614188 (Bankr. N.D. Ohio, March 30, 2018), appeal dismissed, Shoup v. McDermott, 2018 WL 3328861 (N.D. Ohio, July 6, 2018) (case no. 3:17-bk-32181) (Bankruptcy Judge John P. Gustafson) (granting the debtors a Chapter 7 discharge would be an abuse under the totality of the circumstances, where the debtors spent $85,000 to acquire two motor vehicles prior to their bankruptcy filing, and adding the debtors' voluntary retirement contributions of $338 and $210.90 per month to their income yielded disposable income of $288 per month, which exceeded the $215 per month of disposable income that resulted in a presumption of abuse under Code § 707(b)(2)) (text of opinion)

In re Stackhouse, 582 B.R. 445 (Bankr. S.D. Ohio, March 6, 2018) (case no. 2:17-bk-53498) (Bankruptcy Judge C. Kathryn Preston) (granting the debtors a Chapter 7 discharge would be an abuse under the totality of the circumstances where (1) monthly student loan payments of $1,200, car payments of $265, and general financial assistance payments of $900 that the debtors made to their non-dependent 28-year-old daughter were not reasonable and necessary expenses; (2) the debtors' monthly voluntary retirement contribution of $455 was not a reasonable and necessary expense; and (3) the debtors' monthly storage unit fee of $169 was not a reasonable and necessary expense) (text of opinion)

R

"Cause" for Dismissal under Code § 707(a)

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

See also:

In re Miller, 2018 WL 1226012 (Bankr. N.D. N.Y., March 8, 2018) (case no. 6:17-bk-60023) (Bankruptcy Judge Diane Davis) (a Chapter 7 debtor's failure to cooperate with the trustee constitutes cause to dismiss the case under Code § 707(a) due to the trustee's inability to effectively administer the estate, and here, where the debtor had not fulfilled his statutory duties to cooperate with the trustee, the court would dismiss the case) (text of opinion)

R

Conversion or Dismissal of Case by Debtor

Topical compilation: All topical compilations

PDF Word All circuit compilations

Chapter 7 debtor's alleged bad faith was not so clear as to warrant denial of motion to convert to Chapter 13:

Granting the Chapter 7 debtor's motion to convert to Chapter 13, the court said that the debtor's alleged bad faith was not so clear that converting the case to Chapter 13 would undoubtedly be a waste of everyone's time and effort. In addition, waiting to rule on the debtor's motion to convert would leave the Chapter 7 trustee in something of a quandary, uncertain if he should proceed to fulfill his duties as a Chapter 7 trustee, or wait to take any further action until the motion is decided.

In re Chapman, 2018 WL 1614152 (Bankr. D. Kan., March 30, 2018)

(case no. 6:17-bk-12138) (Bankruptcy Judge Dale L. Somers)

Text of opinion

R

Other Issues

Estate property abandoned by trustee reverts to debtor as though there had been no bankruptcy filing:

A trustee's abandonment constitutes a complete divesture of the estate's interests in the property. Once an asset is abandoned, it is removed from the bankruptcy estate, and this removal is irrevocable except in very limited circumstances. *Chartschlaa v. Nationwide Mutual Ins. Co.*, 538 F.3d 116 (2d Cir. 2008) (citing *Catalano v. Comm'r*, 279 F.3d 682 (9th Cir. 2002)). Abandoned property reverts to the debtor and the debtor's rights to the property are treated as if no bankruptcy petition was filed.

Chapter 7 debtor could prosecute prepetition claim following trustee's abandonment of claim:

Where the debtor continued the prosecution of a prepetition claim after her Chapter 11 case was converted to Chapter 7, the Chapter 7 trustee was the proper party to prosecute the claim following conversion. However, where the trustee subsequently abandoned the claim, the claim reverted to the debtor and was treated as if no bankruptcy petition had been filed.

In re Taylor, 2018 WL 1413538 (Bankr. D. Conn., March 20, 2018), **motion for reconsideration filed** (March 23, 2018)

(case no. 3:15-bk-31208) (Bankruptcy Judge Ann M. Nevins)

Text of opinion

Additional inheritance received after closing of Chapter 7 case was not property of estate:

The Chapter 7 debtors' right to an inheritance was abandoned under Code § 554(c) when the case was closed because the inheritance was properly scheduled by the debtors and the Chapter 7 trustee fully administered the funds available while the case was pending. Accordingly, an additional inheritance amount that the debtors received following the closing of their case, after additional inheritance funds became available, was not property of the estate.

In re Morris, 2018 WL 1321343 (Bankr. N.D. Ohio, March 13, 2018)

(case no. 3:08-bk-36702) (Bankruptcy Judge John P. Gustafson)

Text of opinion

Chapter 7 trustee may surcharge proceeds of sale of encumbered property under Code § 506(c):

An exception to the general rule prohibiting a trustee's surcharge against encumbered property is Code § 506(c), which provides that "the trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property." The trustee bears the burden of proving (1) the expenditure was necessary, (2) the amounts expended were reasonable, and (3) the creditor benefitted from the expenses. However, expenses incurred contesting the validity of a secured creditor's lien cannot be said to provide a benefit to that secured creditor within the meaning of § 506(c). Additionally, § 506(c) provides for the recovery of "necessary costs and expenses"; it does not mention fees. Thus, even in those circumstances in which the trustee has expended time and money to preserve or dispose of a secured creditor's collateral, the trustee's recovery under § 506(a) is to reimburse the estate for the trustee's expenditure; it is not appropriate to pay him his statutory fees/commission.

In Tenth Circuit, fees of Chapter 7 trustee's attorney are based on adjusted lodestar method:

Insofar as allowance of the fees of the Chapter 7 trustee's attorneys was concerned, compensation for services and reimbursement of expenses of professional persons are governed by Code § 330. The normal "threshold issue" bearing on a professional's eligibility for compensation is whether the professional's services conferred a benefit on the bankruptcy estate. In the Tenth Circuit, an adjusted lodestar method is to be used in determining reasonable compensation for a professional's services. This method takes into account all of the factors specified by § 330(a)(3) and the additional factors prescribed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

In re Koonce, 582 B.R. 239 (Bankr. W.D. Okla., March 26, 2018)

(case no. 5:14-bk-11375) (Chief Bankruptcy Judge Janice Loyd)

Text of opinion

In Fifth Circuit, fees of Chapter 7 trustee's attorney are based on adjusted lodestar method:

In determining reasonable compensation for the Chapter 7 trustee's attorney (who may be the trustee herself), bankruptcy courts must first calculate the amount of the lodestar, which is "equal to the number of hours reasonably expended multiplied by the prevailing hourly rate in the community for similar work." Bankruptcy courts then may adjust the lodestar up or down based on the factors contained in Code § 330 and consideration of the twelve factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). See *In re Pilgrim's Pride Corp.*, 690 F.3d 650 (5th Cir. 2012).

In re Pace, 2018 WL 1891311 (Bankr. N.D. Miss., March 22, 2018)

(case no. 1:13-bk-14017) (Chief Bankruptcy Judge Jason D. Woodard)

Text of opinion

Determination of whether Chapter 7 debtor is able to pay filing fee in installments, generally:

In determining whether a Chapter 7 debtor is unable to pay the filing fee in installments, for the purpose of deciding whether to waive the filing fee under 28 U.S.C. § 1930(f), most courts consider the totality of the circumstances. Factors that may be considered in analyzing a debtor's ability to pay the filing fee include (1) discrepancies between a debtor's application and schedules based upon a review of those documents and the debtor's testimony and other pleadings; (2) collateral sources of income from family or friends from which the filing fee may be paid; (3) excessive or unreasonable expenses that could be directed to the payment of the filing fee; (4) whether the debtor agreed to pay a portion of her attorney's fee after the filing of the case; (5) whether the debtor has any property from which the filing fee could be paid; (6) the debtor's historical spending of disposable income; and (7) whether the debtor's current or anticipated income or expenses are the result of temporary or extraordinary circumstances. See *In re Stickney*, 370 B.R. 31 (Bankr. D. N.H. 2007). The debtor has the burden of proving, by a preponderance of the evidence, that her circumstances satisfy the statutory requirements for waiver of the filing fee. *In re Burr*, 344 B.R. 234 (Bankr. W.D. N.Y. 2006).

Court would close case, rather than dismiss it, where Chapter 7 debtor failed to pay filing fee in installments:

Where the court concluded that the Chapter 7 debtor had the ability to pay the filing fee in installments, but the debtor failed to make any of the payments, the court would exercise its discretion and close the case without discharge rather than dismissing it, as the debtor had participated in the case in good faith.

In re Hayes, 581 B.R. 509 (Bankr. W.D. Mich., March 9, 2018)

(case no. 1:17-bk-489) (Bankruptcy Judge James W. Boyd)

Text of opinion

See also:

In re Underwood, 583 B.R. 438 (Bankr. E.D. Mich., March 9, 2018) (case no. 2:06-bk-55754) (Bankruptcy Judge Thomas J. Tucker) (a Chapter 7 debtor who did not demonstrate that there was a reasonable possibility of a surplus in the case lacked standing to object to the Chapter 7 trustee's motion to sell estate property for a price that the debtor contended was inadequate) (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

Court permits direct payment of impaired secured claims only if Chapter 13 plan provides for payment of Chapter 13 trustee's commission on payments:

Under *In re Lopez*, 372 B.R. 40 (9th Cir. B.A.P. 2007), opinion adopted, 550 F.3d 1202 (9th Cir. 2008), an "impaired" claim must be paid by the Chapter 13 trustee unless the court, in its discretion, determines that direct payment by the Chapter 13 debtor is appropriate. Defining impairment as any proposed alteration of the rights of a creditor that the debtor could not insist on but for the protections of the Bankruptcy Code, the court said that, under a proposed Chapter 13 plan that would pay all secured claims through escrow at the closing of the sale or refinance of certain real property, which was to occur by July 2020, the claims of two judicial lien creditors were impaired because the plan curtailed the creditors' rights to execute and foreclose on the liens for a three-year period. For similar reasons, a county's property tax arrearage claim was impaired under the plan. The court concluded that it would permit direct payment by the debtors of these claims only if the debtors agreed to pay the Chapter 13 trustee's commission on the payments.

In re Evans, 584 B.R. 917 (Bankr. D. Or., March 8, 2018)

(case no. 6:17-bk-62302) (Bankruptcy Judge Thomas M. Renn)

Text of opinion

See also:

Schweiger v. MidFirst Bank, 2018 WL 1471680 (D. Md., March 26, 2018) (case no. 1:17-cv-3255) (Chief District Judge James K. Bredar) (because, under Maryland law, the Chapter 13 debtor possessed no right of redemption following the prepetition foreclosure sale of his residence, under Code § 1322(c)(1) the debtor's right to cure the default on his mortgage debt expired prepetition; § 1322(c)(1) did not extend the debtor's right to cure the default) (text of opinion)

In re Klave, 2018 WL 1214377 (Bankr. D. Ariz., March 7, 2018) (case no. 2:16-bk-14246) (Chief Bankruptcy Judge Daniel P. Collins) (under local rules, once the Chapter 13 debtors entered the court's Mortgage Modification Mediation Program, their home mortgage payments needed to be made through the Chapter 13 trustee until the mortgage creditor consented to elimination of the conduit mortgage payment arrangement) (text of opinion)

In re Nunez, 2018 WL 1568524 (Bankr. S.D. Fla., March 28, 2018), appeal filed, Reverse *Mortgage Solutions, Inc. v. Nunez*, Case No. 1:18-cv-22204 (S.D. Fla., filed June 4, 2018) (case no. 1:17-bk-21018) (Chief Bankruptcy Judge Laurel M. Isicoff) (the Chapter 13 debtor was a "Borrower" under a reverse mortgage executed by herself and her mother prior to her mother's death and, as such, was able to cure a default under the reverse mortgage in the debtor's Chapter 13 plan) (text of opinion)

R

Confirmation of Plan:
Treatment of Secured Claims:
Bifurcation, Lien Stripping, Modification

Topical compilation: All topical compilations

PDF Word (general matters) All circuit compilations

PDF Word (910-day vehicles; other issues under hanging paragraph)

Predominant-use test is applied in determining whether vehicle was "acquired for the personal use of the debtor" within meaning of hanging paragraph of Code § 1325(a):

Agreeing with *In re Ozenkoski*, 417 B.R. 794 (Bankr. E.D. Mo. 2009), the court said it would apply the predominant-use test articulated in *In re Joseph*, 2007 WL 950267 (Bankr. W.D. La., March 20, 2007) to determine whether a vehicle was "acquired for the personal use of the debtor" within the meaning of the hanging paragraph of Code § 1325(a). The court distinguished courts applying at least two other tests. See *In re Hill*, 352 B.R. 69 (Bankr. W.D. La. 2006) (the appropriate test was "whether the acquisition of the vehicle enabled the debtor to make a significant contribution to the gross income of the family unit," in which case the vehicle was not acquired for personal use) and *In re Solis*, 356 B.R. 398 (Bankr. S.D. Tex. 2006) (a vehicle is acquired for personal use where "a significant, material portion of the use of the vehicle" was for personal use).

Chapter 13 debtor's vehicle was not "acquired for the personal use of the debtor" within meaning of hanging paragraph of Code § 1325(a):

A vehicle purchased by the Chapter 13 debtor less than 910 days prepetition was predominantly used to perform the functions of her job, although the debtor also used the vehicle for personal uses, and therefore was not "acquired for the personal use of the debtor" within the meaning of the hanging paragraph of Code § 1325(a). Under the predominant-use test from *In re Joseph*, 2007 WL 950267 (Bankr. W.D. La., March 20, 2007), the court found that the debtor's business use of the vehicle predominated over her personal use. The debtor testified that she was required to have a vehicle during the course of her employment with a healthcare provider to pick up patients and transport them to various events and medical appointments, that this portion of her job consumed three and a half to six hours per day, and that her employer reimbursed her for mileage.

In re McGinness, 586 B.R. 14 (Bankr. E.D. Tenn., March 2, 2018)

(case no. 4:17-bk-14746) (Bankruptcy Judge Shelley D. Rucker)

Text of opinion

Worthless junior lien may be stripped in Chapter 13 case without filing of proof of claim:

Reversing *Burkhart v. Community Bank of Tri-County*, 2016 WL 4013917 (D. Md., July 27, 2016), which had affirmed *In re Burkhart*, 505 B.R. 444 (Bankr. D. Md., Jan. 23, 2014), the Court of Appeals held that, because the ability of a Chapter 13 debtor to strip off an unsecured lien stems from Code § 1322(b) rather than § 506(d), a Chapter 13 debtor may strip off a wholly-unsecured junior lien regardless of whether a proof of claim has been filed for the debt secured by the junior lien. Section 1322(b) permits Chapter 13 plans to modify the rights of holders of unsecured claims. Whether a creditor has an unsecured claim turns on the value of the underlying collateral, not the mere existence of a security interest. And in making this determination, courts are not limited to valuing claims that have been filed and allowed. Where, as here, a senior lienholder is only partially secured, any junior lienholder is by definition the holder of an unsecured claim for purposes of § 1322(b), which may be stripped without the filing of a proof of claim.

Burkhart v. Grigsby, 886 F.3d 434 (4th Cir., March 29, 2018)

(case no. 16-1971)

Text of opinion

Amended Bankruptcy Rule 3012 permits secured claim to be valued in Chapter 13 plan:

Under Bankruptcy Rule 3012, as amended on December 1, 2017, a Chapter 13 debtor may determine the amount of a creditor's secured claim in a plan, instead of filing a separate motion, as long as the plan is served on the holder of the claim in the manner provided for service of a summons and complaint by Rule 7004. Though Rule 7004(b) generally authorizes service by mail, this authority is subject to an important exception for service on an insured depository institution. Under Rule 7004(h), persons wishing to serve papers by mail on an insured depository institution, with certain exceptions, must use certified mail addressed to an officer of the institution. Here, a credit union that the debtor was attempting to serve was an insured depository institution within the meaning of Rule 7004(h). See Code § 101(34) (defining "insured credit union") and § 101(35) (defining "insured depository institution" to include "insured credit union").

In re Drobney, 583 B.R. 700 (Bankr. W.D. Mich., March 26, 2018)

(case no. 1:17-bk-5028) (Chief Bankruptcy Judge Scott W. Dales)

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:

PDF Word

All topical compilations

All circuit compilations

Below-median Chapter 13 debtors may calculate PDI by offsetting tax refund income with expenses expected to be incurred over course of year:

Affirming *In re Blake*, 565 B.R. 871 (Bankr. N.D. Ill., March 16, 2017), the Court of Appeals held that the approach adopted by the bankruptcy court to calculate the projected disposable income of a below-median Chapter 13 debtor complied with Code § 1325(b). Under this approach, the debtor prorated her annual tax refund (i.e., divided the annual tax refund by twelve) and added the resulting amount to her current monthly income. Then, the debtor prorated future expenses that the refund would be spent on over that 12-month period, thus partially or fully offsetting the tax refund income as long as her additional expenses were reasonably necessary. The bankruptcy court adopted this practice for a couple of reasons, the Court of Appeals explained. First, the court wanted to alleviate the burdens that the process of modifying confirmed Chapter 13 plan imposed on trustees, debtors' counsel, and the court. Second, the court sought to promote consistency among trustees who often had different practices as to whether a debtor could retain a portion of their tax refund. The Court of Appeals concluded that the reasoning of *Hamilton v. Lanning*, 560 U.S. 505 (2010), which adopted a forward-looking approach to the calculation of a Chapter 13 debtor's projected disposable income in a case involving an above-median debtor, applied with equal force to below-median Chapter 13 debtors.

Marshall v. Blake, 885 F.3d 1065 (7th Cir., March 22, 2018)

(case no. 17-2809)

Text of opinion

Income is included in Chapter 13 debtor's projected disposable income even if exempt:

Agreeing with the majority approach, the court held that the Chapter 13 debtors' workers' compensation award was income included in the debtors' projected disposable income, even though the debtors exempted the award.

Workers' compensation award was included in Chapter 13 debtors' projected disposable income:

Rejecting the Chapter 13 debtors' contention that, because the statutory definition of "median family income" incorporates calculations reported by the Bureau of the Census, Congress must have intended "income" to be defined for purposes of Code § 1325 subject to the same exclusions used by the Census Bureau when it calculates median family income, and affirming *In re Ortiz-Peredo*, 573 B.R. 703 (Bankr. W.D. Tex., July 18, 2017), the district court said that BAPCPA's statutory definition of "current monthly income" makes no mention of the categories excluded from income by the Census Bureau, but rather includes the average monthly income "from all sources that the debtor receives ... without regard to whether such income is taxable income." In the case of the BAPCPA definition of "current monthly income," the statutory language is plain: Quite simply, the term "all" means "all." Accordingly, a workers' compensation award received postpetition was included in the debtors' projected disposable income.

Ortiz-Peredo v. Viegelahn, 587 B.R. 321 (W.D. Tex., March 29, 2018)

(case no. 5:17-cv-796) (Chief District Judge Orlando L. Garcia)

Text of opinion

R

Confirmation of Plan:
Treatment of Unsecured Claims:
Other Issues

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

See also:

Midstate Finance Co., Inc. v. Peoples, --- B.R. ----, 2018 WL 1586138 (E.D. Tenn., March 31, 2018) (case no. 4:17-cv-6) (District Judge Curtis L. Collier) (in applying the best interests of the creditors' test in Code § 1325(a)(4), the bankruptcy court properly valued the Chapter 13 debtors' non-exempt property at its fair market value, but the court erred in failing to discount the payments under the debtors' proposed plan to present value when comparing the amount creditors would receive under that plan with the amount creditors would have received in a hypothetical Chapter 7 liquidation) (text of opinion)

R

Part C

Confirmation of Plan—Other Issues

Other Objections to Confirmation; Other Matters Related to Confirmation

Topical compilations:

PDF Word (general matters)

PDF Word (good faith)

PDF Word (plan term)

All topical compilations

All circuit compilations

See also:

In re Green, 2018 WL 1581635 (Bankr. S.D. Ga., March 27, 2018) (case no. 1:17-bk-11119) (Bankruptcy Judge Susan D. Barrett) (because the Chapter 13 debtor's exclusion of his Social Security income from his "projected disposable income" is expressly allowed by the Bankruptcy Code, the debtor's failure to devote any of his Social Security income to the payment of unsecured creditors could not alone constitute bad faith under Code § 1325(a)(3)) (text of opinion)

R

Part D

Issues Other Than Confirmation of Plan

Modification of Confirmed Plan

Topical compilation: All topical compilations

PDF Word All circuit compilations

Chapter 13 debtor's direct payments on residential mortgage claim are not "payments under the plan" for purposes of Code 1329(a):

Code § 1329(a) permits modification of a Chapter 13 plan after confirmation but only "before the completion of payments under such plan." It is well settled that "completion of payments" under this provision occurs when the debtor pays to the Chapter 13 trustee the full amount required by the confirmed plan and is not dependant on the debtor's direct payments on a mortgage claim.

In re Gibson, 582 B.R. 15 (Bankr. C.D. Ill., March 5, 2018)

(case no. 1:12-bk-81186) (Bankruptcy Judge Thomas L. Perkins)

Text of opinion

Chapter 13 plan could not be modified so as to provide for payments beyond 60-month term:

Although the Chapter 13 debtor, the Chapter 13 trustee, and the debtor's mortgage creditor agreed to a stipulated proposed order that would modify the debtor's confirmed Chapter 13 plan by, among other things, requiring monthly payments for several more months by the debtor to the mortgage creditor, the court could not approve the proposed modification because the debtor's 60-month plan had expired more than a year ago, and, under Code § 1329(c), the court could not approve any plan modification that provided for payments by the debtor after that date.

In re Powell, 583 B.R. 695 (Bankr. E.D. Mich., March 27, 2018)

(case no. 2:11-bk-68697) (Bankruptcy Judge Thomas J. Tucker)

Text of opinion

R

Other Issues

Topical compilations:

PDF Word (general matters)

PDF Word (other matters involving mortgage creditors)

All topical compilations

All circuit compilations

Determination of compliance with Chapter 13 debt limits is not limited to review of debtor's schedules:

In determining whether a Chapter 13 debtor's debts are within the Chapter 13 debt limits established in Code § 109(e), the court is not limited to a review of the debtor's schedules. See, e.g., *In re Shukla*, 550 B.R. 204 (Bankr. E.D. N.Y. 2016); *Stebbins v. Artificial Horizon, Ltd.*, 2016 WL 1069077 (E.D. N.Y., March 17, 2016). The schedules, while important, are not binding, and must be considered along with all readily-available evidence, including claims filed, any liens that are obviously avoidable, and the like. *In re Garcia*, 520 B.R. 848 (Bankr. D. N.M. 2014); *In re Barcal*, 213 B.R. 1008 (8th Cir. B.A.P. 1997).

Debt secured by debtor's property is secured debt for purpose of Chapter 13 debt limits despite debtor's lack of personal liability on debt:

A debt secured by property in which the Chapter 13 debtor has an ownership interest is considered a secured debt for the purpose of the Chapter 13 debt limits in Code § 109(e), even where the debtor is not personally liable on the debt.

Motion to dismiss Chapter 13 case for non-compliance with debt limits is subject to defense of laches:

Because Code § 109(e), establishing debt limits for Chapter 13 eligibility, is not jurisdictional, a motion to dismiss a Chapter 13 case under § 109(e) is subject to a defense of laches.

Motion to dismiss Chapter 13 case for non-compliance with debt limits was not barred by laches:

A creditor's motion to dismiss the Chapter 13 debtor's case due to the debtor's exceeding the Chapter 13 debt limits was not barred by laches, although the creditor filed the motion nine months postpetition, where the mortgage that put the debtor over the secured debt limit was not so much as mentioned until it appeared in a passing reference in the debtor's amended Schedule A, rendering the debtor responsible for five months of the delay. Moreover, from that point forward, some additional amount of time would have been required for the creditor to track down the mortgage and determine that it put the debtor over the debt limit.

In re Fioriglio, 2018 WL 1629779 (Bankr. E.D. N.Y., March 27, 2018)

(case no. 1:16-bk-40602) (Bankruptcy Judge Nancy Hershey Lord)

Text of opinion

Court has discretion to decline to dismiss Chapter 13 case for exceeding debt limits:

Even if a Chapter 13 debtor has debt exceeding the debt limits in Code § 109(e), the court has discretion under Code § 1307(c) in deciding whether to dismiss the debtor's case, and, here, the court would decline to dismiss the case even though the debtor's unsecured debts may have exceeded the statutory limit of $394,725. The uncertainty arose because the debtor's schedules disclosed only $16,185 in student loans, in addition to several other student loans in unknown amounts, while the Chapter 13 trustee estimated that the debtor had $132,000 in scheduled student loans and the servicer for the U.S. Department of Education filed a claim for $341,136. The debtor's disposable income would render a Chapter 7 discharge an abuse, the court said, and requiring the debtor to proceed under Chapter 11 "would be absurd for this true consumer debtor." Based on the facts, it was in the best interests of the debtor, the estate, and the creditors that the debtor be permitted to pursue confirmation of her Chapter 13 plan. To hold otherwise would effectively exclude this debtor from bankruptcy relief, and the congressional intent behind limiting the availability of Chapter 13 through § 109(e) was not applicable here. See also *In re Pratola*, 578 B.R. 414 (Bankr. N.D. Ill., Dec. 27, 2017) (the bankruptcy court was not required to dismiss a Chapter 13 case where the inclusion of student loan debt caused the debtor to exceed the unsecured debt limit).

In re Fishel, 583 B.R. 474 (Bankr. W.D. Wis., March 30, 2018)

(case no. 3:17-bk-14180) (Chief Bankruptcy Judge Catherine Furay)

Text of opinion

Court lacks discretion to decline to dismiss Chapter 13 case for exceeding debt limits:

Disagreeing with *In re Pratola*, 578 B.R. 414 (Bankr. N.D. Ill. 2017), the court said that, while the decision to dismiss or convert a case under Code § 1307 is discretionary, the court is bound to apply its discretion consistent with the plain terms of the Bankruptcy Code. Those plain terms precluded the court from allowing a person who was ineligible to be a Chapter 13 debtor from continuing in Chapter 13. Thus, the court dismissed the case, in which the debtor's unsecured debts totaled more than $870,000.

In re Bailey-Pfeiffer, 2018 WL 1896307 (Bankr. W.D. Wis., March 23, 2018)

(case no. 1:17-bk-13506) (Bankruptcy Judge Brett H. Ludwig)

Text of opinion

Chapter 13 debtor's direct payments on residential mortgage claim are not "payments under the plan" for purposes of Code 1328(a):

A Chapter 13 debtor's direct payments on a non-modifiable, nondischargeable residential mortgage loan, provided for in the debtor's plan under Code § 1322(b)(5), are not "payments under the plan" for purposes of Code 1328(a). Accordingly, a debtor's failure to complete all such direct payments is not grounds to dismiss the case without a discharge. The court observed that, in 17 years on the bench, it had never dismissed a Chapter 13 case without discharge, where the required payments to the trustee were completed, for the reason that the debtor failed to make all of the direct mortgage payments. Nor had the court's research uncovered any such cases in other jurisdictions prior to the decision in *In re Heinzle*, 511 B.R. 69 (Bankr. W.D. Tex. 2014). It was apparent that what triggered this recently-identified theory of dismissal without discharge was the adoption of Bankruptcy Rule 3002.1. It was equally clear that Rule 3002.1 was not intended to serve as the impetus for dismissal without discharge. Rather, it was universally recognized that the rule was intended to benefit debtors by better ensuring the fresh start to a Chapter 13 debtor who completed a plan, by providing a mechanism for review and a forum for resolving disputes over whether the debtor's obligations to the mortgage holder were current at the conclusion of the bankruptcy case.

In re Gibson, 582 B.R. 15 (Bankr. C.D. Ill., March 5, 2018)

(case no. 1:12-bk-81186) (Bankruptcy Judge Thomas L. Perkins)

Text of opinion

Law firm representing multiple Chapter 13 debtors would receive reduced fees as sanction for nondisclosure of modification to form plan elevating priority of payment of firm's fees:

Where a law firm, in multiple cases, proposed Chapter 13 plans in which the district's model plan was modified so as to either raise the priority of the firm's allowed fees or to temporarily reduce the plan's payments to secured creditors in order to allow concurrent fee payments to the firm, the firm needed to have agreements with the debtors permitting this accelerated payment of its fees, and those agreements were required to be in writing and disclosed to the court. Because the firm failed to disclose any such agreements, the firm would not be allowed the district's flat fee but would be required to file an itemized application in each case. Moreover, the firm's allowed fees would be reduced by $500 in each case as a sanction for the lack of disclosure, other than in those cases in which the firm's modification of the model plan led to the dismissal of the case, in which cases the firm's fee application would be disallowed in its entirety.

In re Gilliam, 582 B.R. 459 (Bankr. N.D. Ill., March 28, 2018)

(case no. 1:17-bk-18368) (Bankruptcy Judge Timothy A. Barnes)

Text of opinion

Chapter 13 debtor's attorney would receive reduced fee as sanction for nondisclosure of modification to form plan elevating priority of payment of attorney's fees:

Where the Chapter 13 debtor's attorney filed a Chapter 13 plan that modified the district's model plan so as to elevate the priority of payment of the attorney's fees, without disclosure to the court, the attorney would not be allowed the district's flat fee but would be required to file an itemized application. Moreover, the attorney's allowed fees would be reduced by $250 as a sanction for its nondisclosure. The court noted that the attorney in this case filed only a single case with the undisclosed modification to the model plan, in contrast to the law firm involved in *In re Gilliam*, 582 B.R. 459 (Bankr. N.D. Ill., March 28, 2018), above, which initially filed more than 50 cases with the higher priority of its payments, and thereafter continued to file case after case following the same approach.

In re Williams-Hayes, 2018 WL 2207897 (Bankr. N.D. Ill., March 28, 2018)

(case no. 1:17-bk-27961) (Bankruptcy Judge Timothy A. Barnes)

Text of opinion

Court would not approve no-look fee in Chapter 13 case due to attorney's errors:

Where the Chapter 13 debtor's attorney failed three times to properly serve a credit union whose secured claim was valued in the debtors' proposed Chapter 13 plan, the court said that, to ensure that the increased costs were borne by the party who was responsible for the costs, the court would not approve a "no-look" fee in the case, assuming the debtors again sought confirmation of their plan. The attorney could seek compensation through an itemized application—one that omitted any fees or expenses associated with inadequate service of the plan.

In re Drobney, 583 B.R. 700 (Bankr. W.D. Mich., March 26, 2018)

(case no. 1:17-bk-5028) (Chief Bankruptcy Judge Scott W. Dales)

Text of opinion

Creditor may not seek dismissal of Chapter 13 case under Code § 1307(c) for bad faith in filing case if creditor failed to object to confirmation of plan under Code § 1325(a)(7):

Once the deadline to object to a proposed Chapter 13 plan under Code § 1325(a)(7) has passed, this precludes a creditor from seeking dismissal of the case under Code § 1307(c) based on the debtor's alleged bad faith in filing the petition. Otherwise, the deadline for filing an objection to confirmation would be meaningless in the context of anything other than a creditor's treatment under the debtor's plan. This conclusion also served the purposes of equity; like other matters pertaining to eligibility in bankruptcy, it can and should be determined at the outset of a Chapter 13 case whether the debtor filed the petition in bad faith.

In re Pfetzer, 586 B.R. 421 (Bankr. E.D. Ky., March 22, 2018)

(case no. 2:17-bk-20802) (Chief Bankruptcy Judge Tracey N. Wise)

Text of opinion

Bankruptcy court erred in dismissing Chapter 13 case without notice and hearing:

The bankruptcy court erred in dismissing the pro se Chapter 13 debtor's case without notice to the debtor and a hearing. If the dismissal was under Code § 1307(c), that provision states that the court may dismiss a Chapter 13 case "on request of a party in interest or the United States trustee and after notice and a hearing." And, while a bankruptcy court may dismiss a case on its own motion, the Chapter 13 trustee cited to no caselaw indicating that a case may be dismissed without notice to the debtor and an opportunity for her to be heard.

In re Serra, 2018 WL 1516624 (S.D. Fla., March 28, 2018)

(case no. 1:17-cv-22224) (District Judge Marcia G. Cooke)

Text of opinion

See also:

Perez-Acevedo v. U.S. Department of Education, 301 F.Supp.3d 243 (D. Mass., March 30, 2018) (case no. 1:17-cv-10937) (District Judge Nathaniel M. Gorton) (the Chapter 13 debtor did not establish a right to the "extraordinary relief" of Fed. R. Civ. P. 60(b) in order to vacate his Chapter 13 discharge for the purpose of converting his case to Chapter 11) (text of opinion)

In re Hill, 2018 WL 1448750 (Bankr. N.D. Okla., March 22, 2018) (case nos. 4:17-bk-11083, 4:17-bk-11503) (Chief Bankruptcy Judge Terrance L. Michael) (where a Chapter 13 case is converted to Chapter 7 without confirmation of a Chapter 13 plan, the Chapter 13 trustee may not pay the debtor's attorney's allowed fees from undistributed funds held by the trustee, as the funds belong to the debtor) (text of opinion)

In re Tollstrup, 2018 WL 1384378 (Bankr. D. Or., March 16, 2018) (case no. 3:15-bk-33924) (Bankruptcy Judge David W. Hercher) (where a Notice of Mortgage Payment Change filed by the Chapter 13 debtor's mortgage creditor contained inaccurate information by misstating the debtor's escrow obligation, the debtor was entitled to recover the attorney's fees incurred in responding to the creditor's violation of Bankruptcy Rule 3002.1, but the court lacked authority to award either compensatory damages or monetary sanctions) (text of opinion)

In re Mailatyar, 2018 WL 1614142 (Bankr. D. Ariz., March 30, 2018) (case no. 2:17-bk-13538) (Chief Bankruptcy Judge Daniel P. Collins) (a claim on which a Chapter 13 debtor is personally liable, but which is secured by property that is not property of the bankruptcy estate, is considered an unsecured claim for the purpose of the Chapter 13 debt limits in Code § 109(e)) (text of opinion)

In re Standley, 2018 WL 1457242 (Bankr. S.D. Tex., March 20, 2018) (case no. 4:14-bk-36711) (Bankruptcy Judge Marvin Isgur) (when a Chapter 13 debtor's attorney attempts to recover fees from a third party, *Baker Botts L.L.P. v. ASARCO LLC*, --- U.S. ---, 135 S. Ct. 2158, 192 L.Ed.2d 208 (2015) applies and, in the absence of explicit statutory authorization, the American Rule controls payment of attorney's fees, so that the attorney may not recover fees incurred in defense of the attorney's fee application) (text of opinion)

In re McCallum, 2018 WL 1449147 (Bankr. M.D. Ga., March 22, 2018) (case no. 5:17-bk-51487; adv. proc. no. 5:17-ap-5054) (Chief Bankruptcy Judge James P. Smith) (under Georgia law, a foreclosure under a deed to secure debt is valid so long as notice of the foreclosure sale is mailed to the owner in compliance with Ga. Code Ann. § 44–14–162.2, even if the owner does not receive the notice) (text of opinion)

R

Section Four:
Cases under
Related Federal Statutes

There are no cases in this issue.

R

Permanent Resources

Bankruptcy Code, Rules and Forms

Bankruptcy Code

Full Text of Code (ABI)

Full Text of Code (Cornell Law School)

Full Text of Code (GPO)

Full Text of Code (House of Representatives)

Bankruptcy Rules and Forms Currently in Effect

Federal Rules of Bankruptcy Procedure (HTML version provided by the Administrative Office of the U.S. Courts)

--- HTML version at Cornell Law School

Official Bankruptcy Forms

-- Permitted Changes to Official Bankruptcy Forms

R

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 changes to the Bankruptcy Rules 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 Judicial Conference is the final authority for changes to Official Forms; these changes are not submitted to the Supreme Court.

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 (2013 to present)

Archived Bankruptcy Rule Comments (through 2013)

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 Amendments Effective December 1, 2018

Rules Involved (18):

- Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in Debtor's Principal Residence)
- 5005 (Filing and Transmittal of Papers)
- 7004 (Summons; Service; Proof of Service)
- 7062 (Stay of Proceedings to Enforce a Judgment)
- 8002 (Time for Filing Notice of Appeal)
- 8006 (Certifying a Direct Appeal to the Court of Appeals)
- 8007 (Stay Pending Appeal; Bonds; Suspension of Proceedings)
- 8010 (Completing and Transmitting the Record)
- 8011 (Filing and Service; Signature)
- 8013 (Motions; Intervention)
- 8015 (Form and Length of Briefs; Form of Appendices and Other Papers)
- 8016 (Cross-Appeals)
- 8017 (Brief of an Amicus Curiae)
- Rule 8018.1 (District Court Review of a Judgment that the Bankruptcy Court Lacked the Constitutional Authority to Enter) (**new rule**)
- 8021 (Costs)
- 8022 (Motion for Rehearing)
- Part VIII appendix (**new**)
- 9025 (Security: Proceedings Against Sureties)

Status: Approved by the Supreme Court on April 26, 2018, and transmitted to Congress. See the Supreme Court's transmittal letter. The amendments will go into effect on December 1 unless Congress disapproves them.

Full text: See pages 102-165 of the Report of the Standing Committee's meeting of June 12-13, 2017. See also the Supreme Court's transmittal letter noted above.

Summary of Changes:

- Rule 3002.1 (subdivision (b) is subdivided and amended (1) to authorize courts to modify its requirements for claims arising from home equity lines of credit and (2) to acknowledge the right of the trustee, debtor, or other party in interest, such as the United States trustee, to object to a change in a home-mortgage payment amount after receiving notice of the change; subdivision (e) is amended to allow parties in interest in addition to the debtor or trustee, such as the United States trustee, to seek a determination regarding the validity of any claimed fee, expense, or charge)

- Rule 5005 (electronic filing is made mandatory in all districts, except for filings made by an individual not represented by an attorney, with an exception for good cause shown or as otherwise allowed under local rule)

- Rule 7004 (technical change amending a cross-reference to Civil Rule 4(d))

- Rule 7062 (amended to be consistent with proposed amendments to Civil Rule 62, except that the amended rule maintains the current 14-day duration of the automatic stay of judgment)

- Rule 8002 (multiple amendments)

- Rule 8006 (new Rule 8006(c)(2) authorizes the court to issue a statement on the merits of certification of a direct appeal to the Court of Appeals when the certification is made jointly by all of the parties to the appeal)

- Rule 8007 (amended to be consistent with proposed amendments to Civil Rule 62)

- Rule 8010 (amended to be consistent with proposed amendments to Civil Rule 62)

- Rule 8011 (amended to conform to the amendments to Civil Rule 25 on inmate filing, electronic filing, signature, service, and proof of service; the provisions relating to electronic filing are amended so as to be consistent with the amendments made to Rule 5005)

- Rule 8013 (amended to be consistent with length limitations in the 2016 amendment to Appellate Rule 27(d)(2))

- Rule 8015 (amended to be consistent with length limitations in the 2016 amendment to Appellate Rule 32)

- Rule 8016 (amended to be consistent with length limitations in the 2016 amendment to Appellate Rule 28.1)

- Rule 8017 (amended to be consistent with the 2016 amendment to Appellate Rule 29 as well as the amendment to Rule 29 proposed for 2018)

- Rule 8018.1 (authorize a district court, consistent with the Supreme Court's decision in *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014), to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determined that the bankruptcy court lacked constitutional authority to enter a final judgment)

- Rule 8021 (amended to be consistent with proposed amendments to Civil Rule 62)
- Rule 8022 (amended to be consistent with length limitations in the 2016 amendment to Appellate Rule 40(b))
- Part VIII appendix (summarizes the page, word and line length limits in Part VIII rules)
- Rule 9025 (amended to be consistent with proposed amendments to Civil Rule 62)

Note: A proposed amendment of Rule 8023 (Voluntary Dismissal) was published for public comment in August 2016, but the Advisory Committee on Bankruptcy Rules decided to withdraw the amendment for further consideration. See the Report of Advisory Committee's April 6, 2017, meeting ("B. Rule 8023 (Voluntary Dismissal)", pages 28-29).

R

Bankruptcy Forms:

Proposed Amendments Effective December 1, 2018 (1st group)

Forms Involved (2):

- Form 417A (Notice of Appeal and Statement of Election)
- Form 417C (Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type-Style Requirements)

Status: Approved by the Judicial Conference on September 12, 2017, to go into effect on December 1, 2018. See page 23 of the Report of the Proceedings of the Judicial Conference on Sept. 12, 2017.

Full text: Full text as published for public comment (pages 129-134)

Summary of Changes:

- Form 417A (amended to alert inmate filers to the existence of Director's Form 4170)
- Form 417C (amended to be consistent with amendments to the Bankruptcy Rules proposed for December 2018)

History:

Approved by the Advisory Committee at its March 31, 2016, meeting and submitted to the Standing Committee for approval for publication. See the Report of the Advisory's Committee's March 31, 2016, Meeting (Action Item 6A [page 9; page 605 overall]).

Approved for publication in August 2016 by the Standing Committee at its June 6-7, 2016, meeting. See the Report of the Standing Committee's June 6-7, 2016, Meeting (pages 11, 15-16).

Published for public comment from August 12, 2016, through February 15, 2017.

R

Bankruptcy Forms:

Proposed Amendments Effective December 1, 2018 (2nd group)

Forms Involved (2):

- 411A (General Power of Attorney; Director's Form 4011A redesignated as Official Form)
- 411B (Special Power of Attorney; Director's Form 4011B redesignated as Official Form)

Status: To be considered by the Standing Committee at its June 12, 2018, meeting, for submission to the Judicial Conference for final approval. See the Agenda for the Standing Committee's meeting.

Full text: See pages 199-202 of the Agenda for the Standing Committee's June 12, 2018, meeting.

Summary of Changes: Directors Forms are redesignated as Official Forms so as to comply with Bankruptcy Rule 9010(c), which provides that "[t]he authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose . . . shall be evidenced by a power of attorney conforming substantially to the appropriate Official Form."

History:

Proposed for approval without publication by the Advisory Committee at its April 3, 2018, meeting.

R

Bankruptcy Rules:

Proposed Amendments Effective December 1, 2019

Rules Involved (4):

- Rule 4001 (Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements)
- Rule 6007 (Abandonment or Disposition of Property)
- Rule 9036 (Notice by Electronic Transmission, ***changed to*** Notice or Service Generally)
- Rule 9037 (Privacy Protection for Filings Made with the Court)

Status: To be considered by the Standing Committee at its June 12, 2018, meeting, for submission to the Judicial Conference for approval at its September 2018 meeting and transmission to the Supreme Court. See pages 159-169 of the Agenda for the Standing Committee's meeting.

Full text: See pages 183-198 of the Agenda for the Standing Committee's June 12, 2018, meeting.

Summary of Changes:

- Rule 4001 (subdivision (c), "Obtaining Credit," is amended to exclude Chapter 13 cases)
- Rule 6007 (subdivision (b) is amended to specify the parties to be served with the motion and any notice of the motion; the rule also establishes an objection deadline)
- Rule 9036 (the rule is amended to permit both notice and service by electronic means)
- Rule 9037 (new subdivision (h) prescribes a procedure for the belated redaction of documents that were filed without complying with subdivision (a))

History:

Proposed by the Advisory Committee at its April 6, 2017 meeting. See the Report of Advisory Committee's April 6, 2017, meeting (Action Items 10-12, pages 19-27).

Approved for publication by the Standing Committee at its June 12–13, 2017, meeting. See the Report of Standing Committee's June 12-13, 2017, meeting (pages 23-25).

Published for public comment from August 15, 2017, through February 15, 2018: Public Comment website

Reviewed by the Advisory Committee at its April 3, 2018, meeting, and, after minor changes were made, approved for submission to the Standing Committee at its June 12, 2018, meeting. See Action Item 1 (Rule 4001(c)), Action Item 2 (Rule 6007(b)), Action Item 3 (Rule 9036), and Action Item 4 (Rule 9037(h)) in the Advisory Committee's May 21,

2018, report to the Standing Committee, which is found in pages 159-215 of the Agenda for the Standing Committee's June 12, 2018, meeting.

Note: Amendments to Rule 2002 and Form 410 were published for public comment in August 2017 along with these four rules. However, at its April 3, 2018, meeting the Advisory Committee voted to hold these amendments in abeyance. See Action Item 3 in the Advisory Committee's May 21, 2018, report to the Standing Committee, noted just above.

R

Bankruptcy Rules:
Proposed Amendments Effective December 1, 2020

Rules Involved (3):

- Rule 2002 (notice to creditors and other parties)
- Rule 2004 (examination of parties)
- Rule 8012 (Disclosure Statement, formerly Corporate Disclosure Statement)

Status: Published for public comment. The comment period opened August 15, 2018, and closes February 15, 2019. Comments must be submitted online.

Full text: Full text published for public comment

Summary of Changes:

- Rule 2002 (subdivision (f) is amended to add cases under Chapter 13; subdivision (h) is amended to add cases under Chapters 12 and 13 and to conform the time periods in the subdivision to the respective deadlines for filing proofs of claim under Rule 3002(c); subdivision (k) is amended to add a reference to subdivision (a)(9))
- Rule 2004 (subdivision (c) is amended in various respects)
- Rule 8012 (amended to conform to recent amendments to Fed. R. App. P. 26.1(c))

History:

Proposed by the Advisory Committee at its April 3, 2018, meeting. The proposed amendments to Rule 2002(h) and 8012 originated at the Advisory Committee's September 26, 2017, meeting but were held for later action. See the Report of the Advisory Committee's Sept. 26, 2017, meeting.

Approved for publication for public comment by the Standing Committee at its June 12, 2018, meeting.

R

Internet Resources

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

--- 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

R

Supreme Court Case Status

Certiorari petitions granted:

None.

Certiorari petitions pending:

Failon v. Compass Chemical International, LLC, Case No. 17-1550 (U.S. Sup. Ct., pet. for cert. filed, May 14, 2018)

The debtor has filed a petition for certiorari to review *Failon v. Compass Chemical Int'l, LLC*, 711 Fed. Appx. 141 (4th Cir., Feb. 12, 2018), which held that damages awarded to the debtor's employer, in prepetition state-court litigation against the debtor, for spoilation of evidence were nondischargeable under Code § 523(a)(6).

Distributed for the Court's conference of Sept. 24, 2018.

Supreme Court docket

Hillsman v. Escoto, Case No. 17-1611 (U.S. Sup. Ct., pet. for cert. filed, May 31, 2018)

The creditor has filed a petition for certiorari to review *In re Escoto*, 713 Fed. Appx. 722 (9th Cir., Feb. 27, 2018), which held that the creditor failed to establish that he lost valuable collection remedies as a result of the debtor's failure to disclose certain information, so that the creditor failed to establish that the debtor's debt was nondischargeable under Code § 523(a)(2)(A).

Distributed for the Court's conference of Sept. 24, 2018.

Supreme Court docket

Credit One Bank, N.A. v. Anderson, Case No. 17-1652 (U.S. Sup. Ct., pet. for cert. filed, June 5, 2018)

The creditor has filed a petition for certiorari to review *In re Anderson*, 884 F.3d 382 (2nd Cir., March 7, 2018), which held that the bankruptcy court did not err in refusing to compel arbitration in the debtor's proposed class action to recover for the defendant credit card issuer's alleged violation of the discharge injunction in continuing to report, as charged off, credit card debt that had been discharged in bankruptcy.

Distributed for the Court's conference of Sept. 24, 2018.

Supreme Court docket Case filings on SCOTUSBlog

Baroni v. CIT Bank N.A., Case No. 18-141 (U.S. Sup. Ct., pet. for cert. filed, July 31, 2018)

The debtor has filed a petition for certiorari to review *In re Baroni*, 710 Fed. Appx. 773 (9th Cir. Feb. 8, 2018), which held that a party holding the debtor's original promissory note, indorsed in blank, is a creditor entitled to file a proof of claim in a bankruptcy case.

Distributed for the Court's conference of Sept. 24, 2018.

Supreme Court docket

Baroni v. The Bank of New York Mellon, Case No. 18-142 (U.S. Sup. Ct., pet. for cert. filed, July 31, 2018)

The debtor has filed a petition for certiorari to review *In re Baroni*, 710 Fed. Appx. 770 (9th Cir., Feb. 8, 2018), which held that a party holding the debtor's original promissory note, indorsed in blank, is a creditor entitled to file a proof of claim in a bankruptcy case.

The case has not yet been distributed for conference.

Supreme Court docket

Certiorari petitions recently denied:

None

General Resources

SCOTUSblog

R

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