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CBAR

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 *CBAR* discusses both published and unpublished opinions, including those not available in commercial databases.

CBAR is published monthly in electronic form only. The publisher is Robin Miller LLC, P.O. Box 124, Lawnside, N.J. 08045. Phone: (856) 278-7499. E-mail: robin@cbar.pro Website: http://www.cbar.pro/

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.

A subscription refund will be granted only in the publisher's discretion. Robin Miller LLC is owned and operated by Robin Miller, member number 87865 of The State Bar of California. She has been a legal writer, researcher and editor for over 25 years.

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How to Use This Newsletter

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

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

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

The Monthly Newsletter

The Table of Contents

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

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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:

Supreme Court: Dischargeability of debt—Statement regarding debtor's or insider's financial condition under Code § 523(a)(2): Affirming *In re Appling*, 848 F.3d 953 (11th Cir., Feb. 15, 2017), and resolving a split among the circuits, the Supreme Court held that a statement about a single asset (in this case, a large tax refund) can be a "statement respecting" the debtor's "financial condition" for the purposes of Code § 523(a)(2). A statement is "respecting" a debtor's financial condition, the Court reasoned, if it has a direct relation to or impact on the debtor's overall financial status. Thus, a statement about a single asset may come within Code § 523(a)(2)(B) rather than § 523(a)(2)(A); this would require the statement to be in writing, and the creditor to show reasonable, rather than merely justifiable, reliance, for the debt to be nondischargeable. The decision was unanimous, although three Justices declined to join one part of the opinion by Justice Sotomayor. *Lamar, Archer & Cofrin, LLP v. Appling*, 2018 WL 2465174 (U.S., June 4, 2018) (text of opinion).

Authority of the court—Imposition of sanctions—On debtor's attorney: Finding that UpRight Law and a local affiliated attorney failed to comply with the court's order implementing the settlement of two prior adversary proceedings by the Bankruptcy Administrator, in which UpRight Law and the attorney agreed not to charge additional fees or limit the scope of legal services for clients who retained them before a certain date, the court assessed $150,000 in civil penalties against UpRight Law and the attorney and ordered them, under Code § 526(c)(2)(A), to refund the attorney's fees received in the six cases in which the court found they failed to comply with the settlement. *In re White*, 2018 WL 1902491 (Bankr. N.D. Ala., April 19, 2018), amended (April 27, 2018), appeal filed, *Law Solutions of Chicago LLC v. Corbett*, Case No. 1:18-cv-677 (N.D. Ala., filed May 1, 2018) (text of opinion) (amendment to opinion).

Automatic stay—Termination of stay under Code § 362(c)(3): Adhering to *In re Robinson*, 427 B.R. 412 (Bankr. W.D. Mich. 2010), the court held that, where the debtor had two cases pending within the same year after the earlier one had been dismissed, under Code § 362(c)(3) the automatic stay terminated 30 days after the filing of the second case with respect to the debtor and property of the debtor, but not with respect to property of the estate. *In re Markoch*, 583 B.R. 911 (Bankr. W.D. Mich., April 19, 2018) (text of opinion).

Chapter 7—Revocation of discharge: In order to revoke a Chapter 7 debtor's discharge under Code § 727(d)(2), the movant must show that he was unaware of the debtor's alleged fraud at the time the discharge was entered. *In re Fitzhugh*, 2018 WL 1789596 (9th Cir. B.A.P., April 13, 2018) (text of opinion).

Chapter 7—Surrender of collateral for secured debt: Reaffirming *In re Failla*, 838 F.3d 1170 (11th Cir., Oct. 4, 2016), the Court of Appeals held that the bankruptcy court did not err in granting the Chapter 7 debtors' mortgage creditor's motions to reopen their bankruptcy case and compel the debtors to surrender the mortgaged residential property, where the

debtors had neither redeemed the property nor reaffirmed the debt, but instead continued to reside in the property without making mortgage payments while contesting the creditor's state-court foreclosure proceeding. The circuit's case law was clear that Code § 521(a)(2) provides only three options for a debtor who has property that serves as collateral for his debts: redeem the property, reaffirm the debt, or surrender the property; doing nothing is not an option. Moreover, the creditor's motion was not barred by laches, as there was no prejudice to the debtors in requiring them to comply with § 521(a)(2) and their previous representations to the bankruptcy court that they would surrender the property. *In re Woide*, --- Fed. Appx. ----, 2018 WL 1633550 (11th Cir., April 5, 2018) (text of opinion).

Chapter 7—Statement of intention regarding secured claim: Agreeing with *In re McCray*, 578 B.R. 403 (Bankr. E.D. Mich. 2017) and *In re Williamson*, 540 B.R. 460 (Bankr. D. N.M. 2015), the bankruptcy court held that there was no basis under the Bankruptcy Code or Rules to delay the Chapter 7 debtor's discharge, although the debtor failed to comply with his obligation under Code § 521(a)(2) to file, and then perform, a proper statement of intention regarding a creditor's claim secured by the debtor's mobile home; the debtor stated the intention of retaining the mobile home and continuing to make the required payments on the debt, which was not a permissible option under § 521(a)(2). *In re Templin*, 2018 WL 1864928 (Bankr. D. N.M., April 17, 2018) (text of opinion).

Chapter 13—Allowance of attorney's expenses: Affirming *In re Riley*, 577 B.R. 497 (Bankr. W.D. La., Sept. 29, 2017), the district court held that advances by a Chapter 13 debtor's attorney of filing fees, credit counseling fees, and credit report fees are not reimbursable under Code § 330(a), § 503(b)(1)(A) or § 503(b)(2) because they are not administrative expenses of the debtor's estate. *McBride v. Riley*, 2018 WL 1768602 (W.D. La., April 12, 2018), appeal filed, Case No. 18-30535 (5th Cir., filed April 30, 2018) (text of opinion).

Chapter 13—Confirmation of plan—Treatment of secured claims—910-day car claims: The costs of the optional gap insurance and extended maintenance coverage that the Chapter 13 debtor purchased, less than 910 days prepetition, at same time as his purchase of a motor vehicle were not sufficiently related to the debtor's acquisition of the vehicle so as to be part of the vehicle's sales price, so that the amount paid for these optional items was not protected from bifurcation by the hanging paragraph of Code § 1325(a). Applying the dual status rule, rather than the transformation rule, the court calculated that 93.54% of the total amount financed was a PMSI protected from bifurcation, while the balance was not. *In re Jones*, 583 B.R. 749 (Bankr. W.D. Wash., April 20, 2018) (text of opinion).

Chapter 13—Confirmation of plan—Treatment of secured claims—Permissibility of modification: The anti-modification provision in Code § 1123(b)(5), which is identical to that found in § 1322(b)(2), did not apply where a mortgage creditor's claim was secured by a lien on property owned by the Chapter 11 debtor and containing not only the debtor's residence but also a 1,600-square-foot addition rented to the debtor's brother-in-law. The addition was a separate, self-enclosed residential unit constructed for the purpose of providing a residence for the debtor's mother and father-in-law and had two bedrooms, a living room, a kitchen, a full bath and a separate entrance. *In re Berkland*, 582 B.R. 571 (Bankr. D. Mass., April 6, 2018) (text of opinion).

Chapter 13—Confirmation of plan—Treatment of secured claims—Permissibility of modification: Affirming *In re Bennett*, 2017 WL 1417221 (Bankr. N.D. Iowa, April 20, 2017), the BAP held that the bankruptcy court did not err in ruling that the anti-modification provision in Code § 1322(b)(2) did not apply to a creditor's claim secured by the Chapter 13 debtors' manufactured home, where the home was not sufficiently affixed to the land to

have become a fixture, and therefore part of the underlying real property, under Iowa law. *In re Bennett*, 584 B.R. 15 (8th Cir. B.A.P., April 19, 2018) (text of opinion).

Chapter 13—Confirmation of plan—Treatment of secured claims—Requirement of equal monthly payments: Agreeing with *In re DeSardi*, 340 B.R. 790 (Bankr. S.D. Tex. 2006), the bankruptcy court held that Code § 1325(a)(5)(B)(iii)(I), which provides that if "the property to be distributed" to a secured creditor under a Chapter 13 plan "is in the form of periodic payments such payments shall be in equal monthly amounts," permits full payment of administrative claims in a Chapter 13 case prior to commencing equal monthly payments to secured creditors; the plain language of § 1325(a)(5)(B)(iii)(I) does not include a requirement for equal payments to begin in the first month of the plan. *In re Amaya*, --- B.R. ----, 2018 WL 1773096 (Bankr. S.D. Tex., April 11, 2018) (text of opinion).

Chapter 13—Confirmation of plan—Treatment of secured claims—Requirement of equal monthly payments: Disagreeing with *In re Marks*, 394 B.R. 198 (Bankr. N.D. Ill. 2008), the court held that a proposed Chapter 13 plan that would provide a secured motor vehicle creditor with only adequate protection payments initially, until administrative expense claims, including that of the debtor's attorney, had been paid in full, with a step-up in payments to the secured creditor after that date, could not be confirmed over the secured creditor's objection. *In re Williams*, 583 B.R. 453 (Bankr. N.D. Ill., April 10, 2018) (text of opinion).

Chapter 13—Confirmation of plan—Treatment of secured claims—Requirement of equal monthly payments: Because the secured creditors consented to the debtors' proposed Chapter 13 plans by failing to object to conformation of the plans, thereby satisfying Code § 1325(a)(5)(A), § 1325(a)(5) as a whole was satisfied and the court did not need to consider the Chapter 13 trustee's objection that the plans, by providing secured creditors with only adequate protection payments initially, until administrative expense claims had been paid in full, with a step-up in payments to the secured creditors after that date, violated § 1325(a)(5)(B)(iii)(I). *In re Carr*, 584 B.R. 268 (Bankr. N.D. Ill., April 10, 2018) (text of opinion).

Chapter 13—Confirmation of plan—Treatment of secured claims—Valuation of collateral: Reversing *In re Austin*, 2017 WL 3149323 (Bankr. E.D. Mo., July 24, 2017), the BAP held that the bankruptcy court erred in valuing the Chapter 13 debtor husband's worker's compensation claim at $3,000 as of the petition date, based on the affidavit of the attorney litigating the claim on behalf of the debtor. The IRS filed a claim secured by the worker's compensation claim and, following a postpetition amendment, valued the claim at $15,661.60, representing the proceeds of the claim received postpetition by the husband. The BAP concluded that the attorney's affidavit, which asserted that the husband's claim had only a $3,000 "nuisance" value, was not substantial evidence of the value of the claim, where (1) the attorney admitted that he did not yet know the full extent of the debtor's injuries; (2) the affidavit did not state what demands had been made on the husband's behalf or provide any documentation to corroborate the conclusion that the claim was worth only $3,000 on the petition date; (3) the affidavit did not present copies of the actual claims filed on behalf of the husband, evidence of the Missouri state statutory scheme for valuing worker's compensation claims, or evidence of past awards for similar claims; and (4) the IRS had no opportunity to cross-examine the attorney, as there was no evidentiary hearing, no testimony taken, and nothing admitted into evidence. *In re Austin*, 583 B.R. 480 (8th Cir. B.A.P., April 9, 2018) (text of opinion).

Chapter 13—Confirmation of plan—Treatment of unsecured claims—Priority claim: Agreeing with *In re Resendiz*, 2013 WL 6152921 (Bankr. S.D. Tex., Nov. 20, 2013) and *In re Lightfoot*, 2015 WL 3956211 (Bankr. S.D. Tex., June 22, 2015), and disagreeing with *In re Hernandez*, 2007 WL 3998301 (Bankr. E.D. Tex., Nov. 15, 2007), the bankruptcy court held that,

because the definition of "domestic support obligation" under Code § 101(14A) specifically includes interest accruing pursuant to applicable nonbankruptcy law, and because domestic support obligations are priority claims that must be paid in full in a Chapter 13 plan pursuant to Code § 1322(a)(2), postpetition interest that accrues on DSO claims under applicable nonbankruptcy law must be paid through Chapter 13 plans. However, the court noted that, at least under Texas law, only certain types of DSOs accrue interest. *In re Randall*, 2018 WL 1737620 (Bankr. N.D. Tex., April 10, 2018) (text of opinion).

Chapter 13—Eligibility—Debt limits: Agreeing with *In re Bailey-Pfeiffer*, 2018 WL 1896307 (Bankr. W.D. Wis., March 23, 2018), and disagreeing with *In re Fishel*, 583 B.R. 474 (Bankr. W.D. Wis., March 30, 2018) and *In re Pratola*, 578 B.R. 414 (Bankr. N.D. Ill. 2017), the court held that, while Code § 109(e) is not jurisdictional, the court lacks discretion to decline to dismiss a case in which the Chapter 13 debtor's debts exceed the debt limits stated in § 109(e). *In re Petty*, 2018 WL 1956187 (Bankr. E.D. Tex., April 24, 2018) (text of opinion).

Dischargeability of debt—Student loan debt under Code § 523(a)(8): The debtor, a sixty-four-year-old single woman with no dependents who had been diagnosed with a bilateral severe and profound hearing loss that made it difficult for her to hear her counseling clients, even with the use of adaptive hearing equipment, established undue hardship, permitting the discharge of her more than $107,000 in student loan debt, as the debtor's age and her professional trajectory belied any notion that she would be able to generate sufficient income in the coming years to repay her student loans while maintaining a minimal standard of living. Despite working five to six days per week, the debtor could barely fund her own minimalist lifestyle. The debtor impressed the court as a hardworking woman who chose an area of study that, due to changes in federal laws and regulations, proved less profitable than she had anticipated. *In re Erkson*, 582 B.R. 542 (Bankr. D. Me., April 3, 2018) (text of opinion).

Dischargeability of debt—Student loan debt under Code § 523(a)(8): The 39-year-old debtor, who had been in almost constant treatment for epilepsy and his affective disorders for 30 years, established undue hardship, permitting the discharge of the debtor's $50,000 in student loan debt under Code § 523(a)(8), under the totality-of-the-circumstances test. The court observed that both the *Brunner* test and the totality-of-the-circumstances test for undue hardship were flawed: They were outdated and were no longer true to the statutory language in § 523(a)(8). *In re Smith*, 582 B.R. 556 (Bankr. D. Mass., April 4, 2018) (text of opinion).

Dischargeability of debt—Tax debt under Code § 523(a)(1)—Status of obligation as "tax": Agreeing with *In re Chesteen*, 2018 WL 878847 (Bankr. E.D. La., Feb. 9, 2018), the court held that the individual shared responsibility payment for which the Chapter 13 debtor was liable, based on her failure to purchase health care insurance as mandated by the Affordable Care Act, was a penalty, rather than a tax, for the purpose of Code § 507(a). *In re Parrish*, 583 B.R. 873 (Bankr. E.D. N.C., April 6, 2018), appeal filed, *USA v. Parrish*, Case No. 5:18-cv-173 (E.D. N.C., filed April 20, 2018) (text of opinion).

Dischargeability of debt—Unlisted debt under Code § 523(a)(3)(B): Even if a creditor's alleged debt was "of a kind" specified in Code § 523(a)(6), the alleged debt would not be excepted from the Chapter 7 debtor's discharge under § 523(a)(3)(B) because the creditor received an email from the debtor on January 3, 2017, informing the creditor that the debtor "was in the middle of a bankruptcy proceeding," and the 41 days between January 3, 2017, and February 13, 2017, the deadline for a creditor to file an adversary proceeding, was ample time for him to file such a proceeding. *In re Real*, 2018 WL 2059603 (Bankr. M.D. Fla., April 30, 2018), appeal filed, *Polo v. Real*, Case No. 3-18-cv-662 (M.D. Fla., filed May 18, 2018) (text of opinion).

Judicial estoppel—Application under circumstances: Finding the case controlled by *Metrou v. M.A. Mortenson Co.*, 781 F.3d 357 (7th Cir. 2015), the district court held that a debtor's suit against a city and various police officers for violating her constitutional rights was not precluded by judicial estoppel, although the debtor had initially failed to disclose the lawsuit in her later-filed Chapter 7 bankruptcy case, where the debtor presented evidence that she omitted the action from her bankruptcy schedules due to confusion brought about by poor counsel, and the debtor subsequently re-opened her bankruptcy case and amended her schedules to include her suit. *Ellis v. Alexander*, 2018 WL 1942650 (N.D. Ill., April 25, 2018) (text of opinion).

Meeting of creditors: Although the Chapter 7 trustee held a meeting of creditors, at which the Chapter 7 debtor was examined, on March 1, 2018, the clerk of court failed to send a notice of the meeting to creditors. Under the circumstances, the court would require the debtor to appear for a new meeting of creditors. Listed creditors were entitled to receive notice so that they could participate in the meeting of creditors. The new meeting of creditors shall be treated for purposes of Bankruptcy Rules 4004(a) and 4007(c) as the first date set for the meeting of creditors. *In re Mhoon*, 2018 WL 1726340 (Bankr. D. D.C., April 6, 2018) (text of opinion)

Property of the estate—Avoidance of lien impairing exemption—Determination of impairment: Affirming *In re Harrington*, 578 B.R. 147 (Bankr. N.D. N.Y., Sept. 22, 2017), the district court held that, where the Chapter 13 debtor husband had obtained a remainder interest in real property subject to a lien for a mortgage taken out by the owner, who retained a life estate, the bankruptcy court did not err in including the full amount of the mortgage lien in the court's calculation of impairment under Code § 522(f), rather than, as contended by the judicial lien creditor, netting the mortgage lien against the value of the life estate interest before applying the remainder to reduce the debtor's equity in his remainder interest. *CFCU Community Credit Union v. Harrington*, 584 B.R. 9 (N.D. N.Y, April 9, 2018) (text of opinion).

Property of the estate—Exemptions—Under state law: A workers' compensation award that the debtor received under Illinois law could not be exempted under 19 Del. Code Ann. tit. 19, § 2355, which provides that "claims or payment for compensation due or to become due under this chapter shall not be assignable and all compensation and claims therefor shall be exempt from all claims of creditors." The language "this chapter" clearly references Chapter 23 of Title 19 of the Delaware Code and plainly restricts the exemption of such awards to those made under Delaware law. *In re Coleman*, 584 B.R. 490 (Bankr. D. Del., April 13, 2018) (text of opinion).

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Case Summaries Arranged by Circuit

Supreme Court (1) R

Lamar, Archer & Cofrin, LLP v. Appling, 2018 WL 2465174 (U.S., June 4, 2018)

(case no. 16–1215) Text of opinion

- **Dischargeability of debt—Statement regarding debtor's or insider's financial condition under Code § 523(a)(2):** Affirming *In re Appling*, 848 F.3d 953 (11th Cir., Feb. 15, 2017), and resolving a split among the circuits, the Supreme Court held that a statement about a single asset (in this case, a large tax refund) can be a "statement respecting" the debtor's "financial condition" for the purposes of Code § 523(a)(2). A statement is "respecting" a debtor's financial condition, the Court reasoned, if it has a direct relation to or impact on the debtor's overall financial status. Thus, a statement about a single asset may come within Code § 523(a)(2)(B) rather than § 523(a)(2)(A); this would require the statement to be in writing, and the creditor to show reasonable, rather than merely justifiable, reliance, for the debt to be nondischargeable. The decision was unanimous, although three Justices declined to join one part of the opinion by Justice Sotomayor.

First Circuit (8) R

In re Stevenson, 583 B.R. 573 (1st Cir. B.A.P., April 30, 2018)

(case no. 17-35) Text of opinion

- **Chapter 13—Dismissal of case under Code § 1307(c):** The bankruptcy court did not abuse its discretion in dismissing, for unreasonable delay prejudicial to creditors under Code § 1307(c)(1), a Chapter 13 case commenced by a debtor who had previously obtained a discharge of her debts in a Chapter 7 case, and whose only remaining indebtedness consisted of nondischargeable student loan debt and a debt owed to her landlord, where the record suggested that the debtor's Chapter 13 filing was motivated by or targeted at a single creditor—her landlord—and that her filing was part of a pattern of conduct aimed at thwarting the landlord's eviction efforts.

In re Berkland, 582 B.R. 571 (Bankr. D. Mass., April 6, 2018)

(case no. 1:17-bk-10821) (Bankruptcy Judge Frank J. Bailey) Text of opinion

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Permissibility of modification:** The anti-modification provision in Code § 1123(b)(5), which is identical to that found in § 1322(b)(2), did not apply where a mortgage creditor's claim was secured by a lien on property owned by the Chapter 11 debtor and containing not only the debtor's residence but also a 1,600-square-foot addition rented to the debtor's brother-in-law. The addition was a separate, self-enclosed residential unit constructed for the purpose of providing a residence for the debtor's mother and father-in-law and had two bedrooms, a living room, a kitchen, a full bath and a separate entrance. While the debtor rented the addition only to family members, and at a reduced rent, the addition was nevertheless income-producing within the meaning of *Lomas Mortgage, Inc. v. Louis*, 82 F.3d 1 (1st Cir. 1996) (holding that "the antimodification provision of § 1322(b)(2) does not bar modification of a secured claim on a multi-unit property in which one of the units is the debtor's principal residence and the security interest extends to the other income-producing units").

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Permissibility of modification:** While the debtor built the addition to his residence, which he rented out to family members, after taking out the mortgage on the residence, the better view is that the applicability of the anti-modification provision in Code § 1123(b)(5) and § 1322(b)(2) is determined as of the bankruptcy petition date rather than the loan origination date. This majority adhering to this view includes apparently every bankruptcy court in this circuit to have addressed the issue. See *In re Leigh*, 307 B.R. 324 (Bankr. D. Mass. 2004); *In re Schultz*, 2001 WL 1757060 (Bankr. D. N.H. 2001); *In re Lebrun*, 185 B.R. 665 (Bankr. D. Mass. 1995); *In re Wetherbee*, 164 B.R. 212 (Bankr. D. N.H. 1994); *In re Boisvert*, 156 B.R. 357 (Bankr. D. Mass. 1993); *In re Churchill*, 150 B.R. 288 (Bankr. D. Me. 1993).

In re Craig, 2018 WL 2063217 (Bankr. D. Mass., April 30, 2018)

(case no. 1:17-bk-12373) (Chief Bankruptcy Judge Melvin S. Hoffman) Text of opinion

- **Valuation of property—Residence:** Valuing the Chapter 13 debtors' home at 116 Vincent Road in Dedham, Massachusetts, at $465,000, the bankruptcy court found the appraisal of the creditor's appraiser more reliable than that of the debtors' appraiser. The creditor's appraisal came in at $490,000 while the debtors' appraisal presented a value of $368,000. The debtors' appraiser testified that, unlike the creditor's appraiser, he did not consider lot size in determining the fair market value of the debtors' property, and three out of the four comparables used by the debtors' appraiser were on much smaller lots than the debtors' property. Further diminishing the reliability of the debtors' appraisal was their appraiser's assumption that the debtors' property consisted of eight rooms (excluding the basement) when in fact it had only seven. However, also finding that the comparability adjustments by the creditor's appraiser had not gone far enough, the court factored in an additional downward adjustment of $22,000 to accurately take into account the condition of the family room in the debtors' residence.

In re Erkson, 582 B.R. 542 (Bankr. D. Me., April 3, 2018)

(case no. 2:16-bk-20169; adv. proc. no. 2:16-ap-2018) (Chief Bankruptcy Judge Peter G. Cary)

Text of opinion

- **Dischargeability of debt—Student loan debt under Code § 523(a)(8):** The debtor, a sixty-four-year-old single woman with no dependents who had been diagnosed with a bilateral severe and profound hearing loss that made it difficult for her to hear her counseling clients, even with the use of adaptive hearing equipment, established undue hardship, permitting the discharge of her more than $107,000 in student loan debt, as the debtor's age and her professional trajectory belied any notion that she would be able to generate sufficient income in the coming years to repay her student loans while maintaining a minimal standard of living. Despite working five to six days per week, the debtor could barely fund her own minimalist lifestyle. The debtor impressed the court as a hardworking woman who chose an area of study that, due to changes in federal laws and regulations, proved less profitable than she had anticipated.

In re Garcia, 2018 WL 1956177 (Bankr. D. Puerto Rico, April 24, 2018)

(case no. 3:15-bk-2402; adv. proc. no. 3:17-ap-76) (Brian K. Tester) Text of opinion

- **Avoidable transfers—Avoidance under Code § 544(a):** Because, under Puerto Rico law, a mortgage on the Chapter 7 debtor's property that was not recorded prepetition did not create a lien, there was no unperfected lien for the Chapter 7 trustee to avoid under Code § 544.

In re Giacchetti, 584 B.R. 441 (Bankr. D. Mass., April 2, 2018)

(case no. 1:17-bk-10641; adv. proc. no. 1:17-ap-1038) (Chief Bankruptcy Judge Melvin S. Hoffman) Text of opinion

- **Avoidable transfers—Avoidance by debtor:** While there is case law to the contrary, the majority view, and the view adopted in every reported decision in this district, is that a Chapter 13 debtor does not have standing to assert a trustee's transfer avoidance powers. See, e.g., *In re Kalesnik*, 571 B.R. 491 (Bankr. D. Mass. 2017); *In re Kirschke*, 2009 WL 4344434 (Bankr. D. Mass., Nov. 24, 2009), aff'd on other grounds 2010 WL 2510087 (D. Mass. June 16, 2010); *In re Miller*, 251 B.R. 770 (Bankr. D. Mass. 2000); *In re Perry*, 131 B.R. 763 (Bankr. D. Mass. 1991). Accord, *In re Cardillo*, 169 B.R. 8 (Bankr. D. N.H. 1994). However, the present court did not need to decide the issue.

- **Avoidable transfers—Avoidance by debtor under Code § 522(h):** A Chapter 13 debtor has standing under Code § 522(h) to assert a cause of action under Code § 544(a)(3) to set aside a prepetition state court foreclosure sale.

- **Avoidable transfers—Avoidance under Code § 544(a)(3):** A bankruptcy trustee cloaked with the status of a bona fide purchaser under Code § 544(a)(3) may avoid the transfer of a debtor's interest in property at a foreclosure sale if the deed was not recorded prior to the bankruptcy filing. *In re Mularski*, 565 B.R. 203 (Bankr. D. Mass. 2017).

- **Claim preclusion—Elements under state law:** Under Massachusetts law, the doctrine of claim preclusion makes a valid, final judgment conclusive on the parties and their privies, and bars further litigation of all matters that were or could have been adjudicated in the action. To trigger claim preclusion, three elements must be present: (1) identity or privity of the parties in the present and prior actions; (2) identity of the cause of action; and (3) a prior final judgment on the merits.

- **Claim preclusion—Application under circumstances:** Where a default judgment had been entered against the Chapter 13 debtor in her prepetition state court wrongful foreclosure action against her mortgage creditor, claim preclusion barred the debtor's claim, in an adversary proceeding against the creditor, to set aside the foreclosure sale as a fraudulent transfer under Code § 548, as the facts upon which the claim was based were identical to the facts upon which the debtor's state court complaint was based. However, claim preclusion did not bar either the debtor's claim to avoid the foreclosure sale under Code § 544(a)(3), or the debtor's claim to preserve the avoided transfer for the benefit of the bankruptcy estate under § 551, as neither claim could have been raised in state court.

In re Samuels, Case No. 1:18-bk-10543 (Bankr. D. Mass., April 26, 2018), **appeal filed**, Case No. 18-14 (1st Cir. B.A.P., filed April 26, 2018)

(Bankruptcy Judge Frank J. Bailey) Text of opinion

- **Automatic stay—Termination of stay under Code § 362(c)(3):** Agreeing with *St. Anne's Credit Union v. Ackell*, 490 B.R. 141 (D. Mass. 2013) and *In re Smith*, 573 B.R. 298 (Bankr. D. Me., August 18, 2017), aff'd, *Smith v. Maine Bureau of Revenue Services*, 2018 WL 2248586 (D. Me., May 16, 2018), and disagreeing with *In re*

Jumpp, 356 B.R. 789 (1st Cir. B.A.P., Dec. 28, 2006), the bankruptcy court held that termination of the automatic under Code § 362(c)(3) applies to property of the estate as well as to the debtor and the debtor's property.

In re Smith, 582 B.R. 556 (Bankr. D. Mass., April 4, 2018)

(case no. 1:16-bk-10998; adv. proc. no. 1:16-ap-1079) (Bankruptcy Judge Frank J. Bailey)

Text of opinion

- **Dischargeability of debt—Student loan debt under Code § 523(a)(8):** The 39-year-old debtor, who had been in almost constant treatment for epilepsy and his affective disorders for 30 years, established undue hardship, permitting the discharge of the debtor's $50,000 in student loan debt under Code § 523(a)(8), under the totality-of-the-circumstances test. The court observed that both the *Brunner* test and the totality-of-the-circumstances test for undue hardship were flawed: They were outdated and were no longer true to the statutory language in § 523(a)(8).

Second Circuit (2) R

CFCU Community Credit Union v. Harrington, 584 B.R. 9 (N.D. N.Y, April 9, 2018)

(case no. 5:17-cv-1120) (District Judge David N. Hurd) Text of opinion

- **Property of the estate—Avoidance of lien impairing exemption—Determination of impairment:** Affirming *In re Harrington*, 578 B.R. 147 (Bankr. N.D. N.Y., Sept. 22, 2017), the district court held that, where the Chapter 13 debtor husband had obtained a remainder interest in real property subject to a lien for a mortgage taken out by the owner, who retained a life estate, the bankruptcy court did not err in including the full amount of the mortgage lien in the court's calculation of impairment under Code § 522(f), rather than, as contended by the judicial lien creditor, netting the mortgage lien against the value of the life estate interest before applying the remainder to reduce the debtor's equity in his remainder interest.

In re Jaghab, 584 B.R. 472 (Bankr. E.D. N.Y., April 16, 2018)

(case no. 8:15-bk-73166; adv. proc. no. 8:16-ap-8127) (Bankruptcy Judge Robert E. Grossman)

Text of opinion

- **Property of the estate:** The 50% interest that the Chapter 7 debtor held in a corporation that was the payee of a promissory note did not allow the Chapter 7 trustee to assert a 50% interest in the payments being made on the note; the note was executed in favor of the corporation, not of the debtor and the other 50% shareholder.

Third Circuit (2) R

In re Coleman, 584 B.R. 490 (Bankr. D. Del., April 13, 2018)

(case no. 1:17-bk-12346) (Chief Bankruptcy Judge Brendan L. Shannon) Text of opinion

- **Property of the estate—Exemptions—Under state law:** A workers' compensation award that the debtor received under Illinois law could not be exempted under 19 Del. Code Ann. tit. 19, § 2355, which provides that "claims or payment for compensation due or to become due under this chapter shall not be assignable and all compensation and claims therefor shall be exempt from all claims of creditors." The language "this chapter" clearly references Chapter 23 of Title 19 of the Delaware Code and plainly restricts the exemption of such awards to those made under Delaware law. For a similar case, see *In re Almgren*, 384 B.R. 12 (Bankr. D. Idaho 2007) (worker's compensation benefits awarded under Tennessee law were not exempt under Idaho law).

In re Meyer, 2018 WL 1663292 (Bankr. M.D. Pa., April 4, 2018)

(case no. 1:12-bk-4042; adv. proc. no. 1:17-ap-138) (Chief Bankruptcy Judge Robert N. Opel II)

Text of opinion

- **Jurisdiction—Effect of *Rooker-Feldman* doctrine:** In order for the *Rooker–Feldman* doctrine to apply, the following requirements must be met: (1) the federal plaintiff lost in state court; (2) the plaintiff complains of injuries caused by the state-court judgment; (3) that judgment was rendered before the federal suit was filed; and (4) the plaintiff is inviting the district (or bankruptcy) court to review and reject the state judgment. *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159 (3d Cir. 2010).

- **Issue preclusion—Elements under federal law:** Under federal law, collateral estoppel, or issue preclusion, precludes the relitigation of a legal issue that was litigated in a prior proceeding and is appropriate when (1) the identical issue was decided in a prior adjudication; (2) there was a final judgment on the merits; (3) the party against whom the bar was asserted was a party or in privity with a party to the prior adjudication; and (4) there was a full and fair opportunity to litigate the issue. *Doe v. Hesketh*, 828 F.3d 159 (3d Cir. 2016).

- **Claim preclusion—Elements under federal law:** Under federal law, res judicata, or claim preclusion, bars parties from initiating a suit based on the same cause of action that was brought, or could have been brought, in a prior suit when (1) a final judgment on the merits was reached; (2) the suit involves the same parties or their privies; and (3) the subsequent suit is based on the same cause of action. *Duhaney v. Atty. Gen. of U.S.*, 621 F.3d 340 (3d Cir. 2010).

- **Relief from stay—Preclusive effect:** Because motions for relief from stay are summary proceedings that require a quick determination and are limited in scope, the decision in a relief from stay proceeding does not support preclusion by res judicata or collateral estoppel. Thus, here, the court's granting relief from stay to the Chapter 13 debtor's mortgage creditor did not preclude the debtor's claim for an

award of sanctions under Rule 3002.1(i) for the creditor's failure to comply with Rule 3002.1(c), even though in his response to the creditor's motion for relief from stay the debtor asserted that the creditor failed to file notices of postpetition charges required under Rule 3002.1(c).

- Proof of claim—Secured claim—Postpetition charges—Effect of Rule 3002.1: The Chapter 13 debtor's failure to move for a determination of final cure and payment under Rule 3002.1(h) after the Chapter 13 trustee had filed a Notice of Final Cure and the mortgage creditor filed a timely Response to the Notice of Final Cure did not preclude the debtor's later claim for an award of sanctions under Rule 3002.1(i) for the creditor's failure to file notices of postpetition charges required under Rule 3002.1(c). See *In re Bodrick*, 498 B.R. 793 (Bankr. N.D. Ohio 2013) (the Chapter 13 debtor's failure to file a motion under Rule 3002.1(h) did not bar the debtor's later adversary proceeding to recover for the mortgage creditor's alleged violation of the automatic stay in misapplying the debtor's postpetition payments).

Fourth Circuit (3) R

Bank of America, N.A. v. McCowan, 2018 WL 2016258 (E.D. N.C., April 30, 2018)

(case no. 5:18-cv-75) (Chief District Judge James C. Dever, III) Text of opinion

- **Appellate procedure—Finality of order:** The bankruptcy court's order granting the trustee's motion to revoke the abandonment of certain real property was a final order.

In re Basl, 2018 WL 1886571 (Bankr. E.D. Va., April 18, 2018)

(case no. 3:17-bk-32341; adv. proc. no. 3:17-ap-4495) (Bankruptcy Judge Keith L. Phillips)

Text of opinion

- **Issue preclusion—Elements under state law:** Collateral estoppel, or issue preclusion, under Virginia law has five elements. First, the prior action must have resulted in a valid and final judgment against the party in the present action. Second, the parties or privies in both proceedings must be the same. Third, there must be mutuality between the parties. Fourth, the factual issue litigated actually must have been litigated in the prior action. Fifth, the issue litigated must have been essential to prior judgment. *In re Duncan*, 448 F.3d 725 (4th Cir. 2006).

- **Dischargeability of debt—For willful and malicious injury under Code § 523(a)(6):** A civil judgment against the debtor for stalking under Virginia law did not necessarily establish a willful and malicious injury within the meaning of Code § 523(a)(6).

In re Parrish, 583 B.R. 873 (Bankr. E.D. N.C., April 6, 2018), **appeal filed**, USA v. Parrish, Case No. 5:18-cv-173 (E.D. N.C., filed April 20, 2018)

(case no. 5:17-bk-2341) (Chief Bankruptcy Judge Stephani W. Humrickhouse) Text of opinion

- **Dischargeability of debt—Tax debt under Code § 523(a)(1)—Status of obligation as "tax":** Agreeing with *In re Chesteen*, 2018 WL 878847 (Bankr. E.D. La., Feb. 9, 2018), the court held that the individual shared responsibility payment for which the Chapter 13 debtor was liable, based on her failure to purchase health care insurance as mandated by the Affordable Care Act, was a penalty, rather than a tax, for the purpose of Code § 507(a).

Fifth Circuit (6) R

Booker v. Johns, 2018 WL 1831418 (W.D. La., April 17, 2018), appeal filed, In re Booker, Case No. 18-30526 (5th Cir., filed April 26, 2018)

(case no. 5:16-cv-1604) (Chief District Judge S. Maurice Hicks, Jr.) Text of opinion

- **Chapter 13—Confirmation of plan—Good faith under Code § 1325(a)(3):** The Fifth Circuit utilizes a totality of circumstances test to determine whether a Chapter 13 plan has been proposed in good faith, as required by Code § 1325(a)(3). Under this test, courts considers such factors as (1) the reasonableness of the proposed repayment plan; (2) whether the plan shows an attempt to abuse the spirit of the bankruptcy code; (3) whether the debtor genuinely intends to effectuate the plan; (4) whether there is any evidence of misrepresentation, unfair manipulation, or other inequities; (5) whether the filing of the case was part of an underlying scheme of fraud with an intent not to pay; (6) whether the plan reflects the debtor's ability to pay; and (7) whether a creditor has objected to the plan. See *In re Stanley*, 224 Fed. Appx. 343 (5th Cir. 2007).

- **Chapter 13—Confirmation of plan—Good faith under Code § 1325(a)(3):** The bankruptcy court did not commit clear error in (1) ruling that economic considerations may be taken into account in assessing a Chapter 13 plan's compliance with the good faith test in Code § 1325(a)(3) and (2) concluding that the below-median debtors' plan was not proposed in good faith because the plan proposed the debtors' retention of a boat, motor and trailer (which the debtors valued at $1,500 in total) while paying unsecured creditors only $600. The debtors contended that they needed the boat and related items to fish, as the fish were part of their food supply; the bankruptcy court reasoned that the debtors did not need a boat in order to fish.

McBride v. Riley, 2018 WL 1768602 (W.D. La., April 12, 2018), appeal filed, Case No. 18-30535 (5th Cir., filed April 30, 2018)

(case no. 1:17-cv-1302) (District Judge James T. Trimble, Jr.) Text of opinion

- **Chapter 13—Allowance of attorney's expenses:** Affirming *In re Riley*, 577 B.R. 497 (Bankr. W.D. La., Sept. 29, 2017), the district court held that advances by a Chapter 13 debtor's attorney of filing fees, credit counseling fees, and credit report fees are not reimbursable under Code § 330(a), § 503(b)(1)(A) or § 503(b)(2) because they are not administrative expenses of the debtor's estate.

In re Amaya, --- B.R. ----, 2018 WL 1773096 (Bankr. S.D. Tex., April 11, 2018)

(case no. 7:17-bk-70280) (Bankruptcy Judge Eduardo V. Rodriguez) Text of opinion

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Requirement of equal monthly payments:** Agreeing with *In re DeSardi*, 340 B.R. 790 (Bankr. S.D. Tex. 2006), the bankruptcy court held that Code § 1325(a)(5)(B)(iii)(I), which provides that if "the property to be distributed" to a secured creditor under a Chapter

13 plan "is in the form of periodic payments such payments shall be in equal monthly amounts," permits full payment of administrative claims in a Chapter 13 case prior to commencing equal monthly payments to secured creditors; the plain language of § 1325(a)(5)(B)(iii)(I) does not include a requirement for equal payments to begin in the first month of the plan.

In re Cain, --- B.R. ----, 2018 WL 1779329 (Bankr. S.D. Miss., April 12, 2018)

(case no. 3:17-bk-46; adv. proc. no. 3:17-ap-60) (Bankruptcy Judge Neil P. Olack)

Text of opinion

- **Adversary procedure—Motion to compel arbitration:** The court granted a creditor's motion to compel arbitration of the Chapter 13 debtor's adversary proceeding to recover for the creditor's alleged violation of the Truth in Lending Act.

In re Petty, 2018 WL 1956187 (Bankr. E.D. Tex., April 24, 2018)

(case no. 4:18-bk-40258) (Bankruptcy Judge Brenda T. Rhoades) Text of opinion

- **Chapter 13—Eligibility—Debt limits:** Agreeing with *In re Bailey-Pfeiffer*, 2018 WL 1896307 (Bankr. W.D. Wis., March 23, 2018), and disagreeing with *In re Fishel*, 583 B.R. 474 (Bankr. W.D. Wis., March 30, 2018) and *In re Pratola*, 578 B.R. 414 (Bankr. N.D. Ill. 2017), the court held that, while Code § 109(e) is not jurisdictional, the court lacks discretion to decline to dismiss a case in which the Chapter 13 debtor's debts exceed the debt limits stated in § 109(e).

In re Randall, 2018 WL 1737620 (Bankr. N.D. Tex., April 10, 2018)

(case no. 3:17-bk-33322) (Bankruptcy Judge Harlin DeWayne Hale) Text of opinion

- **Chapter 13—Confirmation of plan—Treatment of unsecured claims—Priority claim:** Agreeing with *In re Resendiz*, 2013 WL 6152921 (Bankr. S.D. Tex., Nov. 20, 2013) and *In re Lightfoot*, 2015 WL 3956211 (Bankr. S.D. Tex., June 22, 2015), and disagreeing with *In re Hernandez*, 2007 WL 3998301 (Bankr. E.D. Tex., Nov. 15, 2007), the bankruptcy court held that, because the definition of "domestic support obligation" under Code § 101(14A) specifically includes interest accruing pursuant to applicable nonbankruptcy law, and because domestic support obligations are priority claims that must be paid in full in a Chapter 13 plan pursuant to Code § 1322(a)(2), postpetition interest that accrues on DSO claims under applicable nonbankruptcy law must be paid through Chapter 13 plans. However, the court noted that, at least under Texas law, only certain types of DSOs accrue interest.

Sixth Circuit (6) R

In re Felix, 582 B.R. 915 (6th Cir. B.A.P., April 6, 2018)

(case no. 17-8004) Text of opinion

- **Appellate procedure—Standard of review:** A dispute regarding domicile is generally considered as a mixed question of law and fact.

- **Property of the estate—Exemptions—Availability to debtor under Code § 522(b)(3)(A):** Affirming *In re Felix*, 562 B.R. 700 (Bankr. S.D. Ohio, Jan. 23, 2017), the BAP held that the bankruptcy court did not commit clear error in holding that the debtors, who owned residences in both Ohio and Maryland, were domiciled in Maryland rather than Ohio for the 730 days prior to the date of the bankruptcy petition and therefore were not entitled to claim exemptions under Ohio law.

In re Abell, 2018 WL 1787357 (Bankr. W.D. Ky., April 12, 2018)

(case no. 3:17-bk-32555) (Bankruptcy Judge Joan A. Lloyd) Text of opinion

- **Proof of claim—Secured claim—Perfection of security interest:** The claim held by a company that sold a motor vehicle to the Chapter 13 debtors was unsecured since, under Kentucky law, perfection of a lien on a motor vehicle does not occur until a physical notation regarding the lien is made on the vehicle's title, and, here, the seller did not strictly comply with the requirements of the statute until two weeks after the debtors filed their Chapter 13 petition.

In re Equere, 2018 WL 1635226 (Bankr. E.D. Mich., April 2, 2018)

(case no. 2:17-bk-53917) (Bankruptcy Judge Mark A. Randon) Text of opinion

- **Chapter 7—Determination of abuse—Under totality of circumstances:** Granting the 59–year–old debtor a Chapter 7 discharge would not be an abuse under the totality of circumstances as defined in § 707(b)(3)(B), under the pre-BAPCPA test stated in *In re Krohn*, 886 F.2d 123 (6th Cir. 1989). The debtor's exclusion of overtime pay from his income calculation was not an abuse, where, as of the petition date, only one paycheck from the preceding nine months reflected overtime, and the debtor indicated that his postpetition overtime work was voluntary and was not certain to continue. The U.S. Trustee did not demonstrate that the debtor's current tax withholdings were inappropriate or abusive, where the debtor testified that he would no longer be claiming at least one of his daughters as a dependent on his income tax return, and that he would be paying higher taxes for working in Canada. Finally, since it was clear that, under Code § 1325(b)(2), the debtor's 401(k) retirement loan repayments were not disposable income, the court did not consider repayment of these loans to be an abuse of the provisions of Chapter 7.

In re Fisher, 584 B.R. 185 (Bankr. N.D. Ohio, April 27, 2018)

(case no. 4:17-bk-40457) (Bankruptcy Judge Kay Woods) Text of opinion

- **Proof of claim—Secured claim—Statute of limitations to enforce note:** The Chapter 13 debtors' mortgage creditor was barred by the six-year statute of limitations in Ohio Rev. Code Ann. § 1303.16(A) from either enforcing the debtors' promissory note or foreclosing upon the mortgage. This provided a basis for disallowing the creditor's proof of claim unless the creditor's potential action for ejectment, which was not time-barred, supported allowance of the proof of claim. Because the issue of ejectment had not been fully briefed, the court would not issue a final decision on whether the claim should be allowed.

In re Hockenberger, 2018 WL 1770172 (Bankr. N.D. Ohio, April 11, 2018)

(case no. 3:12-bk-32367) (Bankruptcy Judge Mary Ann Whipple) Text of opinion

- **Chapter 13—Determination of cure under Rule 3002.1:** While Bankruptcy Rule 3002.1 does not expressly address the burden of proof under subsection (h), courts addressing the issue have concluded that the mortgage holder has the burden to establish outstanding postpetition obligations on the mortgage.

- **Chapter 13—Determination of cure under Rule 3002.1:** The Chapter 13 debtor's mortgage creditor that the debtor owed a postpetition arrearage in the total amount of $38,658.85, which included principal and interest in the amount of $36,841.56 and unpaid escrow in the amount of $3,327.36, less $1,510.07 held in a suspense account by the creditor.

In re Markoch, 583 B.R. 911 (Bankr. W.D. Mich., April 19, 2018)

(case no. 1:18-bk-740) (Chief Bankruptcy Judge Scott W. Dales) Text of opinion

- **Automatic stay—Termination of stay under Code § 362(c)(3):** Adhering to *In re Robinson*, 427 B.R. 412 (Bankr. W.D. Mich. 2010), the court held that, where the debtor had two cases pending within the same year after the earlier one had been dismissed, under Code § 362(c)(3) the automatic stay terminated 30 days after the filing of the second case with respect to the debtor and property of the debtor, but not with respect to property of the estate.

Seventh Circuit (10) R

Ellis v. Alexander, 2018 WL 1942650 (N.D. Ill., April 25, 2018)

(case no. 1:16-cv-5155) (District Judge John J. Tharp, Jr.) Text of opinion

- **Judicial estoppel—Application under circumstances:** Finding the case controlled by *Metrou v. M.A. Mortenson Co.*, 781 F.3d 357 (7th Cir. 2015), the district court held that a debtor's suit against a city and various police officers for violating her constitutional rights was not precluded by judicial estoppel, although the debtor had initially failed to disclose the lawsuit in her later-filed Chapter 7 bankruptcy case, where the debtor presented evidence that she omitted the action from her bankruptcy schedules due to confusion brought about by poor counsel, and the debtor subsequently re-opened her bankruptcy case and amended her schedules to include her suit. For other cases, compare *Cannon-Stokes v. Potter*, 453 F.3d 446 (7th Cir. 2006) (the debtor was judicially estopped from pursuing a claim she failed to disclose in bankruptcy; although the debtor allegedly relied on erroneous advice from bankruptcy counsel in failing to disclose the claim, she never moved to re-open the bankruptcy to disclose the lawsuit and make her creditors whole) and *Spaine v. Community Contacts, Inc.*, 756 F.3d 542 (7th Cir. 2014) (the defendant in the debtor's lawsuit was not entitled to summary judgment on the ground of judicial estoppel where the debtor submitted an affidavit indicating that she had orally disclosed the lawsuit to the bankruptcy trustee at the meeting of creditors, and the trustee, with knowledge of the debtor's lawsuit, concluded that the debtor had no assets).

Kyles v. Federal Home Loan Mortgage Corp, 2018 WL 1784133 (N.D. Ill., April 13, 2018)

(case no. 1:17-cv-1511) (District Judge John J. Tharp, Jr.) Text of opinion

- **Jurisdiction—Effect of *Rooker-Feldman* doctrine:** The debtor's adversary proceeding was barred by the *Rooker-Feldman* doctrine where, after losing a foreclosure battle in state court, the debtor sought to negate the foreclosure judgment by obtaining a declaration from a federal court that the mortgage was void. The foreclosure judgment was final for the purpose of the *Rooker-Feldman* doctrine even though, under Illinois law, a foreclosure judgment cannot be appealed until the sale order has been implemented and the sale of the foreclosed property has been completed. In *Carpenter v. PNC Bank Nat'l Ass'n*, 633 Fed. Appx. 346 (7th Cir. 2016), the Seventh Circuit applied *Rooker-Feldman* in precisely the same factual context: a federal suit filed after an Illinois court entered a judgment of foreclosure but before sale of the property.

In re Allegretti, 584 B.R. 287 (Bankr. N.D. Ill., April 24, 2018)

(case no. 1:17-bk-17844) (Bankruptcy Judge A. Benjamin Goldgar) Text of opinion

- **Proof of claim—Secured claim—Prepetition amount due:** According to the Seventh Circuit, the standards for proving the reasonableness of attorney's fees are procedural, not substantive. Because federal law controls procedure in the federal courts, the applicable standards come from federal law, not state law. Thus, here, where the holder of the second mortgage on the Chapter 13 debtors' home was

entitled to "reasonable attorney's fees" under both the note and the mortgage if the debtors defaulted, the reasonableness of the attorney's fees and costs due as of the petition date included in the creditor's proof of claim was assessed under federal law. While Illinois standards for attorney's fee requests are exacting, federal law assesses attorney's fees for commercial reasonableness. The court noted that other cases had reached differing positions on the issue. Compare *McCarthy v. Nekoosa Port Edwards State Bank*, 2013 WL 3942185 (W.D. Wis. July 30, 2013) (applying federal law) with *In re Coates*, 292 B.R. 894 (Bankr. C.D. Ill. 2003) (applying Illinois law).

- **Proof of claim—Secured claim—Prepetition amount due:** Commercial reasonableness depends, not on the minutiae of an attorney's billing, but on the market's mechanisms. Rather than engage in a detailed, hour-by-hour review of an attorney's bills, courts undertake an overview of the aggregate costs. The goal is to ensure those costs were reasonable in relation to the stakes of the case and to the other side's litigation strategy.

- **Proof of claim—Secured claim—Prepetition amount due:** The evidence in the case, what there was of it, demonstrated the commercial reasonableness of the creditor's attorney's fees and expenses. The creditor paid the fees, so these were not pie-in-the sky numbers that one litigant sought to collect from a stranger but would never dream of paying itself. Moreover, the total amount of $93,735.68 was also reasonable in relation to what was at stake, as on the petition date the creditor was owed $333,795.59 in principal and interest, more than three times the amount of attorney's fees.

In re Benanti, 2018 WL 1801194 (Bankr. C.D. Ill., April 13, 2018)

(case no. 3:15-bk-71018) (Chief Bankruptcy Judge Mary P. Gorman) Text of opinion

- **Claim—Status as contingent:** A claim may be determined to be contingent based on postpetition events. Thus, here, the Chapter 7 debtors' debts under guaranties of certain debts of their business were contingent debts, although on the petition date the business was in default under the loan agreements so that the debtors' debts under the guaranties were not contingent, where following the bankruptcy filing the debtors and the creditor reached an agreement to waive the existing defaults. At that point, the debtors' debts under the guaranties became contingent upon a future default.

- **Proof of claim—Estimation of claim:** Because a creditor's claims under the Chapter 7 debtors' guaranties were contingent, the court was required to estimate the claims under Code § 502(c). Here, because there appeared to be no danger of default by the principal obligor, the debtors' business, the court would value the claims at zero. The business had been current on its payment obligations since entering into the lending agreements, and the business had become increasingly profitable. While the business was in default when the debtors filed their bankruptcy case, the defaults were not related to payment but instead stemmed directly from the isolated and unexpected incident of a stroke suffered by the debtor husband, necessitating a transfer of majority ownership of the business to the debtor wife. These defaults were not a sign of some pattern of behavior that would indicate a likelihood of further default.

In re Carr, 584 B.R. 268 (Bankr. N.D. Ill., April 10, 2018)

(case nos. 1:17-bk-29195, 1:17-bk-25013) (Bankruptcy Judge Deborah L. Thorne)

Text of opinion

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Acceptance of plan by creditor:** The court agreed with the majority view that Code § 1325(a)(5)(A) is satisfied where a secured creditor had proper notice of the debtor's proposed Chapter 13 plan and the creditor did not object to confirmation of the plan.

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Requirement of equal monthly payments:** Because the secured creditors consented to the debtors' proposed Chapter 13 plans by failing to object to conformation of the plans, thereby satisfying Code § 1325(a)(5)(A), § 1325(a)(5) as a whole was satisfied and the court did not need to consider the Chapter 13 trustee's objection that the plans, by providing secured creditors with only adequate protection payments initially, until administrative expense claims had been paid in full, with a step-up in payments to the secured creditors after that date, violated § 1325(a)(5)(B)(iii)(I).

- **Chapter 13—Confirmation of plan—Good faith under Code § 1325(a)(3):** There is no per se rule that a Chapter 13 plan proposing to pay the debtor's attorney's fees ahead of the debtor's secured creditors is a violation of the good faith requirement in Code § 1325(a)(3). This treatment is perfectly permissible under Code § 1326(b)(1).

- **Chapter 13—Allowance of attorney's fees:** The Bankruptcy Code does not require that Chapter 13 debtors' attorneys' fees benefit the estate. This was not always the case, as starting in the early nineteenth century and ending in 1978, a debtor's attorney was generally entitled to have his compensation paid out of the bankruptcy estate as an administrative expense only if the attorney could demonstrate that his services had provided a clear and substantial benefit to the bankruptcy estate. Michelle Arnopol Cecil, A Reappraisal of Attorneys' Fees in Bankruptcy, 98 Ky. L.J. 67 (2010); see also *Matter of Lee*, 3 B.R. 15 (Bankr. N.D. Ga. 1979) (deciding case under the Bankruptcy Act). This changed in 1978 with the enactment of the Bankruptcy Reform Act, but under the case law that developed, the services of the debtor's attorney were generally still not compensable out of the estate where the services had benefitted only the debtor and had not aided in the administration of the estate in some way. See, e.g., *In re Chas. A. Stevens & Co.*, 105 B.R. 866 (Bankr. N.D. Ill. 1989). In 1994, however, Congress again amended the bankruptcy laws. This time, it modified Code § 330 to remove any reference to "the debtor's attorney." As a result, the general rule has become that a debtor's attorney in a Chapter 7 case cannot be compensated out of the estate as an administrative priority claimant unless he/she is employed by the trustee. Congress, however, added a special exception at the same time for debtors' attorneys in Chapters 12 and 13 only. Code § 330(a)(4)(B) provides that "[i]n a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section." It has therefore become clear that (1) debtors' attorneys may be compensated out of the estate in Chapters 12 and 13, and (2) reasonable compensation may be allowed by the court, based on a consideration of the relevant

factors, regardless of any separate benefit to the estate or lack thereof. See, e.g., *In re Tahah*, 330 B.R. 777 (10th Cir. B.A.P. 2005).

- Chapter 13—Allowance of attorney's fees: If a debtor's attorney's fees are allowed by the court, they are entitled to administrative expense status under Code § 503(b)(2). With that status, those fees become entitled to payment out of the estate at second priority. In Chapter 13, that means that, under Code § 1322(a)(2), the plan must provide for the fees' payment in full over time, unless the attorney agrees otherwise. Under Code § 1326(b)(1), the payments for the fees must be made either before or concurrently with any payments to creditors, including secured creditors. See generally *In re Maldonado*, 483 B.R. 326 (Bankr. N.D. Ill. 2012).

- Chapter 13—Allowance of attorney's fees: The bankruptcy court has an independent duty to review a debtor's attorney's fees for reasonableness before allowing those fees to be paid out of the estate as an administrative expense. Ordinarily, the bankruptcy court must approve compensation to be paid out of the estate based on the factors set forth in Code § 330, with those factors mirroring those used in a traditional lodestar analysis. *In re Sullivan*, 674 F.3d 65 (1st Cir. 2012). The court, however, is not required to perform a lodestar analysis, "and bankruptcy courts have increasingly adopted systems under which attorneys for chapter 13 debtors can be awarded a presumptively reasonable standard fee for each case." *In re Brent*, 458 B.R. 444 (Bankr. N.D. Ill. 2011). Even where a presumptively reasonable no-look fee is sought, a "reasoned objection" from a party in interest shifts the burden of proof back onto the fee-claimant, who must establish the reasonableness of the fees sought under § 330. *In re Crager*, 691 F.3d 671 (5th Cir. 2012).

- Chapter 13—Allowance of attorney's fees: A fiduciary relationship existed between two Chapter 13 debtors and their attorneys before entering into their respective retention agreements such that the attorneys had a heightened duty to disclose the implications of their compensation. This finding was warranted for three reasons. First, these debtors were debtors with primarily consumer debts, and Congress has signaled that consumer debtors comprise one particular class of vulnerable and unknowledgeable persons. Second, these agreements were signed on the eve of bankruptcy, and prospective bankruptcy debtors were often anxious and desperate to retain houses, tenancies or leases, and automobiles. Finally, even where a prospective principal is not vulnerable and unknowledgeable, there is a heightened reliance on fair dealing from a prospective agent in setting the terms of the compensation where the implications of the fee structure on the interests of the client can only be known based on information within the control of the prospective agent.

- Chapter 13—Allowance of attorney's fees: In two cases, the applications for compensation filed by the Chapter 13 debtors' attorneys would be denied due to the attorneys' violation of a local rule providing that "[e]very agreement between a debtor and an attorney for the debtor that pertains, directly or indirectly, to the compensation paid or given, or to be paid or given, to or for the benefit of the attorney must be in the form of a written document signed by the debtor and the attorney" and must be disclosed to the court. Here, though agreements existed, they were not disclosed, so that neither attorney was entitled to have his compensation approved.

In re Howard, 584 B.R. 252 (Bankr. N.D. Ill., April 19, 2018), appeal filed, The City of Chicago v. Howard, Case No. 1:18-cv-2753 (N.D. Ill., filed April 17, 2018)

(case no. 1:17-bk-25141) (Bankruptcy Judge Jacqueline P. Cox) Text of opinion

- **Violation of stay—Retention of property of estate:** Disagreeing with *In re Avila*, 566 B.R. 558 (Bankr. N.D. Ill. 2017), the bankruptcy court held that the City of Chicago violated the automatic stay by refusing to return the Chapter 13 debtor's car, which the city had impounded prepetition, unless the debtor paid the city's claim for $13,000 in unpaid parking tickets in full. The court reasoned that (1) the city was bound by the debtor's confirmed Chapter 13 plan, to which the city had not objected, which treated the city's claim as unsecured; (2) the city lacked authority to enact a municipal code provision stating that vehicles impounded by the city were subject to a possessory lien in favor of the city for the amount required to obtain release of the vehicle; (3) because the city had no lien on the debtor's vehicle, the city was not entitled to maintain possession of the vehicle to perfect its lien under Code § 362(b)(3), which states that the automatic stay does not apply to any act to perfect, maintain or continue the perfection of an interest in property; and (4) Code § 362(b)(4), which states that the automatic stay does not cover the commencement or continuation of proceedings by governmental units to enforce its police and regulatory power, including the enforcement of a judgment other than a money judgment, did not apply in the absence of an application by the city for an order of adequate protection. The City of Chicago, the court declared, was "usurping the court's authority and responsibility to decide whether and how debtors have to provide adequate protection." In addition, the city was "ignoring its duty to return vehicles" under *Thompson v. GMAC*, 566 F.3d 699 (7th Cir. 2009).

In re Loy, 584 B.R. 302 (Bankr. N.D. Ind., April 26, 2018)

(case no. 1:16-bk-12328) (Chief Bankruptcy Judge Robert E. Grant) Text of opinion

- **Violation of discharge injunction:** The state of Indiana did not violate the discharge injunction where the debt the state sought to recover from the debtor following his discharge, which was for penalties imposed for making fraudulent representations in order to obtain unemployment benefits, was nondischargeable under Code § 523(a)(7).

In re Renk, 2018 WL 1956189 (Bankr. E.D. Wis., April 24, 2018)

(case no. 2:17-bk-27651; adv. proc. no. 2:17-ap-2361) (Chief Bankruptcy Judge Susan V. Kelley)

Text of opinion

- **Jurisdiction—Effect of *Rooker-Feldman* doctrine:** Under the *Rooker-Feldman* doctrine, lower federal courts may not consider claims that directly seek to set aside a state court judgment or claims that are inextricably intertwined with the state court judgment. This determination hinges on whether the federal claim alleges that the injury was caused by the state court judgment, or alternatively, whether the federal claim alleges an independent prior injury that the state court failed to remedy. *Jakupovic v. Curran*, 850 F.3d 898 (7th Cir. 2017). However, if a contention in federal litigation is intertwined with the state litigation only in the sense that it entails a factual or legal contention that was, or could have been, presented to the state judge, then the connection between the state and federal cases concerns the

rules of preclusion, which are not jurisdictional and are outside the scope of the *Rooker- Feldman* doctrine. The vital question is whether the federal plaintiff seeks the alteration of a state court's judgment. *Milchtein v. Chisholm*, 880 F.3d 895 (7th Cir. 2018) (stating also that the phrase "inextricably intertwined" ... "should not be used as a ground of decision" because it has the potential to blur the boundary between claim preclusion and the *Rooker-Feldman* doctrine). In any case, an exception exists if the party did not have a reasonable opportunity to raise an issue in state court proceedings. See, e.g., *Jakupovic*, above; *Brown v. Bowman*, 668 F.3d 437 (7th Cir. 2012); *Taylor v. Fed. Nat'l Mortg. Ass'n*, 374 F.3d 529 (7th Cir. 2004); *Long v. Shorebank Dev. Corp.*, 182 F.3d 548 (7th Cir. 1999).

In re Tabor, 583 B.R. 155 (Bankr. N.D. Ill., April 11, 2018), amended (April 13, 2018)

(case no. 1:15-bk-26544) (Bankruptcy Judge Timothy A. Barnes) Text of opinion

Amendments to opinion

- **Authority of the court—Imposition of sanctions:** There are, essentially, four types of authority that might be invoked to sanction an attorney appearing before the bankruptcy court: (1) the power to regulate behavior before it inherent in all courts; (2) the direct, specific authority of a statute or rule; (3) the ability to regulate the practice of the federal bar, as delegated to the court by the United States District Court for this District; and (4) the authority afforded specifically to the bankruptcy courts under Code § 105(a). Each type of authority has its own limitations, including, for example, scope, predicates, burdens and remedies.

- **Authority of the court—Imposition of sanctions—Under inherent authority:** The Supreme Court has provided a variety of examples of when a federal court might exercise its inherent authority. Federal courts have the power to punish for contempt, to vacate judgments if procured through fraud, control courtroom behavior and assess costs and award fees. The Seventh Circuit has stated that, although the exercise of the inherent power may be limited by statute or rule, it is still possible in appropriate circumstances for a court to sanction bad-faith conduct by means of the inherent power even if that conduct could also be sanctioned under the statute or the Rules.

- **Authority of the court—Imposition of sanctions—Under Code § 105(a):** Code § 105(a) empowers bankruptcy courts to sanction conduct that abuses the judicial process. The bankruptcy court's power under § 105(a) often goes hand-in-hand with its inherent power. The existence of a narrower authority does not supplant the ability to use the broader power of § 105(a), so long as the use of § 105(a) does not contravene an express limitation in the statute or the rules. Like the inherent powers of the court, § 105(a) allows the court to address conduct without extensive and needless satellite litigation. While a showing of bad faith is not required, a movant, in invoking the sanction powers of the bankruptcy court under § 105(a), must show that court action goes to the central objectives of bankruptcy.

- **Authority of the court—Imposition of sanctions—On debtor's attorney:** Here, where an attorney filed two Chapter 13 bankruptcy cases for a debtor in the same calendar year but failed to prosecute either case, in effect merely buying time for the debtor, who was facing a sheriff's sale of his residence, and in the second case the debtor's scheduled amounts for secured and unsecured debt both exceeded the applicable debt limits in Code § 109(e), the court, acting under its authority under Code § 105(a),

ordered the attorney to refund to the debtor the $4,432.70 in fees collected in the two cases, and further ordered the attorney to pay the debtor an additional $4,000 to allow the debtor to again seek bankruptcy relief, which the debtor still required.

In re Williams, 583 B.R. 453 (Bankr. N.D. Ill., April 10, 2018)

(case no. 1:17-bk-33186) (Bankruptcy Judge LaShonda A. Hunt) Text of opinion

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Requirement of equal monthly payments:** Disagreeing with *In re Marks*, 394 B.R. 198 (Bankr. N.D. Ill. 2008), the court held that a proposed Chapter 13 plan that would provide a secured motor vehicle creditor with only adequate protection payments initially, until administrative expense claims, including that of the debtor's attorney, had been paid in full, with a step-up in payments to the secured creditor after that date, could not be confirmed over the secured creditor's objection.

Eighth Circuit (4) R

In re Reed, 888 F.3d 930 (8th Cir., April 25, 2018)

(case no. 17-1143) Text of opinion

- **Authority of the court—Imposition of sanctions—Under civil contempt power:** Affirming *In re Reed*, 2017 WL 44645 (E.D. Mo., Jan. 3, 2017), the Court of Appeals declared that a bankruptcy court has inherent authority to sanction a party for failing to comply with a court order. A party commits contempt when he violates a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order. A contempt finding requires clear and convincing evidence. Here, the bankruptcy court did not err in imposing sanctions on a bankruptcy attorney for failing to comply with the court's turnover order.

In re Austin, 583 B.R. 480 (8th Cir. B.A.P., April 9, 2018)

(case no. 17-6024) Text of opinion

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Valuation of collateral:** Under Code § 502(a), a creditor may file a proof of claim and it is deemed allowed, unless a party in interest objects. Under Bankruptcy Rule 3001(f), a proof of claim that comports with the requirements of Rule 3001 constitutes prima facie evidence of the validity and amount of the claim. The filing of an objection does not deprive the proof of claim of a presumptive validity unless the objection is supported by substantial evidence. As part of the burden of producing substantial evidence to rebut the presumptive validity, the objecting party bears the burden of producing substantial evidence as to the value of the collateral securing the claim. *In re Heritage Highgate Inc.*, 679 F.3d 132 (3rd Cir. 2012). This is because, under Code § 506, the claim is secured only to the extent of the value of the collateral. Substantial evidence means "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

  Reversing *In re Austin*, 2017 WL 3149323 (Bankr. E.D. Mo., July 24, 2017), the BAP held that the bankruptcy court erred in valuing the Chapter 13 debtor husband's worker's compensation claim at $3,000 as of the petition date, based on the affidavit of the attorney litigating the claim on behalf of the debtor. The IRS filed a claim secured by the worker's compensation claim and, following a postpetition amendment, valued the claim at $15,661.60, representing the proceeds of the claim received postpetition by the husband. The BAP concluded that the attorney's affidavit, which asserted that the husband's claim had only a $3,000 "nuisance" value, was not substantial evidence of the value of the claim, where (1) the attorney admitted that he did not yet know the full extent of the debtor's injuries; (2) the affidavit did not state what demands had been made on the husband's behalf or provide any documentation to corroborate the conclusion that the claim was worth only $3,000 on the petition date; (3) the affidavit did not present copies of the actual claims filed on behalf of the husband, evidence of the Missouri state statutory scheme for valuing worker's compensation claims, or evidence of past awards for similar claims; and (4) the IRS

had no opportunity to cross-examine the attorney, as there was no evidentiary hearing, no testimony taken, and nothing admitted into evidence.

The debtors had the burden of producing substantial evidence to rebut the IRS's claim. They were required to provide evidence that had a reasonable, objective basis for the valuation of a tort claim; this could include such things as lost wages, medical bills or worker's compensation schedules. Allowing a valuation of a tort claim without a reasonable factual basis encouraged abuse. Debtors could avoid a secured creditor's interest in tort claims simply by failing to obtain the facts necessary to support those claims.

In re Bennett, 584 B.R. 15 (8th Cir. B.A.P., April 19, 2018)

(case no. 17-6025) Text of opinion

- **Chapter 13—Confirmation of plan—Treatment of secured claims—Permissibility of modification:** Affirming *In re Bennett*, 2017 WL 1417221 (Bankr. N.D. Iowa, April 20, 2017), the BAP held that the bankruptcy court did not err in ruling that the anti-modification provision in Code § 1322(b)(2) did not apply to a creditor's claim secured by the Chapter 13 debtors' manufactured home, where the home was not sufficiently affixed to the land to have become a fixture, and therefore part of the underlying real property, under Iowa law.

Seibert v. Cedar Rapids Lodge & Suites, LLC, 583 B.R. 214 (D. Minn., April 10, 2018), **appeal filed**, Case No. 18-2058 (8th Cir., filed May 15, 2018)

(case no. 0:17-cv-4756) (District Judge Susan Richard Nelson) Text of opinion

- **Issue preclusion—Jurisdiction whose preclusion law applies:** Where a judgment was issued by a federal court, federal principles of collateral estoppel determine whether the judgment has preclusive effect. See *Heiser v. Woodruff*, 327 U.S. 726 (1946); *In re Docteroff*, 133 F.3d 210 (3d Cir. 1997).

- **Issue preclusion—Elements under federal law:** Collateral estoppel, also known as issue preclusion, has five elements under federal law: (1) the party sought to be precluded in the second suit must have been a party, or in privity with a party, to the original lawsuit; (2) the issue sought to be precluded must be the same as the issue involved in the prior action; (3) the issue sought to be precluded must have been actually litigated in the prior action; (4) the issue sought to be precluded must have been determined by a valid and final judgment; and (5) the determination in the prior action must have been essential to the prior judgment. *Sandy Lake Band of Miss. Chippewa v. United States*, 714 F.3d 1098 (8th Cir. 2013); *Robinette v. Jones*, 476 F.3d 585 (8th Cir. 2007).

- **Issue preclusion—Based on default judgment:** The general rule is that a default judgment does not give rise to collateral estoppel because, in the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. *Arizona v. California*, 530 U.S. 392, 120 S.Ct. 2304, 147 L.Ed.2d 374 (2000) (quoting Restatement (Second) of Judgments § 27 cmt. e).

- **Issue preclusion—Based on default judgment:** Several circuits have recognized an exception to the general rule when the party against whom preclusion is asserted substantially participated in the prior litigation before the default judgment. The leading cases are *In re Daily*, 47 F.3d 365 (9th Cir. 1995), *In re Bush*, 62 F.3d 1319 (11th Cir. 1995), and *In re Docteroff*, 133 F.3d 210 (3d Cir. 1997). While the Eighth Circuit Court of Appeals has not resolved the issue, the present court found the previously-described cases persuasive and held that collateral estoppel may apply to a default judgment when the party against whom the judgment was entered substantially participated in the litigation and engaged in bad faith conduct to frustrate the legal process prior to the default.

- **Issue preclusion—Based on default judgment:** Here, the debtor, who actively participated in the parties' prepetition Iowa litigation over nearly a three-year period, engaged in bad-faith conduct in that litigation, and so, pursuant to the doctrine of collateral estoppel, the default judgment entered against him in that action barred him from contesting the dischargeability of the judgment debt.

Ninth Circuit (10) R

In re Gilman, 887 F.3d 956 (9th Cir., April 13, 2018)

(case no. 16-55436) Text of opinion

- **Appellate procedure—Finality of order:** Orders granting or denying exemptions are final orders that are immediately appealable.

- **Relief from judgment—Under Rule 60(b)(1):** The bankruptcy court did not abuse its discretion in granting the debtor's motion, asserting excusable neglect under Civil Rule 60(b)(1), for relief from a judgment sustaining a creditor's objection to the debtor's claimed homestead exemption, where the court sustained the objection after the debtor's attorney failed to respond to the objection, and the attorney failed to respond due to a "calendaring error" resulting in the attorney's having "too many balls in the air."

- **Property of the estate—Exemptions—Under state law—Of homestead:** Under California law, conveyance of the debtor's homestead property to a third party does not defeat the debtor's right to an automatic homestead exemption in the property because continuous residency, rather than continuous ownership, controls the analysis. However, physical occupancy on the petition filing date without the requisite intent to live there is not sufficient to establish residency. Thus, here, where the debtor was in the process of selling the claimed homestead property on the petition date, the bankruptcy court erred in allowing the debtor's homestead exemption without making a determination as to whether the debtor intended to continue to reside in the property. Accordingly, the court vacated in part *In re Gilman*, 2015 WL 12747656 (C.D. Cal., Dec. 3, 2015).

In re Taggart, 888 F.3d 438 (9th Cir., April 23, 2018), pet for reh'g en banc filed (June 6, 2018)

(case nos. 16-35402, 16-60032, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043)

Text of opinion

- **Violation of discharge injunction:** Affirming *In re Taggart*, 548 B.R. 275 (9th Cir. B.A.P., April 12, 2016), which had reversed *In re Taggart*, 522 B.R. 627 (Bankr. D. Or., Dec. 16, 2014), the Court of Appeals held that the good-faith belief by prepetition creditors that the discharge injunction did not prevent them from seeking an attorney's fee award against the debtor for fees that they incurred following the debtor's discharge precluded an award of contempt sanctions against the creditors for violating the discharge injunction, regardless of whether the creditors' belief was reasonable. The court has adopted a two-part test for determining the propriety of a contempt sanction in the context of a discharge injunction: To justify sanctions, the movant must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction. *In re Bennett*, 298 F.3d 1059 (9th Cir. 2002). To satisfy the first prong, knowledge of the applicability of the injunction must be proved as a matter of fact and may not be inferred simply because the creditor knew of the bankruptcy proceeding. Additionally, the creditor's good-faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's

belief is unreasonable. *In re Zilog, Inc.*, 450 F.3d 996 (9th Cir. 2006). Here, the bankruptcy court applied an incorrect rule of law in holding that a good-faith belief that the discharge injunction was inapplicable to the creditors' claims was irrelevant. As a result, the BAP did not err when it reversed the contempt sanctions entered by the bankruptcy court.

In re Fitzhugh, 2018 WL 1789596 (9th Cir. B.A.P., April 13, 2018)

(case no. 17-1141) Text of opinion

- **Chapter 7—Revocation of discharge:** In order to revoke a Chapter 7 debtor's discharge under Code § 727(d)(2), the movant must show that he was unaware of the debtor's alleged fraud at the time the discharge was entered. *In re Dietz*, 914 F.2d 161 (9th Cir. 1990).

In re Hamilton, 584 B.R. 310 (9th Cir. B.A.P., April 17, 2018), appeal filed, Case No. 18-60026 (9th Cir., filed May 3, 2018)

(case nos. 17-1126, 17-1223) Text of opinion

- **Dischargeability of debt—For willful and malicious injury under Code § 523(a)(6):** In the Ninth Circuit, the "willful injury" requirement under Code § 523(a)(6) is met only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from the debtor's conduct. *In re Jercich*, 238 F.3d 1202 (9th Cir. 2001).

- **Dischargeability of debt—For willful and malicious injury under Code § 523(a)(6):** A state court judgment for breach of fiduciary duty and related torts arising from the Chapter 7 debtors' theft of proprietary information from the debtor husband's employer was nondischargeable under § Code 523(a)(6).

- **Dischargeability of debt—Interest as included in nondischargeable debt:** Interest is an integral part of a nondischargeable debt, and, where a creditor's state-court judgment was nondischargeable, the creditor was entitled to post-judgment interest at the state, rather than federal, rate, for the entire post-judgment period, including the period following the bankruptcy court's nondischargeability determination.

In re Holcomb, 2018 WL 1976526 (9th Cir. B.A.P., April 25, 2018)

(case no. 17-1268) Text of opinion

- **Jurisdiction—Over postdischarge matter:** The bankruptcy court lacked jurisdiction over the debtor's claims against her bankruptcy attorney for fraudulent concealment, fraudulent misrepresentation, and constructive fraud in connection with the attorney's representation of the debtor after her case had been converted from Chapter 11 to Chapter 7. The claims did not fall within "related to" jurisdiction because the claims could not have any conceivable effect on the debtor's bankruptcy estate. The claims belonged to the debtor personally and were not property of her estate, creditors have been paid in full, the debtor had received her discharge, and the Chapter 7 estate had been fully administered and closed.

In re Johnson, 2018 WL 1803002 (9th Cir. B.A.P., April 16, 2018), appeal filed, Case No. 18-60025 (9th Cir., filed May 1, 2018)

(case no. 17-1194) Text of opinion

- **Issue preclusion—Application under circumstances:** Ordinarily, stipulated judgments are not given preclusive effect under California law because the issues were not actually litigated. Where the record or judgment evidences an intent by the parties for a stipulated judgment to be preclusive, however, a court may give effect to that judgment. Thus, here, the bankruptcy court did not err in applying collateral estoppel to a stipulated judgment entered in California state court litigation so as to render the judgment nondischargeable under Code § 523(a)(2)(A).

In re Anderson, 2018 WL 2059600 (Bankr. D. Idaho, April 30, 2018)

(case no. 4:15-bk-40878; adv. proc. no. 4:17-ap-8046) (Bankruptcy Judge Jim D. Pappas)

Text of opinion

- **Chapter 7—Revocation of discharge:** Acting under Code § 727(d)(3), the bankruptcy court revoked the discharges of the Chapter 7 debtors after the debtors, who were real estate agents, failed to comply with the court's order to turn over commissions received postpetition, which the debtors consistently claimed were not estate property.

In re Jones, 583 B.R. 749 (Bankr. W.D. Wash., April 20, 2018)

(case no. 2:17-bk-12813) (Bankruptcy Judge Christopher M. Alston) Text of opinion

- **Chapter 13—Confirmation of plan—Treatment of secured claims—910-day car claims:** The costs of the optional gap insurance and extended maintenance coverage that the Chapter 13 debtor purchased, less than 910 days prepetition, at same time as his purchase of a motor vehicle were not sufficiently related to the debtor's acquisition of the vehicle so as to be part of the vehicle's sales price, so that the amount paid for these optional items was not protected from bifurcation by the hanging paragraph of Code § 1325(a). Applying the dual status rule, rather than the transformation rule, the court calculated that 93.54% of the total amount financed was a PMSI protected from bifurcation, while the balance was not.

In re Malek, 2018 WL 1750089 (Bankr. D. Mont., April 10, 2018)

(case no. 2:15-bk-61179) (Bankruptcy Judge Benjamin Philip Hursh) Text of opinion

- **Chapter 13—Voluntary dismissal of case:** Denying the Chapter 13 debtor's motion under Code § 1307(b) to voluntarily dismiss his case, and instead converting the case to Chapter 7 under Code § 1307(c), the court said that the debtor's failure to list two properties for sale for 10 to 12 months of the approximately 18-month marketing period provided for in the debtor's confirmed plan was sufficiently "egregious behavior" to constitute bad faith, warranting denial of the debtor's motion under *In re Rosson*, 545 F.3d 764 (9th Cir. 2008).

In re Power, 2018 WL 1887318 (Bankr. D. Idaho, April 18, 2018)

(case no. 8:16-bk-40636; adv. proc. no. 8:16-ap-8034) (Bankruptcy Judge Jim D. Pappas)

Text of opinion

- **Avoidable transfers—Preferential transfer—New value defense:** Where a lender that refinanced the Chapter 7 debtors' motor vehicle loan did not perfect its security interest in the vehicle until 40 days after the loan, in which the debtors granted the lender the security interest, the exchange was not "substantially contemporaneous" for the purpose of Code § 547(c)(1)(B), so that the lender could not assert the "new value" defense in § 547(c)(1) in the Chapter 7 trustee's proceeding to avoid the transfer as a preference under § 547(b).

Tenth Circuit (5) R

In re Van Winkle, 583 B.R. 759 (10th Cir. B.A.P., April 3, 2018)

(cases nos. 17-31, 17-32, 17-33) Text of opinion

- **Jurisdiction—Effect of *Rooker-Feldman* doctrine:** The *Rooker-Feldman* doctrine precludes a federal action that tries to modify or set aside a state-court judgment on the ground that the state proceedings should not have led to that judgment. *Mayotte v. U.S. Bank Nat'l Ass'n*, 880 F.3d 1169 (10th Cir. 2018).

- **Violation of discharge injunction:** Reversing in part *In re Van Winkle*, 2017 WL 562430 (Bankr. D. N.M., Feb. 10, 2017), the BAP held that, because New Mexico law allows the enforcement of a foreclosure deficiency judgment against real property that has been redeemed from foreclosure, creditors holding a deficiency judgment following their foreclosure of a judgment lien against real property owned by the debtor did not violate the discharge injunction by commencing proceedings to foreclose the deficiency judgment after the personal representative of the debtor's probate estate redeemed the real property from foreclosure following the debtor's death, since the creditors did not attempt to collect the judgment from the debtor's probate estate.

In re Crow, Case No. 2:17-bk-20280 (Bankr. D. Wyo., April 4, 2018), **appeal filed**, Case No. 18-60 (10th Cir. B.A.P., filed April 17, 2018)

(Bankruptcy Judge Cathleen D. Parker) Text of opinion

- **Property of the estate—Exemptions—Of entireties property under Code § 522(b)(3)(B):** A brokerage account was owned by the debtor and his non-filing wife as tenants by the entirety under Wyoming law and therefore was exempt, except as to the amount of the spouses' joint debt; the wife's actions in withdrawing funds from the account did not sever the tenancy.

In re Millard, --- B.R. ----, 2018 WL 2021245 (Bankr. D. Utah, April 27, 2018)

(case no. 2:17-bk-20016) (Bankruptcy Judge Joel T. Marker) Text of opinion

- **Consumer debts:** The obligation of the debtor, an attorney, to repay the negative balance on his capital account at his law firm when he left the firm was not a consumer debt, even though the monthly draws the debtor had taken from the account had been used to pay his household expenses.

In re Stewart, 583 B.R. 775 (Bankr. W.D. Okla., April 27, 2018), **appeal filed**, Case No. 18-68 (10th Cir. B.A.P., filed May 14, 2018)

(case no. 5:15-bk-12215) (Chief Bankruptcy Judge Janice Loyd) Text of opinion

- **Chapter 7—Attorney's fees—Disclosure requirements:** The failure of an attorney representing the involuntary Chapter 7 debtors and their 13 affiliated limited liability

companies to disclose, for over two years, the amount and source of the nearly $350,000 in attorney's fees he received violated Code § 329(a) and Bankruptcy Rule 2016(b) and warranted an order requiring the attorney to disgorge $25,000 of the fees.

In re Templin, 2018 WL 1864928 (Bankr. D. N.M., April 17, 2018)

(case no. 1:17-bk-13196) (Bankruptcy Judge David T. Thuma) Text of opinion

- **Chapter 7—Statement of intention regarding secured claim:** Agreeing with *In re McCray*, 578 B.R. 403 (Bankr. E.D. Mich. 2017) and *In re Williamson*, 540 B.R. 460 (Bankr. D. N.M. 2015), the bankruptcy court held that there was no basis under the Bankruptcy Code or Rules to delay the Chapter 7 debtor's discharge, although the debtor failed to comply with his obligation under Code § 521(a)(2) to file, and then perform, a proper statement of intention regarding a creditor's claim secured by the debtor's mobile home; the debtor stated the intention of retaining the mobile home and continuing to make the required payments on the debt, which was not a permissible option under § 521(a)(2).

Eleventh Circuit (8) R

In re Woide, --- Fed. Appx. ----, 2018 WL 1633550 (11th Cir., April 5, 2018)

(case nos. 17-10776, 17-10777) Text of opinion

- **Reopening of case:** The Chapter 7 debtors' mortgage creditor, which sought to compel the debtors to surrender their mortgaged residential property, had both statutory and constitutional standing to seek reopening of the bankruptcy case.

- **Chapter 7—Surrender of collateral for secured debt:** Affirming *In re Woide*, 2017 WL 78798 (M.D. Fla., Jan. 9, 2017), reconsideration denied, 2017 WL 549160 (Feb. 9, 2017), which had affirmed *In re Woide*, 551 B.R. 865 (Bankr. M.D. Fla., June 22, 2016), and reaffirming *In re Failla*, 838 F.3d 1170 (11th Cir., Oct. 4, 2016), the Court of Appeals held that the bankruptcy court did not err in granting the Chapter 7 debtors' mortgage creditor's motions to reopen their bankruptcy case and compel the debtors to surrender the mortgaged residential property, where the debtors had neither redeemed the property nor reaffirmed the debt, but instead continued to reside in the property without making mortgage payments while contesting the creditor's state-court foreclosure proceeding. The circuit's case law was clear that Code § 521(a)(2) provides only three options for a debtor who has property that serves as collateral for his debts: redeem the property, reaffirm the debt, or surrender the property; doing nothing is not an option. Moreover, the creditor's motion was not barred by laches, as there was no prejudice to the debtors in requiring them to comply with § 521(a)(2) and their previous representations to the bankruptcy court that they would surrender the property.

Loder v. Icemakers, Inc., 2018 WL 1697389 (N.D. Ala., April 6, 2018)

(case no. 2:17-cv-1696) (District Judge L. Scott Coogler) Text of opinion

- **Appellate procedure—Notice of appeal:** When a party files a timely motion for relief from judgment after filing a notice of appeal, the notice of appeal is suspended until the court decides the motion for relief from judgment. *In re Markowitz*, 190 F.3d 455 (6th Cir. 1999); *In re Potter*, 285 B.R. 344 (10th Cir. B.A.P. 2002).

Thompson v. McDermott, Case No. 3:17-cv-130 (N.D. Ga., April 3, 2018), **appeal filed**, In re Thompson, Case No. 18-11885 (11th Cir., filed May 3, 2018)

(District Judge Timothy C. Batten, Sr.) Text of opinion

- **Chapter 7—Revocation of discharge:** The bankruptcy court did not err in revoking the Chapter 7 debtors' discharges under Code § 727(d)(2); this provision does not include an unstated requirement, which is explicitly made a part of § 727(d)(1), that the moving party not have known of the offending conduct prior to the debtor's discharge.

In re Brannon, 584 B.R. 417 (Bankr. N.D. Ga., April 5, 2018)

(case no. 1:16-bk-54770; adv. proc. no. 1:16-ap-5212) (Chief Bankruptcy Judge Wendy L. Hagenau) Text of opinion

- **Avoidable transfers—Avoidance under Code § 544(a)(3):** Because Georgia Code Ann. § 44–2–3 provides that "every unrecorded voluntary deed or conveyance of land made by any person shall be void as against subsequent bona fide purchasers for value without notice of such voluntary deed or conveyance," the Chapter 7 trustee, in the status of a bona fide purchaser of real property under Code § 544(a)(3), could avoid the transfer, under a prepetition divorce decree, of the debtor's one-half interest in the former marital residence to her former husband, where the debtor never executed a deed conveying her one-half interest to her former husband, and neither the divorce decree nor a notice of lis pendens had been recorded in the real estate records.

- **Chapter 7—Sale of estate property by trustee—Co-owned property:** The court granted the Chapter 7 trustee's motion under Code § 363(h) to sell the debtor's former marital residence free and clear of the one-half interest in the residence held by the debtor's former husband, who was entitled to receive one-half of the net proceeds of the sale.

In re Dopson, 2018 WL 2021247 (Bankr. N.D. Ga., April 27, 2018)

(case no. 1:17-bk-51476; adv. proc. no. 1:18-ap-5020) (Bankruptcy Judge James R. Sacca)

Text of opinion

- **Dischargeability of debt—Existence of debt:** Determining whether a debt is nondischargeable is a two step-process. *In re Anzo*, 547 B.R. 454 (Bankr. N.D. Ga. 2016). The first step is to determine whether a claim exists or can be maintained under state or non-bankruptcy federal law. Only after it is determined that a claim exists or can be maintained does the second step--determining nondischargeability--come into play. If suit is not brought within the time period allotted under state law, then a debt cannot be established or maintained. As such, a state law statute of limitations is only relevant when determining whether a claim can be established or maintained, and once it is determined that a claim can be established or maintained, the state statute of limitations is no longer relevant to the question of dischargeability.

In re Murphy, 2018 WL 2059605 (Bankr. N.D. Ga., April 30, 2018), amended (May 17, 2018)

(case no. 1:15-bk-56050; adv. proc. no. 1:17-ap-5275) (Chief Bankruptcy Judge Wendy L. Hagenau) Text of opinion

- **Violation of stay—Standing to recover:** The Chapter 7 trustee is not an "individual" entitled to recover damages under Code § 362(k) for a violation of the automatic stay. See *In re McKeever*, 550 B.R. 623 (Bankr. N.D. Ga. 2016); *In re Taylor*, 430 B.R. 305 (Bankr. N.D. Ga. 2010).

In re Real, 2018 WL 2059603 (Bankr. M.D. Fla., April 30, 2018), **appeal filed**, Polo v. Real, Case No. 3-18-cv-662 (M.D. Fla., filed May 18, 2018)

(case no. 3:16-bk-3913) (Bankruptcy Judge Jerry A. Funk) Text of opinion

- **Dischargeability of debt—Jurisdiction of nonbankruptcy court to determine:** State courts have concurrent jurisdiction with bankruptcy courts to determine whether a debt is excepted from discharge under Code § 523(a)(3)(A). The majority of courts also hold that state courts have concurrent jurisdiction to determine the dischargeability of a debt under § 523(a)(3)(B). See, e.g., *In re Keenom*, 231 B.R 116 (Bankr. M.D. Ga. 1999) (recognizing concurrent jurisdiction); *In re Massa*, 217 B.R. 412 (Bankr. W.D. N.Y. 1998) (same); *In re Franklin*, 179 B.R. 913 (Bankr. E.D. Cal. 1995) (same). But see *In re Padilla*, 84 B.R. 194 (Bankr. D. Colo. 1987) (holding that bankruptcy court has concurrent jurisdiction under § 523(a)(3)(A) and exclusive jurisdiction under § 523(a)(3)(B)).

- **Dischargeability of debt—Unlisted debt under Code § 523(a)(3)(A):** Unscheduled debts are not excepted from discharge under Code § 523(a)(3)(A) in no-asset Chapter 7 cases. See, e.g., *In re Garrett*, 266 B.R 910 (Bankr. S.D. Ga. 2001).

- **Dischargeability of debt—Unlisted debt under Code § 523(a)(3)(B):** Courts are divided on the level of proof necessary to establish whether a debt is "of a kind" specified in Code § 523(a)(2), (4), or (6) for the purpose of § 523(a)(3)(B). Some courts require only a showing that a colorable or viable claim under one of those sections exists. See, e.g., *In re Keenom*, 231 B.R. 116 (Bankr. M.D. Ga. 1999); *In re Haga*, 131 B.R. 320 (Bankr, W.D. Tex. 1991). Other courts read "of a kind" to require a determination on the merits. See, e.g., *In re Richie*, 380 B.R. 868 (Bankr. M.D. Fla. 2007); *In re Jones*, 296 B.R. 447 (Bankr. M.D. Tenn. 2003).

- **Dischargeability of debt—Unlisted debt under Code § 523(a)(3)(B):** The statutory language of Code § 523(a)(3)(B) clearly contemplates that mere knowledge of a pending bankruptcy proceeding is sufficient to bar the claim of a creditor who took no action, whether or not that creditor received official notice from the court of various pertinent dates. This furthers the bankruptcy policy of affording a fresh start to the debtor by preventing a creditor, who knew of a proceeding but who did not receive formal notification, from standing back, allowing the bankruptcy action to proceed without adjudication of his claim, and then asserting that the debt owed him is nondischargeable. *In re Alton*, 837 F.2d 457 (11th Cir. 1988).

- **Dischargeability of debt—Unlisted debt under Code § 523(a)(3)(B):** Even if a creditor's alleged debt was "of a kind" specified in Code § 523(a)(6), the alleged debt would not be excepted from the Chapter 7 debtor's discharge under § 523(a)(3)(B) because the creditor received an email from the debtor on January 3, 2017, informing the creditor that the debtor "was in the middle of a bankruptcy proceeding," and the 41 days between January 3, 2017, and February 13, 2017, the deadline for a creditor to file an adversary proceeding, was ample time for him to file such a proceeding.

In re White, 2018 WL 1902491 (Bankr. N.D. Ala., April 19, 2018), amended (April 27, 2018), appeal filed, Law Solutions of Chicago LLC v. Corbett, Case No. 1:18-cv-677 (N.D. Ala., filed May 1, 2018)

(case nos. 1:17-bk-40093, 1:17-bk-40462, 1:17-bk-40599, 2:17-bk-999, 7:16-bk-72114, 7:17-bk-70171) (Chief Bankruptcy Judge James J. Robinson)

Text of opinion Amendment to opinion

- **Authority of the court—Imposition of sanctions—On debtor's attorney:** Finding that UpRight Law and a local affiliated attorney failed to comply with the court's order implementing the settlement of two prior adversary proceedings by the Bankruptcy Administrator, in which UpRight Law and the attorney agreed not to charge additional fees or limit the scope of legal services for clients who retained them before a certain date, the court assessed $150,000 in civil penalties against UpRight Law and the attorney and ordered them, under Code § 526(c)(2)(A), to refund the attorney's fees received in the six cases in which the court found they failed to comply with the settlement.

District of Columbia Circuit (1) R

In re Mhoon, 2018 WL 1726340 (Bankr. D. D.C., April 6, 2018)

(case no. 1:18-bk-59) (Bankruptcy Judge S. Martin Teel, Jr.) Text of opinion

- **Meeting of creditors:** Although the Chapter 7 trustee held a meeting of creditors, at which the Chapter 7 debtor was examined, on March 1, 2018, the clerk of court failed to send a notice of the meeting to creditors. Under the circumstances, the court would require the debtor to appear for a new meeting of creditors. Listed creditors were entitled to receive notice so that they could participate in the meeting of creditors. The new meeting of creditors shall be treated for purposes of Bankruptcy Rules 4004(a) and 4007(c) as the first date set for the meeting of creditors.

This Issue's New Cases: Full Abstracts

Section One:
Nonchapter-Specific Materials

Part A

Automatic Stay

Existence of Stay

Topical compilation:

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All topical compilations

All circuit compilations

See also:

In re Samuels, Case No. 1:18-bk-10543 (Bankr. D. Mass., April 26, 2018), appeal filed, Case No. 18-14 (1st Cir. B.A.P., filed April 26, 2018) (Bankruptcy Judge Frank J. Bailey) (agreeing with *St. Anne's Credit Union v. Ackell*, 490 B.R. 141 (D. Mass. 2013) and *In re Smith*, 573 B.R. 298 (Bankr. D. Me., August 18, 2017), aff'd, *Smith v. Maine Bureau of Revenue Services*, 2018 WL 2248586 (D. Me., May 16, 2018), and disagreeing with *In re Jumpp*, 356 B.R. 789 (1st Cir. B.A.P., Dec. 28, 2006), the bankruptcy court held that termination of the automatic under Code § 362(c)(3) applies to property of the estate as well as to the debtor and the debtor's property) (text of opinion)

In re Markoch, 583 B.R. 911 (Bankr. W.D. Mich., April 19, 2018) (case no. 1:18-bk-740) (Chief Bankruptcy Judge Scott W. Dales) (adhering to *In re Robinson*, 427 B.R. 412 (Bankr. W.D. Mich. 2010), the court held that, where the debtor had two cases pending within the same year after the earlier one had been dismissed, under Code § 362(c)(3) the automatic stay terminated 30 days after the filing of the second case with respect to the debtor and property of the debtor, but not with respect to property of the estate) (text of opinion)

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Relief from Stay

Topical compilation:

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All topical compilations

All circuit compilations

Relief from stay decisions do not have preclusive effect:

Because motions for relief from stay are summary proceedings that require a quick determination and are limited in scope, the decision in a relief from stay proceeding does not support preclusion by res judicata or collateral estoppel. Thus, here, the court's granting relief from stay to the Chapter 13 debtor's mortgage creditor did not preclude the debtor's claim for an award of sanctions under Rule 3002.1(i) for the creditor's failure to comply with Rule 3002.1(c), even though in his response to the creditor's motion for relief from stay the debtor asserted that the creditor failed to file notices of postpetition charges required under Rule 3002.1(c).

In re Meyer, 2018 WL 1663292 (Bankr. M.D. Pa., April 4, 2018)

(case no. 1:12-bk-4042; adv. proc. no. 1:17-ap-138) (Chief Bankruptcy Judge Robert N. Opel II)

Text of opinion

R

Violation of Stay

Topical compilation:

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All circuit compilations

City violated automatic stay by refusing to return vehicle impounded prepetition:

Disagreeing with *In re Avila*, 566 B.R. 558 (Bankr. N.D. Ill. 2017), the bankruptcy court held that the City of Chicago violated the automatic stay by refusing to return the Chapter 13 debtor's car, which the city had impounded prepetition, unless the debtor paid the city's claim for $13,000 in unpaid parking tickets in full. The court reasoned that (1) the city was bound by the debtor's confirmed Chapter 13 plan, to which the city had not objected, which treated the city's claim as unsecured; (2) the city lacked authority to enact a municipal code provision stating that vehicles impounded by the city were subject to a possessory lien in favor of the city for the amount required to obtain release of the vehicle; (3) because the city had no lien on the debtor's vehicle, the city was not entitled to maintain possession of the vehicle to perfect its lien under Code § 362(b)(3), which states that the automatic stay does not apply to any act to perfect, maintain or continue the perfection of an interest in property; and (4) Code § 362(b)(4), which states that the automatic stay does not cover the commencement or continuation of proceedings by governmental units to enforce its police and regulatory power, including the enforcement of a judgment other than a money judgment, did not apply in the absence of an application by the city for an order of adequate protection. The City of Chicago, the court declared, was "usurping the court's authority and responsibility to decide whether and how debtors have to provide adequate protection." In addition, the city was "ignoring its duty to return vehicles" under *Thompson v. GMAC*, 566 F.3d 699 (7th Cir. 2009).

In re Howard, 584 B.R. 252 (Bankr. N.D. Ill., April 19, 2018), **appeal filed**, The City of Chicago v. Howard, Case No. 1:18-cv-2753 (N.D. Ill., filed April 17, 2018)

(case no. 1:17-bk-25141) (Bankruptcy Judge Jacqueline P. Cox)

Text of opinion

See also:

In re Murphy, 2018 WL 2059605 (Bankr. N.D. Ga., April 30, 2018), amended (May 17, 2018) (case no. 1:15-bk-56050; adv. proc. no. 1:17-ap-5275) (Chief Bankruptcy Judge Wendy L. Hagenau) (the Chapter 7 trustee is not an "individual" entitled to recover damages under Code § 362(k) for a violation of the automatic stay; see *In re McKeever*, 550 B.R. 623 (Bankr. N.D. Ga. 2016); *In re Taylor*, 430 B.R. 305 (Bankr. N.D. Ga. 2010)) (text of opinion)


R

Part B

Dischargeability

Student Loan Debts

Topical compilation: All topical compilations

PDF Word All circuit compilations

64-year-old debtor with profound hearing loss established undue hardship under Code § 523(a)(8):

The debtor, a sixty-four-year-old single woman with no dependents who had been diagnosed with a bilateral severe and profound hearing loss that made it difficult for her to hear her counseling clients, even with the use of adaptive hearing equipment, established undue hardship, permitting the discharge of her more than $107,000 in student loan debt, as the debtor's age and her professional trajectory belied any notion that she would be able to generate sufficient income in the coming years to repay her student loans while maintaining a minimal standard of living. Despite working five to six days per week, the debtor could barely fund her own minimalist lifestyle. The debtor impressed the court as a hardworking woman who chose an area of study that, due to changes in federal laws and regulations, proved less profitable than she had anticipated.

In re Erkson, 582 B.R. 542 (Bankr. D. Me., April 3, 2018)

(case no. 2:16-bk-20169; adv. proc. no. 2:16-ap-2018) (Chief Bankruptcy Judge Peter G. Cary)

Text of opinion

Debtor who had been in almost constant treatment for epilepsy for 30 years established undue hardship under Code § 523(a)(8):

The 39-year-old debtor, who had been in almost constant treatment for epilepsy and his affective disorders for 30 years, established undue hardship, permitting the discharge of the debtor's $50,000 in student loan debt under Code § 523(a)(8), under the totality-of-the-circumstances test. The court observed that both the *Brunner* test and the totality-of-the-circumstances test for undue hardship were flawed: They were outdated and were no longer true to the statutory language in § 523(a)(8).

In re Smith, 582 B.R. 556 (Bankr. D. Mass., April 4, 2018)

(case no. 1:16-bk-10998; adv. proc. no. 1:16-ap-1079) (Bankruptcy Judge Frank J. Bailey)

Text of opinion


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Other Debts

Scope note: Coverage is quite selective.

Topical compilation:

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All topical compilations

All circuit compilations

Supreme Court: Statement concerning single asset may be "statement respecting" debtor's "financial condition":

Affirming *In re Appling*, 848 F.3d 953 (11th Cir., Feb. 15, 2017), and resolving a split among the circuits, the Supreme Court held that a statement about a single asset (in this case, a large tax refund) can be a "statement respecting" the debtor's "financial condition" for the purposes of Code § 523(a)(2). A statement is "respecting" a debtor's financial condition, the Court reasoned, if it has a direct relation to or impact on the debtor's overall financial status. Thus, a statement about a single asset may come within Code § 523(a)(2)(B) rather than § 523(a)(2)(A); this would require the statement to be in writing, and the creditor to show reasonable, rather than merely justifiable, reliance, for the debt to be nondischargeable. The decision was unanimous, although three Justices declined to join one part of the opinion by Justice Sotomayor.

Lamar, Archer & Cofrin, LLP v. Appling, 2018 WL 2465174 (U.S., June 4, 2018)

(case no. 16–1215)

Text of opinion

Allegedly nondischargeable debt must first be shown to exist:

Determining whether a debt is nondischargeable is a two step-process. *In re Anzo*, 547 B.R. 454 (Bankr. N.D. Ga. 2016). The first step is to determine whether a claim exists or can be maintained under state or non-bankruptcy federal law. Only after it is determined that a claim exists or can be maintained does the second step--determining nondischargeability--come into play. If suit is not brought within the time period allotted under state law, then a debt cannot be established or maintained. As such, a state law statute of limitations is only relevant when determining whether a claim can be established or maintained, and once it is determined that a claim can be established or maintained, the state statute of limitations is no longer relevant to the question of dischargeability.

In re Dopson, 2018 WL 2021247 (Bankr. N.D. Ga., April 27, 2018)

(case no. 1:17-bk-51476; adv. proc. no. 1:18-ap-5020) (Bankruptcy Judge James R. Sacca)

Text of opinion

Concurrent jurisdiction of state courts to determine nondischargeability under Code § 523(a)(3):

State courts have concurrent jurisdiction with bankruptcy courts to determine whether a debt is excepted from discharge under Code § 523(a)(3)(A). The majority of courts also hold that state courts have concurrent jurisdiction to determine the dischargeability of a debt under § 523(a)(3)(B). See, e.g., *In re Keenom*, 231 B.R 116 (Bankr. M.D. Ga. 1999) (recognizing concurrent jurisdiction); *In re Massa*, 217 B.R. 412 (Bankr. W.D. N.Y. 1998) (same); *In re Franklin*, 179 B.R. 913 (Bankr. E.D. Cal. 1995) (same). But see *In re Padilla*, 84 B.R. 194 (Bankr. D. Colo. 1987) (holding that bankruptcy court has concurrent jurisdiction under § 523(a)(3)(A) and exclusive jurisdiction under § 523(a)(3)(B)).

Unscheduled debts are not excepted from discharge in no-asset Chapter 7 cases:

Unscheduled debts are not excepted from discharge under Code § 523(a)(3)(A) in no-asset Chapter 7 cases. See, e.g., *In re Garrett*, 266 B.R 910 (Bankr. S.D. Ga. 2001).

Meaning of "of a kind" in Code § 523(a)(3)(B):

Courts are divided on the level of proof necessary to establish whether a debt is "of a kind" specified in Code § 523(a)(2), (4), or (6) for the purpose of § 523(a)(3)(B). Some courts require only a showing that a colorable or viable claim under one of those sections exists. See, e.g., *In re Keenom*, 231 B.R. 116 (Bankr. M.D. Ga. 1999); *In re Haga*, 131 B.R. 320 (Bankr, W.D. Tex. 1991). Other courts read "of a kind" to require a determination on the merits. See, e.g., *In re Richie*, 380 B.R. 868 (Bankr. M.D. Fla. 2007); *In re Jones*, 296 B.R. 447 (Bankr. M.D. Tenn. 2003).

Actual notice of bankruptcy case for purpose of Code § 523(a)(3)(B), generally:

The statutory language of Code § 523(a)(3)(B) clearly contemplates that mere knowledge of a pending bankruptcy proceeding is sufficient to bar the claim of a creditor who took no action, whether or not that creditor received official notice from the court of various pertinent dates. This furthers the bankruptcy policy of affording a fresh start to the debtor by preventing a creditor, who knew of a proceeding but who did not receive formal notification, from standing back, allowing the bankruptcy action to proceed without adjudication of his claim, and then asserting that the debt owed him is nondischargeable. *In re Alton*, 837 F.2d 457 (11th Cir. 1988).

Creditor had actual notice of debtor's bankruptcy case in time to file nondischargeability complaint:

Even if a creditor's alleged debt was "of a kind" specified in Code § 523(a)(6), the alleged debt would not be excepted from the Chapter 7 debtor's discharge under § 523(a)(3)(B) because the creditor received an email from the debtor on January 3, 2017, informing the creditor that the debtor "was in the middle of a bankruptcy proceeding," and the 41 days between January 3, 2017, and February 13, 2017, the deadline for a creditor to file an adversary proceeding, was ample time for him to file such a proceeding.

In re Real, 2018 WL 2059603 (Bankr. M.D. Fla., April 30, 2018), **appeal filed**, Polo v. Real, Case No. 3-18-cv-662 (M.D. Fla., filed May 18, 2018)

(case no. 3:16-bk-3913) (Bankruptcy Judge Jerry A. Funk)

Text of opinion

"Willful" injury under Code § 523(a)(6), generally:

In the Ninth Circuit, the "willful injury" requirement under Code § 523(a)(6) is met only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from the debtor's conduct. *In re Jercich*, 238 F.3d 1202 (9th Cir. 2001).

State-court judgment for breach of fiduciary duty was nondischargeable under § Code 523(a)(6):

A state court judgment for breach of fiduciary duty and related torts arising from the Chapter 7 debtors' theft of proprietary information from the debtor husband's employer was nondischargeable under § Code 523(a)(6).

In re Hamilton, 584 B.R. 310 (9th Cir. B.A.P., April 17, 2018), appeal filed, Case No. 18-60026 (9th Cir., filed May 3, 2018)

(case nos. 17-1126, 17-1223)

Text of opinion

See also:

In re Parrish, 583 B.R. 873 (Bankr. E.D. N.C., April 6, 2018), appeal filed, *USA v. Parrish*, Case No. 5:18-cv-173 (E.D. N.C., filed April 20, 2018) (case no. 5:17-bk-2341) (Chief Bankruptcy Judge Stephani W. Humrickhouse) (agreeing with *In re Chesteen*, 2018 WL 878847 (Bankr. E.D. La., Feb. 9, 2018), the court held that the individual shared responsibility payment for which the Chapter 13 debtor was liable, based on her failure to purchase health care insurance as mandated by the Affordable Care Act, was a penalty, rather than a tax, for the purpose of Code § 507(a)) (text of opinion)

In re Basl, 2018 WL 1886571 (Bankr. E.D. Va., April 18, 2018) (case no. 3:17-bk-32341; adv. proc. no. 3:17-ap-4495) (Bankruptcy Judge Keith L. Phillips) (a civil judgment against the debtor for stalking under Virginia law did not necessarily establish a willful and malicious injury within the meaning of Code § 523(a)(6)) (text of opinion)

R

Other Issues

Topical compilation:

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All topical compilations

All circuit compilations

See also:

In re Hamilton, 584 B.R. 310 (9th Cir. B.A.P., April 17, 2018), appeal filed, Case No. 18-60026 (9th Cir., filed May 3, 2018) (case nos. 17-1126, 17-1223) (interest is an integral part of a nondischargeable debt, and, where a creditor's state-court judgment was nondischargeable, the creditor was entitled to post-judgment interest at the state, rather than federal, rate, for the entire post-judgment period, including the period following the bankruptcy court's nondischargeability determination) (text of opinion)

R

Part C

Jurisdiction and Procedure

Adversary Procedure

Topical compilation:

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All topical compilations

All circuit compilations

See also:

In re Cain, --- B.R. ----, 2018 WL 1779329 (Bankr. S.D. Miss., April 12, 2018) (case no. 3:17-bk-46; adv. proc. no. 3:17-ap-60) (Bankruptcy Judge Neil P. Olack) (the court granted a creditor's motion to compel arbitration of the Chapter 13 debtor's adversary proceeding to recover for the creditor's alleged violation of the Truth in Lending Act) (text of opinion)

R

Appellate Procedure

Topical compilation:

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See also:

Bank of America, N.A. v. McCowan, 2018 WL 2016258 (E.D. N.C., April 30, 2018) (case no. 5:18-cv-75) (Chief District Judge James C. Dever, III) (the bankruptcy court's order granting the trustee's motion to revoke the abandonment of certain real property was a final order) (text of opinion)

In re Felix, 582 B.R. 915 (6th Cir. B.A.P., April 6, 2018) (case no. 17-8004) (a dispute regarding domicile is generally considered as a mixed question of law and fact) (text of opinion)

Loder v. Icemakers, Inc., 2018 WL 1697389 (N.D. Ala., April 6, 2018) (case no. 2:17-cv-1696) (District Judge L. Scott Coogler) (when a party files a timely motion for relief from judgment after filing a notice of appeal, the notice of appeal is suspended until the court decides the motion for relief from judgment; see *In re Markowitz*, 190 F.3d 455 (6th Cir. 1999); *In re Potter*, 285 B.R. 344 (10th Cir. B.A.P. 2002)) (text of opinion)

In re Gilman, 887 F.3d 956 (9th Cir., April 13, 2018) (case no. 16-55436) (orders granting or denying exemptions are final orders that are immediately appealable) (text of opinion)

R

Other Procedural Issues

Topical compilation:

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Elements of issue preclusion under federal law:

Under federal law, collateral estoppel, or issue preclusion, precludes the relitigation of a legal issue that was litigated in a prior proceeding and is appropriate when (1) the identical issue was decided in a prior adjudication; (2) there was a final judgment on the merits; (3) the party against whom the bar was asserted was a party or in privity with a party to the prior adjudication; and (4) there was a full and fair opportunity to litigate the issue. *Doe v. Hesketh*, 828 F.3d 159 (3d Cir. 2016).

Elements of claim preclusion under federal law:

Under federal law, res judicata, or claim preclusion, bars parties from initiating a suit based on the same cause of action that was brought, or could have been brought, in a prior suit when (1) a final judgment on the merits was reached; (2) the suit involves the same parties or their privies; and (3) the subsequent suit is based on the same cause of action. *Duhaney v. Atty. Gen. of U.S.*, 621 F.3d 340 (3d Cir. 2010).

In re Meyer, 2018 WL 1663292 (Bankr. M.D. Pa., April 4, 2018)

(case no. 1:12-bk-4042; adv. proc. no. 1:17-ap-138) (Chief Bankruptcy Judge Robert N. Opel II)

Text of opinion

Court orders new meeting of creditors where no notice was sent to creditors of first meeting of creditors:

Although the Chapter 7 trustee held a meeting of creditors, at which the Chapter 7 debtor was examined, on March 1, 2018, the clerk of court failed to send a notice of the meeting to creditors. Under the circumstances, the court would require the debtor to appear for a new meeting of creditors. Listed creditors were entitled to receive notice so that they could participate in the meeting of creditors. The new meeting of creditors shall be treated for purposes of Bankruptcy Rules 4004(a) and 4007(c) as the first date set for the meeting of creditors.

In re Mhoon, 2018 WL 1726340 (Bankr. D. D.C., April 6, 2018)

(case no. 1:18-bk-59) (Bankruptcy Judge S. Martin Teel, Jr.)

Text of opinion

Elements of claim preclusion under Massachusetts law:

Under Massachusetts law, the doctrine of claim preclusion makes a valid, final judgment conclusive on the parties and their privies, and bars further litigation of all matters that were or could have been adjudicated in the action. To trigger claim preclusion, three elements must be present: (1) identity or privity of the parties in the present and prior actions; (2) identity of the cause of action; and (3) a prior final judgment on the merits.

Claim preclusion barred debtor's claim under Code § 548, but not claim under § 544(a)(3):

Where a default judgment had been entered against the Chapter 13 debtor in her prepetition state court wrongful foreclosure action against her mortgage creditor, claim preclusion barred the debtor's claim, in an adversary proceeding against the creditor, to set aside the foreclosure sale as a fraudulent transfer under Code § 548, as the facts upon which the claim was based were identical to the facts upon which the debtor's state court complaint was based. However, claim preclusion did not bar either the debtor's claim to avoid the foreclosure sale under Code § 544(a)(3), or the debtor's claim to preserve the avoided transfer for the benefit of the bankruptcy estate under § 551, as neither claim could have been raised in state court.

In re Giacchetti, --- B.R. ----, 2018 WL 1629140 (Bankr. D. Mass., April 2, 2018)

(case no. 1:17-bk-10641; adv. proc. no. 1:17-ap-1038) (Chief Bankruptcy Judge Melvin S. Hoffman)

Text of opinion

Elements of issue preclusion under Virginia law:

Collateral estoppel, or issue preclusion, under Virginia law has five elements. First, the prior action must have resulted in a valid and final judgment against the party in the present action. Second, the parties or privies in both proceedings must be the same. Third, there must be mutuality between the parties. Fourth, the factual issue litigated actually must have been litigated in the prior action. Fifth, the issue litigated must have been essential to prior judgment. *In re Duncan*, 448 F.3d 725 (4th Cir. 2006).

In re Basl, 2018 WL 1886571 (Bankr. E.D. Va., April 18, 2018)

(case no. 3:17-bk-32341; adv. proc. no. 3:17-ap-4495) (Bankruptcy Judge Keith L. Phillips)

Text of opinion

Federal principles of collateral estoppel determine preclusive effect of federal court judgment:

Where a judgment was issued by a federal court, federal principles of collateral estoppel determine whether the judgment has preclusive effect. See *Heiser v. Woodruff*, 327 U.S. 726 (1946); *In re Docteroff*, 133 F.3d 210 (3d Cir. 1997).

Elements of collateral estoppel under federal law:

Collateral estoppel, also known as issue preclusion, has five elements under federal law: (1) the party sought to be precluded in the second suit must have been a party, or in privity with a party, to the original lawsuit; (2) the issue sought to be precluded must be the same as the issue involved in the prior action; (3) the issue sought to be precluded must have been actually litigated in the prior action; (4) the issue sought to be precluded must have been determined by a valid and final judgment; and (5) the determination in the prior action must have been essential to the prior judgment. *Sandy Lake Band of Miss. Chippewa v. United States*, 714 F.3d 1098 (8th Cir. 2013); *Robinette v. Jones*, 476 F.3d 585 (8th Cir. 2007).

Default judgment generally does not give rise to collateral estoppel:

The general rule is that a default judgment does not give rise to collateral estoppel because, in the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. *Arizona v. California*, 530 U.S. 392, 120 S.Ct. 2304, 147 L.Ed.2d 374 (2000) (quoting Restatement (Second) of Judgments § 27 cmt. e).

Default judgment may have collateral estoppel effect where defendant substantially participated in litigation but engaged in bad faith:

Several circuits have recognized an exception to the general rule when the party against whom preclusion is asserted substantially participated in the prior litigation before the default judgment. The leading cases are *In re Daily*, 47 F.3d 365 (9th Cir. 1995), *In re Bush*, 62 F.3d 1319 (11th Cir. 1995), and *In re Docteroff*, 133 F.3d 210 (3d Cir. 1997). While the Eighth Circuit Court of Appeals has not resolved the issue, the present court found the previously-described cases persuasive and held that collateral estoppel may apply to a default judgment when the party against whom the judgment was entered substantially participated in the litigation and engaged in bad faith conduct to frustrate the legal process prior to the default.

Default judgment had collateral effect where debtor substantially participated in litigation but engaged in bad faith:

Here, the debtor, who actively participated in the parties' prepetition Iowa litigation over nearly a three-year period, engaged in bad-faith conduct in that litigation, and so, pursuant to the doctrine of collateral estoppel, the default judgment entered against him in that action barred him from contesting the dischargeability of the judgment debt.

Seibert v. Cedar Rapids Lodge & Suites, LLC, 583 B.R. 214 (D. Minn., April 10, 2018), **appeal filed**, Case No. 18-2058 (8th Cir., filed May 15, 2018)

(case no. 0:17-cv-4756) (District Judge Susan Richard Nelson)

Text of opinion

Debtor was not judicially estopped from prosecuting lawsuit despite initial failure to disclose suit in bankruptcy case:

Finding the case controlled by *Metrou v. M.A. Mortenson Co.*, 781 F.3d 357 (7th Cir. 2015), the district court held that a debtor's suit against a city and various police officers for violating her constitutional rights was not precluded by judicial estoppel, although the debtor had initially failed to disclose the lawsuit in her later-filed Chapter 7 bankruptcy case, where the debtor presented evidence that she omitted the action from her bankruptcy schedules due to confusion brought about by poor counsel, and the debtor subsequently re-opened her bankruptcy case and amended her schedules to include her suit. For other cases, compare *Cannon-Stokes v. Potter*, 453 F.3d 446 (7th Cir. 2006) (the debtor was judicially estopped from pursuing a claim she failed to disclose in bankruptcy; although the debtor allegedly relied on erroneous advice from bankruptcy counsel in failing to disclose the claim, she never moved to re-open the bankruptcy to disclose the lawsuit and make her creditors whole) and *Spaine v. Community Contacts, Inc.*, 756 F.3d 542 (7th Cir. 2014) (the defendant in the debtor's lawsuit was not entitled to summary judgment on the ground of judicial estoppel where the debtor submitted an affidavit indicating that she had orally disclosed the lawsuit to the bankruptcy trustee at the meeting of creditors, and the trustee, with knowledge of the debtor's lawsuit, concluded that the debtor had no assets).

Ellis v. Alexander, 2018 WL 1942650 (N.D. Ill., April 25, 2018)

(case no. 1:16-cv-5155) (District Judge John J. Tharp, Jr.)

Text of opinion

Stipulated judgment was entitled to collateral estoppel effect under California law:

Ordinarily, stipulated judgments are not given preclusive effect under California law because the issues were not actually litigated. Where the record or judgment evidences an intent by the parties for a stipulated judgment to be preclusive, however, a court may give effect to that judgment. Thus, here, the bankruptcy court did not err in applying collateral estoppel to a stipulated judgment entered in California state court litigation so as to render the judgment nondischargeable under Code § 523(a)(2)(A).

In re Johnson, 2018 WL 1803002 (9th Cir. B.A.P., April 16, 2018), appeal filed, Case No. 18-60025 (9th Cir., filed May 1, 2018)

(case no. 17-1194)

Text of opinion

See also:

In re Woide, --- Fed. Appx. ----, 2018 WL 1633550 (11th Cir., April 5, 2018) (case nos. 17-10776, 17-10777) (the Chapter 7 debtors' mortgage creditor, which sought to compel the debtors to surrender their mortgaged residential property, had both statutory and constitutional standing to seek reopening of the bankruptcy case) (text of opinion)

In re Gilman, 887 F.3d 956 (9th Cir., April 13, 2018) (case no. 16-55436) (the bankruptcy court did not abuse its discretion in granting the debtor's motion, asserting excusable neglect under Civil Rule 60(b)(1), for relief from a judgment sustaining a creditor's objection to the debtor's claimed homestead exemption, where the court sustained the objection after the debtor's attorney failed to respond to the objection, and the attorney failed to respond due to a "calendaring error" resulting in the attorney's having "too many balls in the air") (text of opinion)

R

Elements of *Rooker–Feldman* doctrine:

In order for the *Rooker–Feldman* doctrine to apply, the following requirements must be met: (1) the federal plaintiff lost in state court; (2) the plaintiff complains of injuries caused by the state-court judgment; (3) that judgment was rendered before the federal suit was filed; and (4) the plaintiff is inviting the district (or bankruptcy) court to review and reject the state judgment. *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159 (3d Cir. 2010).

In re Meyer, 2018 WL 1663292 (Bankr. M.D. Pa., April 4, 2018)

(case no. 1:12-bk-4042; adv. proc. no. 1:17-ap-138) (Chief Bankruptcy Judge Robert N. Opel II)

Text of opinion

Adversary proceeding was barred by *Rooker-Feldman* doctrine:

The debtor's adversary proceeding was barred by the *Rooker-Feldman* doctrine where, after losing a foreclosure battle in state court, the debtor sought to negate the foreclosure judgment by obtaining a declaration from a federal court that the mortgage was void. The foreclosure judgment was final for the purpose of the *Rooker-Feldman* doctrine even though, under Illinois law, a foreclosure judgment cannot be appealed until the sale order has been implemented and the sale of the foreclosed property has been completed. In *Carpenter v. PNC Bank Nat'l Ass'n*, 633 Fed. Appx. 346 (7th Cir. 2016), the Seventh Circuit applied *Rooker-Feldman* in precisely the same factual context: a federal suit filed after an Illinois court entered a judgment of foreclosure but before sale of the property.

Kyles v. Federal Home Loan Mortgage Corp, 2018 WL 1784133 (N.D. Ill., April 13, 2018)

(case no. 1:17-cv-1511) (District Judge John J. Tharp, Jr.)

Text of opinion

Rooker-Feldman doctrine, generally:

Under the *Rooker-Feldman* doctrine, lower federal courts may not consider claims that directly seek to set aside a state court judgment or claims that are inextricably intertwined with the state court judgment. This determination hinges on whether the federal claim alleges that the injury was caused by the state court judgment, or alternatively, whether the federal claim alleges an independent prior injury that the state court failed to remedy. *Jakupovic v. Curran*, 850 F.3d 898 (7th Cir. 2017). However, if a contention in federal litigation is intertwined with the state litigation only in the sense that it entails a factual or legal contention that was, or could have been, presented to the state judge, then the connection between the state and federal cases concerns the rules of preclusion, which are not jurisdictional and are outside the scope of the *Rooker-Feldman* doctrine. The vital question is whether the federal plaintiff seeks the alteration of a state court's judgment. *Milchtein v. Chisholm*, 880 F.3d 895 (7th Cir. 2018) (stating also that the phrase "inextricably intertwined" ... "should not be used as a ground of decision" because it has the potential to blur the boundary between claim preclusion and the *Rooker-Feldman* doctrine). In any case, an exception exists if the party did not have a reasonable opportunity to raise an issue in state court proceedings. See, e.g., *Jakupovic*, above; *Brown v. Bowman*, 668 F.3d 437 (7th Cir. 2012); *Taylor v. Fed. Nat'l Mortg. Ass'n*, 374 F.3d 529 (7th Cir. 2004); *Long v. Shorebank Dev. Corp.*, 182 F.3d 548 (7th Cir. 1999).

In re Renk, 2018 WL 1956189 (Bankr. E.D. Wis., April 24, 2018)

(case no. 2:17-bk-27651; adv. proc. no. 2:17-ap-2361) (Chief Bankruptcy Judge Susan V. Kelley)

Text of opinion

Bankruptcy court lacked jurisdiction over debtor's claims against her bankruptcy attorney:

The bankruptcy court lacked jurisdiction over the debtor's claims against her bankruptcy attorney for fraudulent concealment, fraudulent misrepresentation, and constructive fraud in connection with the attorney's representation of the debtor after her case had been converted from Chapter 11 to Chapter 7. The claims did not fall within "related to" jurisdiction because the claims could not have any conceivable effect on the debtor's bankruptcy estate. The claims belonged to the debtor personally and were not property of her estate, creditors have been paid in full, the debtor had received her discharge, and the Chapter 7 estate had been fully administered and closed.

In re Holcomb, 2018 WL 1976526 (9th Cir. B.A.P., April 25, 2018)

(case no. 17-1268)

Text of opinion

See also:

In re Van Winkle, 583 B.R. 759 (10th Cir. B.A.P., April 3, 2018) (cases nos. 17-31, 17-32, 17-33) (the *Rooker-Feldman* doctrine precludes a federal action that tries to modify or set aside a state-court judgment on the ground that the state proceedings should not have led to that judgment; see *Mayotte v. U.S. Bank Nat'l Ass'n*, 880 F.3d 1169 (10th Cir. 2018)) (text of opinion)

R

Part D

Means Test

There are no cases in this issue.

R

Part E

Proof of Claim

Proof of Claim: By Secured Creditor: Amount of Claim

Topical compilations:

All topical compilations

PDF Word (prepetition charges)

All circuit compilations

PDF Word (postpetition charges)

Court's grant of relief from stay did not preclude debtor's later claim for sanctions under Rule 3002.1(i):

Because motions for relief from stay are summary proceedings that require a quick determination and are limited in scope, the decision in a relief from stay proceeding does not support preclusion by res judicata or collateral estoppel. Thus, here, the court's granting relief from stay to the Chapter 13 debtor's mortgage creditor did not preclude the debtor's claim for an award of sanctions under Rule 3002.1(i) for the creditor's failure to comply with Rule 3002.1(c), even though in his response to the creditor's motion for relief from stay the debtor asserted that the creditor failed to file notices of postpetition charges required under Rule 3002.1(c).

Debtor's failure to file response under Rule 3002.1(h) did not preclude later claim for sanctions under Rule 3002.1(i):

The Chapter 13 debtor's failure to move for a determination of final cure and payment under Rule 3002.1(h) after the Chapter 13 trustee had filed a Notice of Final Cure and the mortgage creditor filed a timely Response to the Notice of Final Cure did not preclude the debtor's later claim for an award of sanctions under Rule 3002.1(i) for the creditor's failure to file notices of postpetition charges required under Rule 3002.1(c). See *In re Bodrick*, 498 B.R. 793 (Bankr. N.D. Ohio 2013) (the Chapter 13 debtor's failure to file a motion under Rule 3002.1(h) did not bar the debtor's later adversary proceeding to recover for the mortgage creditor's alleged violation of the automatic stay in misapplying the debtor's postpetition payments).

In re Meyer, 2018 WL 1663292 (Bankr. M.D. Pa., April 4, 2018)

(case no. 1:12-bk-4042; adv. proc. no. 1:17-ap-138) (Chief Bankruptcy Judge Robert N. Opel II)

Text of opinion

Federal law controls determination of whether attorney's fees claimed by creditor are reasonable:

According to the Seventh Circuit, the standards for proving the reasonableness of attorney's fees are procedural, not substantive. Because federal law controls procedure in the federal courts, the applicable standards come from federal law, not state law. Thus, here, where the holder of the second mortgage on the Chapter 13 debtors' home was entitled to "reasonable attorney's fees" under both the note and the mortgage if the debtors defaulted, the reasonableness of the attorney's fees and costs due as of the petition date included in the creditor's proof of claim was assessed under federal law. While Illinois standards for attorney's fee requests are exacting, federal law assesses attorney's fees for commercial reasonableness. The court noted that other cases had reached differing positions on the issue. Compare *McCarthy v. Nekoosa Port Edwards State Bank*, 2013 WL 3942185 (W.D. Wis. July 30, 2013) (applying federal law) with *In re Coates*, 292 B.R. 894 (Bankr. C.D. Ill. 2003) (applying Illinois law).

Commercial reasonableness depends on mechanisms of the market:

Commercial reasonableness depends, not on the minutiae of an attorney's billing, but on the market's mechanisms. Rather than engage in a detailed, hour-by-hour review of an attorney's bills, courts undertake an overview of the aggregate costs. The goal is to ensure those costs were reasonable in relation to the stakes of the case and to the other side's litigation strategy.

Mortgage creditor's claimed $93,735.68 in attorney's fees was reasonable under federal law:

The evidence in the case, what there was of it, demonstrated the commercial reasonableness of the creditor's attorney's fees and expenses. The creditor paid the fees, so these were not pie-in-the sky numbers that one litigant sought to collect from a stranger but would never dream of paying itself. Moreover, the total amount of $93,735.68 was also reasonable in relation to what was at stake, as on the petition date the creditor was owed $333,795.59 in principal and interest, more than three times the amount of attorney's fees.

In re Allegretti, 584 B.R. 287 (Bankr. N.D. Ill., April 24, 2018)

(case no. 1:17-bk-17844) (Bankruptcy Judge A. Benjamin Goldgar)

Text of opinion

Mortgage creditor's claim might be barred by statute of limitations:

The Chapter 13 debtors' mortgage creditor was barred by the six-year statute of limitations in Ohio Rev. Code Ann. § 1303.16(A) from either enforcing the debtors' promissory note or foreclosing upon the mortgage. This provided a basis for disallowing the creditor's proof of claim unless the creditor's potential action for ejectment, which was not time-barred, supported allowance of the proof of claim. Because the issue of ejectment had not been fully briefed, the court would not issue a final decision on whether the claim should be allowed.

In re Fisher, 584 B.R. 185 (Bankr. N.D. Ohio, April 27, 2018)

(case no. 4:17-bk-40457) (Bankruptcy Judge Kay Woods)

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 Abell, 2018 WL 1787357 (Bankr. W.D. Ky., April 12, 2018) (case no. 3:17-bk-32555) (Bankruptcy Judge Joan A. Lloyd) (the claim held by a company that sold a motor vehicle to the Chapter 13 debtors was unsecured since, under Kentucky law, perfection of a lien on a motor vehicle does not occur until a physical notation regarding the lien is made on the vehicle's title, and, here, the seller did not strictly comply with the requirements of the statute until two weeks after the debtors filed their Chapter 13 petition) (text of opinion)

R

Claim may be determined to be contingent based on postpetition events:

A claim may be determined to be contingent based on postpetition events. Thus, here, the Chapter 7 debtors' debts under guaranties of certain debts of their business were contingent debts, although on the petition date the business was in default under the loan agreements so that the debtors' debts were then not contingent, where following the bankruptcy filing the debtors and the creditor reached an agreement to waive the existing defaults. At that point, the debtors' debts under the guaranties became contingent upon a future default.

Court values contingent claims under debtors' guaranties at zero:

Because a creditor's claims under the Chapter 7 debtors' guaranties were contingent, the court was required to estimate the claims under Code § 502(c). Here, because there appeared to be no danger of default by the principal obligor, the debtors' business, the court would value the claims at zero. The business had been current on its payment obligations since entering into the lending agreements, and the business had become increasingly profitable. While the business was in default when the debtors filed their bankruptcy case, the defaults were not related to payment but instead stemmed directly from the isolated and unexpected incident of a stroke suffered by the debtor husband, necessitating a transfer of majority ownership of the business to the debtor wife. These defaults were not a sign of some pattern of behavior that would indicate a likelihood of further default.

In re Benanti, 2018 WL 1801194 (Bankr. C.D. Ill., April 13, 2018)

(case no. 3:15-bk-71018) (Chief Bankruptcy Judge Mary P. Gorman)

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

See also:

In re Jaghab, 584 B.R. 472 (Bankr. E.D. N.Y., April 16, 2018) (case no. 8:15-bk-73166; adv. proc. no. 8:16-ap-8127) (Bankruptcy Judge Robert E. Grossman) (the 50% interest that the Chapter 7 debtor held in a corporation that was the payee of a promissory note did not allow the Chapter 7 trustee to assert a 50% interest in the payments being made on the note; the note was executed in favor of the corporation, not of the debtor and the other 50% shareholder) (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:

PDF Word

All topical compilations

All circuit compilations

See also:

In re Felix, 582 B.R. 915 (6th Cir. B.A.P., April 6, 2018) (case no. 17-8004) (affirming *In re Felix*, 562 B.R. 700 (Bankr. S.D. Ohio, Jan. 23, 2017), the BAP held that the bankruptcy court did not commit clear error in holding that the debtors, who owned residences in both Ohio and Maryland, were domiciled in Maryland rather than Ohio for the 730 days prior to the date of the bankruptcy petition and therefore were not entitled to claim exemptions under Ohio law) (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

See also:

CFCU Community Credit Union v. Harrington, 584 B.R. 9 (N.D. N.Y, April 9, 2018) (case no. 5:17-cv-1120) (District Judge David N. Hurd) (affirming *In re Harrington*, 578 B.R. 147 (Bankr. N.D. N.Y., Sept. 22, 2017), the district court held that, where the Chapter 13 debtor husband had obtained a remainder interest in real property subject to a lien for a mortgage taken out by the owner, who retained a life estate, the bankruptcy court did not err in including the full amount of the mortgage lien in the court's calculation of impairment under Code § 522(f), rather than, as contended by the judicial lien creditor, netting the mortgage lien against the value of the life estate interest before applying the remainder to reduce the debtor's equity in his remainder interest) (text of opinion)

R

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

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

California law: Debtor may not claim automatic homestead exemption without intent to continue to reside in property:

Under California law, conveyance of the debtor's homestead property to a third party does not defeat the debtor's right to an automatic homestead exemption in the property because continuous residency, rather than continuous ownership, controls the analysis. However, physical occupancy on the petition filing date without the requisite intent to live there is not sufficient to establish residency. Thus, here, where the debtor was in the process of selling the claimed homestead property on the petition date, the bankruptcy court erred in allowing the debtor's homestead exemption without making a determination as to whether the debtor intended to continue to reside in the property. Accordingly, the court vacated in part *In re Gilman*, 2015 WL 12747656 (C.D. Cal., Dec. 3, 2015).

In re Gilman, 887 F.3d 956 (9th Cir., April 13, 2018)

(case no. 16-55436)

Text of opinion

Delaware law: Workers' compensation award under Illinois law was not exempt:

A workers' compensation award that the debtor received under Illinois law could not be exempted under 19 Del. Code Ann. tit. 19, § 2355, which provides that "claims or payment for compensation due or to become due under this chapter shall not be assignable and all compensation and claims therefor shall be exempt from all claims of creditors." The language "this chapter" clearly references Chapter 23 of Title 19 of the Delaware Code and plainly restricts the exemption of such awards to those made under Delaware law. For a similar case, see *In re Almgren*, 384 B.R. 12 (Bankr. D. Idaho 2007) (worker's compensation benefits awarded under Tennessee law were not exempt under Idaho law).

In re Coleman, --- B.R. ----, 2018 WL 1801198 (Bankr. D. Del., April 13, 2018)

(case no. 1:17-bk-12346) (Chief Bankruptcy Judge Brendan L. Shannon)

Text of opinion

See also:

In re Crow, Case No. 2:17-bk-20280 (Bankr. D. Wyo., April 4, 2018), appeal filed, Case No. 18-60 (10th Cir. B.A.P., filed April 17, 2018) (Bankruptcy Judge Cathleen D. Parker) (a brokerage account was owned by the debtor and his non-filing wife as tenants by the entirety under Wyoming law and therefore was exempt, except as to the amount of the spouses' joint debt; the wife's actions in withdrawing funds from the account did not sever the tenancy) (text of opinion)

R

Part G

Other Issues

Authority of the Court

Bankruptcy court properly sanctioned attorney for failure to comply with turnover order:

Affirming *In re Reed*, 2017 WL 44645 (E.D. Mo., Jan. 3, 2017), the Court of Appeals declared that a bankruptcy court has inherent authority to sanction a party for failing to comply with a court order. A party commits contempt when he violates a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order. A contempt finding requires clear and convincing evidence. Here, the bankruptcy court did not err in imposing sanctions on a bankruptcy attorney for failing to comply with the court's turnover order.

In re Reed, 888 F.3d 930 (8th Cir., April 25, 2018)

(case no. 17-1143)

Text of opinion

See also:

In re White, 2018 WL 1902491 (Bankr. N.D. Ala., April 19, 2018), amended (April 27, 2018), appeal filed, *Law Solutions of Chicago LLC v. Corbett*, Case No. 1:18-cv-677 (N.D. Ala., filed May 1, 2018) (case nos. 1:17-bk-40093, 1:17-bk-40462, 1:17-bk-40599, 2:17-bk-999, 7:16-bk-72114, 7:17-bk-70171) (Chief Bankruptcy Judge James J. Robinson) (finding that UpRight Law and a local affiliated attorney failed to comply with the court's order implementing the settlement of two prior adversary proceedings by the Bankruptcy Administrator, in which UpRight Law and the attorney agreed not to charge additional fees or limit the scope of legal services for clients who retained them before a certain date, the court assessed $150,000 in civil penalties against UpRight Law and the attorney and ordered them, under Code § 526(c)(2)(A), to refund the attorney's fees received in the six cases in which the court found they failed to comply with the settlement) (text of opinion) (amendment to opinion)

Four types of authority to sanction attorney appearing before bankruptcy court:

There are, essentially, four types of authority that might be invoked to sanction an attorney appearing before the bankruptcy court: (1) the power to regulate behavior before it inherent in all courts; (2) the direct, specific authority of a statute or rule; (3) the ability to regulate the practice of the federal bar, as delegated to the court by the United States District Court for this District; and (4) the authority afforded specifically to the bankruptcy courts under Code § 105(a). Each type of authority has its own limitations, including, for example, scope, predicates, burdens and remedies.

Bankruptcy court's inherent authority, generally:

The Supreme Court has provided a variety of examples of when a federal court might exercise its inherent authority. Federal courts have the power to punish for contempt, to vacate judgments if procured through fraud, control courtroom behavior and assess costs and award fees. The Seventh Circuit has stated that, although the exercise of the inherent power may be limited by statute or rule, it is still possible in appropriate circumstances for a court to sanction bad-faith conduct by means of the inherent power even if that conduct could also be sanctioned under the statute or the Rules.

Court's authority to impose sanctions under Code § 105(a), generally:

Code § 105(a) empowers bankruptcy courts to sanction conduct that abuses the judicial process. The bankruptcy court's power under § 105(a) often goes hand-in-hand with its inherent power. The existence of a narrower authority does not supplant the ability to use the broader power of § 105(a), so long as the use of § 105(a) does not contravene an express limitation in the statute or the rules. Like the inherent powers of the court, § 105(a) allows the court to address conduct without extensive and needless satellite litigation. While a showing of bad faith is not required, a movant, in invoking the sanction powers of the bankruptcy court under § 105(a), must show that court action goes to the central objectives of bankruptcy.

Court sanctions debtor's attorney by ordering return of fees collected and additional payment of $4,000:

Here, where an attorney filed two Chapter 13 bankruptcy cases for a debtor in the same calendar year but failed to prosecute either case, in effect merely buying time for the debtor, who was facing a sheriff's sale of his residence, and in the second case the debtor's scheduled amounts for secured and unsecured debt both exceeded the applicable debt limits in Code § 109(e), the court, acting under its authority under Code § 105(a), ordered the attorney to refund to the debtor the $4,432.70 in fees collected in the two cases, and further ordered the attorney to pay the debtor an additional $4,000 to allow the debtor to again seek bankruptcy relief, which the debtor still required.

In re Tabor, 583 B.R. 155 (Bankr. N.D. Ill., April 11, 2018), amended (April 13, 2018)

(case no. 1:15-bk-26544) (Bankruptcy Judge Timothy A. Barnes)

Text of opinion Amendments to opinion

R

Majority view holds that Chapter 13 debtor may not exercise trustee's avoidance powers:

While there is case law to the contrary, the majority view, and the view adopted in every reported decision in this district, is that a Chapter 13 debtor does not have standing to assert a trustee's transfer avoidance powers. See, e.g., *In re Kalesnik*, 571 B.R. 491 (Bankr. D. Mass. 2017); *In re Kirschke*, 2009 WL 4344434 (Bankr. D. Mass., Nov. 24, 2009), aff'd on other grounds 2010 WL 2510087 (D. Mass. June 16, 2010); *In re Miller*, 251 B.R. 770 (Bankr. D. Mass. 2000); *In re Perry*, 131 B.R. 763 (Bankr. D. Mass. 1991). Accord, *In re Cardillo*, 169 B.R. 8 (Bankr. D. N.H. 1994). However, the present court did not need to decide the issue.

Chapter 13 debtor has standing to assert transfer avoidance claim under Code § 522(h):

A Chapter 13 debtor has standing under Code § 522(h) to assert a cause of action under Code § 544(a)(3) to set aside a prepetition state court foreclosure sale.

Bankruptcy trustee may avoid transfer where foreclosure deed has not been recorded:

A bankruptcy trustee cloaked with the status of a bona fide purchaser under Code § 544(a)(3) may avoid the transfer of a debtor's interest in property at a foreclosure sale if the deed was not recorded prior to the bankruptcy filing. *In re Mularski*, 565 B.R. 203 (Bankr. D. Mass. 2017).

Claim preclusion barred debtor's claim under Code § 548, but not claim under § 544(a)(3):

Where a default judgment had been entered against the Chapter 13 debtor in her prepetition state court wrongful foreclosure action against her mortgage creditor, claim preclusion barred the debtor's claim, in an adversary proceeding against the creditor, to set aside the foreclosure sale as a fraudulent transfer under Code § 548, as the facts upon which the claim was based were identical to the facts upon which the debtor's state court complaint was based. However, claim preclusion did not bar either the debtor's claim to avoid the foreclosure sale under Code § 544(a)(3), or the debtor's claim to preserve the avoided transfer for the benefit of the bankruptcy estate under § 551, as neither claim could have been raised in state court.

In re Giacchetti, 584 B.R. 441 (Bankr. D. Mass., April 2, 2018)

(case no. 1:17-bk-10641; adv. proc. no. 1:17-ap-1038) (Chief Bankruptcy Judge Melvin S. Hoffman)

Text of opinion

See also:

In re Garcia, 2018 WL 1956177 (Bankr. D. Puerto Rico, April 24, 2018) (case no. 3:15-bk-2402; adv. proc. no. 3:17-ap-76) (Brian K. Tester) (because, under Puerto Rico law, a mortgage on the Chapter 7 debtor's property that was not recorded prepetition did not create a lien, there was no unperfected lien for the Chapter 7 trustee to avoid under Code § 544) (text of opinion)

In re Brannon, 584 B.R. 417 (Bankr. N.D. Ga., April 5, 2018) (case no. 1:16-bk-54770; adv. proc. no. 1:16-ap-5212) (Chief Bankruptcy Judge Wendy L. Hagenau) (because Georgia Code Ann. § 44–2–3 provides that "every unrecorded voluntary deed or conveyance of land made by any person shall be void as against subsequent bona fide purchasers for value without notice of such voluntary deed or conveyance," the Chapter 7 trustee, in the status of a bona fide purchaser of real property under Code § 544(a)(3), could avoid the transfer, under a prepetition divorce decree, of the debtor's one-half interest in the former marital residence to her former husband, where the debtor never executed a deed conveying her one-half interest to her former husband, and neither the divorce decree nor a notice of lis pendens had been recorded in the real estate records) (text of opinion)

In re Power, 2018 WL 1887318 (Bankr. D. Idaho, April 18, 2018) (case no. 8:16-bk-40636; adv. proc. no. 8:16-ap-8034) (Bankruptcy Judge Jim D. Pappas) (where a lender that refinanced the Chapter 7 debtors' motor vehicle loan did not perfect its security interest in the vehicle until 40 days after the loan, in which the debtors granted the lender the security interest, the exchange was not "substantially contemporaneous" for the purpose of Code § 547(c)(1)(B), so that the lender could not assert the "new value" defense in § 547(c)(1) in the Chapter 7 trustee's proceeding to avoid the transfer as a preference under § 547(b)) (text of opinion)

R

Scope and Violation of Discharge Injunction

Good-faith belief, even if unreasonable, that discharge injunction does not apply precludes finding of contempt for violating injunction:

Affirming *In re Taggart*, 548 B.R. 275 (9th Cir. B.A.P., April 12, 2016), which had reversed *In re Taggart*, 522 B.R. 627 (Bankr. D. Or., Dec. 16, 2014), the Court of Appeals held that the good-faith belief by prepetition creditors that the discharge injunction did not prevent them from seeking an attorney's fee award against the debtor for fees that they incurred following the debtor's discharge precluded an award of contempt sanctions against the creditors for violating the discharge injunction, regardless of whether the creditors' belief was reasonable. The court has adopted a two-part test for determining the propriety of a contempt sanction in the context of a discharge injunction: To justify sanctions, the movant must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction. *In re Bennett*, 298 F.3d 1059 (9th Cir. 2002). To satisfy the first prong, knowledge of the applicability of the injunction must be proved as a matter of fact and may not be inferred simply because the creditor knew of the bankruptcy proceeding. Additionally, the creditor's good-faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable. *In re Zilog, Inc.*, 450 F.3d 996 (9th Cir. 2006). Here, the bankruptcy court applied an incorrect rule of law in holding that a good-faith belief that the discharge injunction was inapplicable to the creditors' claims was irrelevant. As a result, the BAP did not err when it reversed the contempt sanctions entered by the bankruptcy court.

In re Taggart, 888 F.3d 438 (9th Cir., April 23, 2018), **pet for reh'g en banc filed** (June 6, 2018)

(case nos. 16-35402, 16-60032, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043)

Text of opinion

Foreclosure of foreclosure deficiency judgment did not violate discharge injunction:

Reversing in part *In re Van Winkle*, 2017 WL 562430 (Bankr. D. N.M., Feb. 10, 2017), the BAP held that, because New Mexico law allows the enforcement of a foreclosure deficiency judgment against real property that has been redeemed from foreclosure, creditors holding a deficiency judgment following their foreclosure of a judgment lien against real property owned by the debtor did not violate the discharge injunction by commencing proceedings to foreclose the deficiency judgment after the personal representative of the debtor's probate estate redeemed the real property from foreclosure following the debtor's death, since the creditors did not attempt to collect the judgment from the debtor's probate estate.

In re Van Winkle, 583 B.R. 759 (10th Cir. B.A.P., April 3, 2018)

(cases nos. 17-31, 17-32, 17-33)

Text of opinion

See also:

In re Loy, 584 B.R. 302 (Bankr. N.D. Ind., April 26, 2018) (case no. 1:16-bk-12328) (Chief Bankruptcy Judge Robert E. Grant) (the state of Indiana did not violate the discharge injunction where the debt the state sought to recover from the debtor following his discharge, which was for penalties imposed for making fraudulent representations in order to obtain unemployment benefits, was nondischargeable under Code § 523(a)(7)) (text of opinion)

R

Valuation of Property

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Debtors did not provide substantial evidence valuing worker's compensation claim:

Reversing *In re Austin*, 2017 WL 3149323 (Bankr. E.D. Mo., July 24, 2017), the BAP held that the bankruptcy court erred in valuing the Chapter 13 debtor husband's worker's compensation claim at $3,000 as of the petition date, based on the affidavit of the attorney litigating the claim on behalf of the debtor. The IRS filed a claim secured by the worker's compensation claim and, following a postpetition amendment, valued the claim at $15,661.60, representing the proceeds of the claim received postpetition by the husband. The BAP concluded that the attorney's affidavit, which asserted that the husband's claim had only a $3,000 "nuisance" value, was not substantial evidence of the value of the claim, where (1) the attorney admitted that he did not yet know the full extent of the debtor's injuries; (2) the affidavit did not state what demands had been made on the husband's behalf or provide any documentation to corroborate the conclusion that the claim was worth only $3,000 on the petition date; (3) the affidavit did not present copies of the actual claims filed on behalf of the husband, evidence of the Missouri state statutory scheme for valuing worker's compensation claims, or evidence of past awards for similar claims; and (4) the IRS had no opportunity to cross-examine the attorney, as there was no evidentiary hearing, no testimony taken, and nothing admitted into evidence.

The debtors had the burden of producing substantial evidence to rebut the IRS's claim. They were required to provide evidence that had a reasonable, objective basis for the valuation of a tort claim; this could include such things as lost wages, medical bills or worker's compensation schedules. Allowing a valuation of a tort claim without a reasonable factual basis encouraged abuse. Debtors could avoid a secured creditor's interest in tort claims simply by failing to obtain the facts necessary to support those claims.

In re Austin, 583 B.R. 480 (8th Cir. B.A.P., April 9, 2018)

(case no. 17-6024)

Text of opinion

Court values residence in Dedham, Massachusetts, at $465,000:

Valuing the Chapter 13 debtors' home at 116 Vincent Road in Dedham, Massachusetts, at $465,000, the bankruptcy court found the appraisal of the creditor's appraiser more reliable than that of the debtors' appraiser. The creditor's appraisal came in at $490,000 while the debtors' appraisal presented a value of $368,000. The debtors' appraiser testified that, unlike the creditor's appraiser, he did not consider lot size in determining the fair market value of the debtors' property, and three out of the four comparables used by the debtors' appraiser were on much smaller lots than the debtors' property. Further diminishing the reliability of the debtors' appraisal was their appraiser's assumption that the debtors' property consisted of eight rooms (excluding the basement) when in fact it had only seven. However, also finding that the comparability adjustments by the creditor's appraiser had not gone far enough, the court factored in an additional downward adjustment of $22,000 to accurately take into account the condition of the family room in the debtors' residence.

In re Craig, 2018 WL 2063217 (Bankr. D. Mass., April 30, 2018)

(case no. 1:17-bk-12373) (Chief Bankruptcy Judge Melvin S. Hoffman)

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 was not abuse under totality of circumstances:

Granting the 59–year–old debtor a Chapter 7 discharge would not be an abuse under the totality of circumstances as defined in § 707(b)(3)(B) under the pre-BAPCPA test stated in *In re Krohn*, 886 F.2d 123 (6th Cir. 1989). The debtor's exclusion of overtime pay from his income calculation was not an abuse, where, as of the petition date, only one paycheck from the preceding nine months reflected overtime, and the debtor indicated that his postpetition overtime work was voluntary and was not certain to continue. The U.S. Trustee did not demonstrate that the debtor's current tax withholdings were inappropriate or abusive, where the debtor testified that he would no longer be claiming at least one of his daughters as a dependent on his income tax return, and that he would be paying higher taxes for working in Canada. Finally, since it was clear that, under Code § 1325(b)(2), the debtor's 401(k) retirement loan repayments were not disposable income, the court did not consider repayment of these loans to be an abuse of the provisions of Chapter 7.

In re Equere, 2018 WL 1635226 (Bankr. E.D. Mich., April 2, 2018)

(case no. 2:17-bk-53917) (Bankruptcy Judge Mark A. Randon)

Text of opinion

See also:

In re Millard, --- B.R. ----, 2018 WL 2021245 (Bankr. D. Utah, April 27, 2018) (case no. 2:17-bk-20016) (Bankruptcy Judge Joel T. Marker) (the obligation of the debtor, an attorney, to repay the negative balance on his capital account at his law firm when he left the firm was not a consumer debt, even though the monthly draws the debtor had taken from the account had been used to pay his household expenses) (text of opinion)

R

Denial or Revocation of Discharge

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

See also:

Thompson v. McDermott, Case No. 3:17-cv-130 (N.D. Ga., April 3, 2018), appeal filed, *In re Thompson*, Case No. 18-11885 (11th Cir., filed May 3, 2018) (District Judge Timothy C. Batten, Sr.) (the bankruptcy court did not err in revoking the Chapter 7 debtors' discharges under Code § 727(d)(2); this provision does not include an unstated requirement, which is explicitly made a part of § 727(d)(1), that the moving party not have known of the offending conduct prior to the debtor's discharge) (text of opinion)

In re Fitzhugh, 2018 WL 1789596 (9th Cir. B.A.P., April 13, 2018) (case no. 17-1141) (in order to revoke a Chapter 7 debtor's discharge under Code § 727(d)(2), the movant must show that he was unaware of the alleged fraud at the time the discharge was entered; see *In re Dietz*, 914 F.2d 161 (9th Cir. 1990)) (text of opinion)

In re Anderson, 2018 WL 2059600 (Bankr. D. Idaho, April 30, 2018) (case no. 4:15-bk-40878; adv. proc. no. 4:17-ap-8046) (Bankruptcy Judge Jim D. Pappas) (acting under Code § 727(d)(3), the bankruptcy court revoked the discharges of the Chapter 7 debtors after the debtors, who were real estate agents, failed to comply with the court's order to turn over commissions received postpetition, which the debtors consistently claimed were not estate property) (text of opinion)

R

Reaffirmation Agreements; Statement of Intention; Surrender or Redemption of Collateral; Assumption of Lease of Personal Property

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Court of Appeals orders Chapter 7 debtors to surrender mortgaged residential property:

Affirming *In re Woide*, 2017 WL 78798 (M.D. Fla., Jan. 9, 2017), reconsideration denied, 2017 WL 549160 (Feb. 9, 2017), which had affirmed *In re Woide*, 551 B.R. 865 (Bankr. M.D. Fla., June 22, 2016), and reaffirming *In re Failla*, 838 F.3d 1170 (11th Cir., Oct. 4, 2016), the Court of Appeals held that the bankruptcy court did not err in granting the Chapter 7 debtors' mortgage creditor's motions to reopen their bankruptcy case and compel the debtors to surrender the mortgaged residential property, where the debtors had neither redeemed the property nor reaffirmed the debt, but instead continued to reside in the property without making mortgage payments while contesting the creditor's state-court foreclosure proceeding. The circuit's case law was clear that Code § 521(a)(2) provides only three options for a debtor who has property that serves as collateral for his debts: redeem the property, reaffirm the debt, or surrender the property; doing nothing is not an option. Moreover, the creditor's motion was not barred by laches, as there was no prejudice to the debtors in requiring them to comply with § 521(a)(2) and their previous representations to the bankruptcy court that they would surrender the property.

In re Woide, --- Fed. Appx. ----, 2018 WL 1633550 (11th Cir., April 5, 2018)

(case nos. 17-10776, 17-10777)

Text of opinion

See also:

In re Templin, 2018 WL 1864928 (Bankr. D. N.M., April 17, 2018) (case no. 1:17-bk-13196) (Bankruptcy Judge David T. Thuma) (agreeing with *In re McCray*, 578 B.R. 403 (Bankr. E.D. Mich. 2017) and *In re Williamson*, 540 B.R. 460 (Bankr. D. N.M. 2015), the bankruptcy court held that there was no basis under the Bankruptcy Code or Rules to delay the Chapter 7 debtor's discharge, although the debtor failed to comply with his obligation under Code § 521(a)(2) to file, and then perform, a proper statement of intention regarding a creditor's claim secured by the debtor's mobile home; the debtor stated the intention of retaining the mobile home and continuing to make the required payments on the debt, which was not a permissible option under § 521(a)(2)) (text of opinion)

R

Other Issues

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

See also:

In re Stewart, 583 B.R. 775 (Bankr. W.D. Okla., April 27, 2018), appeal filed, Case No. 18-68 (10th Cir. B.A.P., filed May 14, 2018) (case no. 5:15-bk-12215) (Chief Bankruptcy Judge Janice Loyd) (the failure of an attorney representing the involuntary Chapter 7 debtors and their 13 affiliated limited liability companies to disclose, for over two years, the amount and source of the nearly $350,000 in attorney's fees he received violated Code § 329(a) and Bankruptcy Rule 2016(b) and warranted an order requiring the attorney to disgorge $25,000 of the fees) (text of opinion)

In re Brannon, 584 B.R. 417 (Bankr. N.D. Ga., April 5, 2018) (case no. 1:16-bk-54770; adv. proc. no. 1:16-ap-5212) (Chief Bankruptcy Judge Wendy L. Hagenau) (the court granted the Chapter 7 trustee's motion under Code § 363(h) to sell the debtor's former marital residence free and clear of the one-half interest in the residence held by the debtor's former husband, who was entitled to receive one-half of the net proceeds of the sale) (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

Secured creditor's lack of objection to proposed Chapter 13 plan constitutes consent to plan:

The court agreed with the majority view that Code § 1325(a)(5)(A) is satisfied where a secured creditor had proper notice of the debtor's proposed Chapter 13 plan and the creditor did not object to confirmation of the plan.

Secured creditors' consent to Chapter 13 plans rendered moot trustee's objections on grounds of lack of equal monthly payments to secured creditors:

Because the secured creditors consented to the debtors' proposed Chapter 13 plans by failing to object to conformation of the plans, thereby satisfying Code § 1325(a)(5)(A), § 1325(a)(5) as a whole was satisfied and the court did not need to consider the Chapter 13 trustee's objection that the plans, by providing secured creditors with only adequate protection payments initially, until administrative expense claims had been paid in full, with a step-up in payments to the secured creditors after that date, violated § 1325(a)(5)(B)(iii)(I).

In re Carr, 584 B.R. 268 (Bankr. N.D. Ill., April 10, 2018)

(case nos. 1:17-bk-29195, 1:17-bk-25013) (Bankruptcy Judge Deborah L. Thorne)

Text of opinion

See also:

In re Amaya, --- B.R. ----, 2018 WL 1773096 (Bankr. S.D. Tex., April 11, 2018) (case no. 7:17-bk-70280) (Bankruptcy Judge Eduardo V. Rodriguez) (agreeing with *In re DeSardi*, 340 B.R. 790 (Bankr. S.D. Tex. 2006), the bankruptcy court held that Code § 1325(a)(5)(B)(iii)(I), which provides that if "the property to be distributed" to a secured creditor under a Chapter 13 plan "is in the form of periodic payments such payments shall be in equal monthly amounts," permits full payment of administrative claims in a Chapter 13 case prior to commencing equal monthly payments to secured creditors; the plain language of § 1325(a)(5)(B)(iii)(I) does not include a requirement for equal payments to begin in the first month of the plan) (text of opinion)

In re Williams, 583 B.R. 453 (Bankr. N.D. Ill., April 10, 2018) (case no. 1:17-bk-33186) (Bankruptcy Judge LaShonda A. Hunt) (disagreeing with *In re Marks*, 394 B.R. 198 (Bankr. N.D. Ill. 2008), the court held that a proposed Chapter 13 plan that would provide a secured motor vehicle creditor with only adequate protection payments initially, until administrative expense claims, including that of the debtor's attorney, had been paid in full, with a step-up in payments to the secured creditor after that date, could not be confirmed over the secured creditor's objection) (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)

Anti-modification provision in Code § 1123(b)(5) did not apply where debtor rented out addition to residence:

The anti-modification provision in Code § 1123(b)(5), which is identical to that found in § 1322(b)(2), did not apply where a mortgage creditor's claim was secured by a lien on property owned by the Chapter 11 debtor and containing not only the debtor's residence but also a 1,600-square-foot addition rented to the debtor's brother-in-law. The addition was a separate, self-enclosed residential unit constructed for the purpose of providing a residence for the debtor's mother and father-in-law and had two bedrooms, a living room, a kitchen, a full bath and a separate entrance. While the debtor rented the addition only to family members, and at a reduced rent, the addition was nevertheless income-producing within the meaning of *Lomas Mortgage, Inc. v. Louis*, 82 F.3d 1 (1st Cir. 1996) (holding that "the antimodification provision of § 1322(b)(2) does not bar modification of a secured claim on a multi-unit property in which one of the units is the debtor's principal residence and the security interest extends to the other income-producing units").

Application of anti-modification provision in Code § 1123(b)(5) is determined as of petition date:

While the debtor built the addition to his residence, which he rented out to family members, after taking out the mortgage on the residence, the better view is that the applicability of the anti-modification provision in Code § 1123(b)(5) and § 1322(b)(2) is determined as of the bankruptcy petition date rather than the loan origination date. This majority adhering to this view includes apparently every bankruptcy court in this circuit to have addressed the issue. See *In re Leigh*, 307 B.R. 324 (Bankr. D. Mass. 2004); *In re Schultz*, 2001 WL 1757060 (Bankr. D. N.H. 2001); *In re Lebrun*, 185 B.R. 665 (Bankr. D. Mass. 1995); *In re Wetherbee*, 164 B.R. 212 (Bankr. D. N.H. 1994); *In re Boisvert*, 156 B.R. 357 (Bankr. D. Mass. 1993); *In re Churchill*, 150 B.R. 288 (Bankr. D. Me. 1993).

In re Berkland, 582 B.R. 571 (Bankr. D. Mass., April 6, 2018)

(case no. 1:17-bk-10821) (Bankruptcy Judge Frank J. Bailey)

Text of opinion

Debtor has burden of producing substantial evidence to rebut value of secured claim:

Under Code § 502(a), a creditor may file a proof of claim and it is deemed allowed, unless a party in interest objects. Under Bankruptcy Rule 3001(f), a proof of claim that comports with the requirements of Rule 3001 constitutes prima facie evidence of the validity and amount of the claim. The filing of an objection does not deprive the proof of claim of a presumptive validity unless the objection is supported by substantial evidence. As part of the burden of producing substantial evidence to rebut the presumptive validity, the objecting party bears the burden of producing substantial evidence as to the value of the collateral securing the claim. *In re Heritage Highgate Inc.*, 679 F.3d 132 (3rd Cir. 2012). This is because, under Code § 506, the claim is secured only to the extent of the value of the collateral. Substantial evidence means "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Debtors did not provide substantial evidence rebutting value of worker's compensation claim that secured creditor's claim:

Reversing *In re Austin*, 2017 WL 3149323 (Bankr. E.D. Mo., July 24, 2017), the BAP held that the bankruptcy court erred in valuing the Chapter 13 debtor husband's worker's compensation claim at $3,000 as of the petition date, based on the affidavit of the attorney litigating the claim on behalf of the debtor. The IRS filed a claim secured by the worker's compensation claim and, following a postpetition amendment, valued the claim at $15,661.60, representing the proceeds of the claim received postpetition by the husband. The BAP concluded that the attorney's affidavit, which asserted that the husband's claim had only a $3,000 "nuisance" value, was not substantial evidence of the value of the claim, where (1) the attorney admitted that he did not yet know the full extent of the debtor's injuries; (2) the affidavit did not state what demands had been made on the husband's behalf or provide any documentation to corroborate the conclusion that the claim was worth only $3,000 on the petition date; (3) the affidavit did not present copies of the actual claims filed on behalf of the husband, evidence of the Missouri state statutory scheme for valuing worker's compensation claims, or evidence of past awards for similar claims; and (4) the IRS had no opportunity to cross-examine the attorney, as there was no evidentiary hearing, no testimony taken, and nothing admitted into evidence.

The debtors had the burden of producing substantial evidence to rebut the IRS's claim. They were required to provide evidence that had a reasonable, objective basis for the valuation of a tort claim; this could include such things as lost wages, medical bills or worker's compensation schedules. Allowing a valuation of a tort claim without a reasonable factual basis encouraged abuse. Debtors could avoid a secured creditor's interest in tort claims simply by failing to obtain the facts necessary to support those claims.

In re Austin, 583 B.R. 480 (8th Cir. B.A.P., April 9, 2018)

(case no. 17-6024)

Text of opinion

Costs of optional gap insurance and extended maintenance coverage for Chapter 13 debtor's 910-day vehicle were not protected by hanging paragraph of Code § 1325(a):

The costs of the optional gap insurance and extended maintenance coverage that the Chapter 13 debtor purchased, less than 910 days prepetition, at same time as his purchase of a motor vehicle were not sufficiently related to the debtor's acquisition of the vehicle so as to be part of the vehicle's sales price, so that the amount paid for these optional items was not protected from bifurcation by the hanging paragraph of Code § 1325(a). Applying the dual status rule, rather than the transformation rule, the court calculated that 93.54% of the total amount financed was a PMSI protected from bifurcation, while the balance was not.

In re Jones, 583 B.R. 749 (Bankr. W.D. Wash., April 20, 2018)

(case no. 2:17-bk-12813) (Bankruptcy Judge Christopher M. Alston)

Text of opinion

See also:

In re Bennett, 584 B.R. 15 (8th Cir. B.A.P., April 19, 2018) (case no. 17-6025) (affirming *In re Bennett*, 2017 WL 1417221 (Bankr. N.D. Iowa, April 20, 2017), the BAP held that the bankruptcy court did not err in ruling that the anti-modification provision in Code § 1322(b)(2) did not apply to a creditor's claim secured by the Chapter 13 debtors' manufactured home, where the home was not sufficiently affixed to the land to have become a fixture, and therefore part of the underlying real property, under Iowa law) (text of opinion)

R

Part B

Confirmation of Plan—Treatment of Unsecured Claims

Confirmation of Plan:
Treatment of Unsecured Claims:
Other Issues

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

Postpetition interest on DSO may be required to be paid under Chapter 13 plan:

Agreeing with *In re Resendiz*, 2013 WL 6152921 (Bankr. S.D. Tex., Nov. 20, 2013) and *In re Lightfoot*, 2015 WL 3956211 (Bankr. S.D. Tex., June 22, 2015), and disagreeing with *In re Hernandez*, 2007 WL 3998301 (Bankr. E.D. Tex., Nov. 15, 2007), the bankruptcy court held that, because the definition of "domestic support obligation" under Code § 101(14A) specifically includes interest accruing pursuant to applicable nonbankruptcy law, and because domestic support obligations are priority claims that must be paid in full in a Chapter 13 plan pursuant to Code § 1322(a)(2), postpetition interest that accrues on DSO claims under applicable nonbankruptcy law must be paid through Chapter 13 plans. However, the court noted that, at least under Texas law, only certain types of DSOs accrue interest.

In re Randall, 2018 WL 1737620 (Bankr. N.D. Tex., April 10, 2018)

(case no. 3:17-bk-33322) (Bankruptcy Judge Harlin DeWayne Hale)

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

Test for good faith under Code § 1325(a)(3):

The Fifth Circuit utilizes a totality of circumstances test to determine whether a Chapter 13 plan has been proposed in good faith, as required by Code § 1325(a)(3). Under this test, courts considers such factors as (1) the reasonableness of the proposed repayment plan; (2) whether the plan shows an attempt to abuse the spirit of the bankruptcy code; (3) whether the debtor genuinely intends to effectuate the plan; (4) whether there is any evidence of misrepresentation, unfair manipulation, or other inequities; (5) whether the filing of the case was part of an underlying scheme of fraud with an intent not to pay; (6) whether the plan reflects the debtor's ability to pay; and (7) whether a creditor has objected to the plan. See *In re Stanley*, 224 Fed. Appx. 343 (5th Cir. 2007).

Chapter 13 plan providing for retention of unnecessary boat was not proposed in good faith:

The bankruptcy court did not commit clear error in (1) ruling that economic considerations may be taken into account in assessing a Chapter 13 plan's compliance with the good faith test in Code § 1325(a)(3) and (2) concluding that the below-median debtors' plan was not proposed in good faith because the plan proposed the debtors' retention of a boat, motor and trailer (which the debtors valued at $1,500 in total) while paying unsecured creditors only $600. The debtors contended that they needed the boat and related items to fish, as the fish were part of their food supply; the bankruptcy court reasoned that the debtors did not need a boat in order to fish.

Booker v. Johns, 2018 WL 1831418 (W.D. La., April 17, 2018), **appeal filed**, In re Booker, Case No. 18-30526 (5th Cir., filed April 26, 2018)

(case no. 5:16-cv-1604) (Chief District Judge S. Maurice Hicks, Jr.)

Text of opinion

See also:

In re Carr, 584 B.R. 268 (Bankr. N.D. Ill., April 10, 2018) (case nos. 1:17-bk-29195, 1:17-bk-25013) (Bankruptcy Judge Deborah L. Thorne) (there is no per se rule that a Chapter 13 plan proposing to pay the debtor's attorney's fees ahead of the debtor's secured creditors is a violation of the good faith requirement in Code § 1325(a)(3); this treatment is perfectly permissible under Code § 1326(b)(1)) (text of opinion)

R

Effect of Plan Confirmation

Topical compilation:

PDF Word

All topical compilations

All circuit compilations

See also:

In re Howard, 584 B.R. 252 (Bankr. N.D. Ill., April 19, 2018), appeal filed, *The City of Chicago v. Howard*, Case No. 1:18-cv-2753 (N.D. Ill., filed April 17, 2018) (case no. 1:17-bk-25141) (Bankruptcy Judge Jacqueline P. Cox) (a city was bound by the debtor's confirmed Chapter 13 plan, to which the city had not objected, which treated the city's claim for unpaid parking tickets as unsecured, although the city claimed that the debtor's vehicle, which the city had impounded prepetition, was subject to a possessory lien in the city's favor) (text of opinion)

R

Part D

Issues Other Than Confirmation of Plan

Other Issues

Topical compilations:

PDF Word (general matters)

PDF Word (other matters involving mortgage creditors)

All topical compilations

All circuit compilations

Chapter 13 debtor's attorney's fees are not required to benefit bankruptcy estate:

The Bankruptcy Code does not require that Chapter 13 debtors' attorneys' fees benefit the estate. This was not always the case, as starting in the early nineteenth century and ending in 1978, a debtor's attorney was generally entitled to have his compensation paid out of the bankruptcy estate as an administrative expense only if the attorney could demonstrate that his services had provided a clear and substantial benefit to the bankruptcy estate. Michelle Arnopol Cecil, A Reappraisal of Attorneys' Fees in Bankruptcy, 98 Ky. L.J. 67 (2010); see also *Matter of Lee*, 3 B.R. 15 (Bankr. N.D. Ga. 1979) (deciding case under the Bankruptcy Act). This changed in 1978 with the enactment of the Bankruptcy Reform Act, but under the case law that developed, the services of the debtor's attorney were generally still not compensable out of the estate where the services had benefitted only the debtor and had not aided in the administration of the estate in some way. See, e.g., *In re Chas. A. Stevens & Co.*, 105 B.R. 866 (Bankr. N.D. Ill. 1989). In 1994, however, Congress again amended the bankruptcy laws. This time, it modified Code § 330 to remove any reference to "the debtor's attorney." As a result, the general rule has become that a debtor's attorney in a Chapter 7 case cannot be compensated out of the estate as an administrative priority claimant unless he/she is employed by the trustee. Congress, however, added a special exception at the same time for debtors' attorneys in Chapters 12 and 13 only. Code § 330(a)(4)(B) provides that "[i]n a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section." It has therefore become clear that (1) debtors' attorneys may be compensated out of the estate in Chapters 12 and 13, and (2) reasonable compensation may be allowed by the court, based on a consideration of the relevant factors, regardless of any separate benefit to the estate or lack thereof. See, e.g., *In re Tahah*, 330 B.R. 777 (10th Cir. B.A.P. 2005).

Chapter 13 debtor's attorney's fees are entitled to administrative expense status:

If a debtor's attorney's fees are allowed by the court, they are entitled to administrative expense status under Code § 503(b)(2). With that status, those fees become entitled to payment out of the estate at second priority. In Chapter 13, that means that, under Code § 1322(a)(2), the plan must provide for the fees' payment in full over time, unless the attorney agrees otherwise. Under Code § 1326(b)(1), the payments for the fees must be made either before or concurrently with any payments to creditors, including secured creditors. See generally *In re Maldonado*, 483 B.R. 326 (Bankr. N.D. Ill. 2012).

[continued on the following page]

Bankruptcy court has independent duty to review attorney's fees for reasonableness:

The bankruptcy court has an independent duty to review a debtor's attorney's fees for reasonableness before allowing those fees to be paid out of the estate as an administrative expense. Ordinarily, the bankruptcy court must approve compensation to be paid out of the estate based on the factors set forth in Code § 330, with those factors mirroring those used in a traditional lodestar analysis. *In re Sullivan*, 674 F.3d 65 (1st Cir. 2012). The court, however, is not required to perform a lodestar analysis, "and bankruptcy courts have increasingly adopted systems under which attorneys for chapter 13 debtors can be awarded a presumptively reasonable standard fee for each case." *In re Brent*, 458 B.R. 444 (Bankr. N.D. Ill. 2011). Even where a presumptively reasonable no-look fee is sought, a "reasoned objection" from a party in interest shifts the burden of proof back onto the fee-claimant, who must establish the reasonableness of the fees sought under § 330. *In re Crager*, 691 F.3d 671 (5th Cir. 2012).

Fiduciary relationship existed between two Chapter 13 debtors and their attorneys before entering into their respective retention agreements:

A fiduciary relationship existed between two Chapter 13 debtors and their attorneys before entering into their respective retention agreements such that the attorneys had a heightened duty to disclose the implications of their compensation. This finding was warranted for three reasons. First, these debtors were debtors with primarily consumer debts, and Congress has signaled that consumer debtors comprise one particular class of vulnerable and unknowledgeable persons. Second, these agreements were signed on the eve of bankruptcy, and prospective bankruptcy debtors were often anxious and desperate to retain houses, tenancies or leases, and automobiles. Finally, even where a prospective principal is not vulnerable and unknowledgeable, there is a heightened reliance on fair dealing from a prospective agent in setting the terms of the compensation where the implications of the fee structure on the interests of the client can only be known based on information within the control of the prospective agent.

Applications for compensation filed by Chapter 13 debtors' attorneys would be denied due to violation of local rule requiring disclosure to court of agreement regarding compensation:

In two cases, the applications for compensation filed by the Chapter 13 debtors' attorneys would be denied due to the attorneys' violation of a local rule providing that "[e]very agreement between a debtor and an attorney for the debtor that pertains, directly or indirectly, to the compensation paid or given, or to be paid or given, to or for the benefit of the attorney must be in the form of a written document signed by the debtor and the attorney" and must be disclosed to the court. Here, though agreements existed, they were not disclosed, so that neither attorney was entitled to have his compensation approved.

In re Carr, 584 B.R. 268 (Bankr. N.D. Ill., April 10, 2018)

(case nos. 1:17-bk-29195, 1:17-bk-25013) (Bankruptcy Judge Deborah L. Thorne)

Text of opinion

Creditor has burden of proof under Bankruptcy Rule 3002.1(h):

While Bankruptcy Rule 3002.1 does not expressly address the burden of proof under subsection (h), courts addressing the issue have concluded that the mortgage holder has the burden to establish outstanding postpetition obligations on the mortgage.

Mortgage creditor established that Chapter 13 debtor's postpetition arrearage was $38,659:

The Chapter 13 debtor's mortgage creditor established that the debtor owed a postpetition arrearage in the total amount of $38,658.85, which included principal and interest in the amount of $36,841.56 and unpaid escrow in the amount of $3,327.36, less $1,510.07 held in a suspense account by the creditor.

In re Hockenberger, 2018 WL 1770172 (Bankr. N.D. Ohio, April 11, 2018)

(case no. 3:12-bk-32367) (Bankruptcy Judge Mary Ann Whipple)

Text of opinion

See also:

In re Stevenson, 583 B.R. 573 (1st Cir. B.A.P., April 30, 2018) (case no. 17-35) (the bankruptcy court did not abuse its discretion in dismissing, for unreasonable delay prejudicial to creditors under Code § 1307(c)(1), a Chapter 13 case commenced by a debtor who had previously obtained a discharge of her debts in a Chapter 7 case, and whose only remaining indebtedness consisted of nondischargeable student loan debt and a debt owed to her landlord, where the record suggested that the debtor's Chapter 13 filing was motivated by or targeted at a single creditor—her landlord—and that her filing was part of a pattern of conduct aimed at thwarting the landlord's eviction efforts) (text of opinion)

McBride v. Riley, 2018 WL 1768602 (W.D. La., April 12, 2018), appeal filed, Case No. 18-30535 (5th Cir., filed April 30, 2018) (case no. 1:17-cv-1302) (District Judge James T. Trimble, Jr.) (affirming *In re Riley*, 577 B.R. 497 (Bankr. W.D. La., Sept. 29, 2017), the district court held that advances by a Chapter 13 debtor's attorney of filing fees, credit counseling fees, and credit report fees are not reimbursable under Code § 330(a), § 503(b)(1)(A) or § 503(b)(2) because they are not administrative expenses of the debtor's estate) (text of opinion)

In re Petty, 2018 WL 1956187 (Bankr. E.D. Tex., April 24, 2018) (case no. 4:18-bk-40258) (Bankruptcy Judge Brenda T. Rhoades) (agreeing with *In re Bailey-Pfeiffer*, 2018 WL 1896307 (Bankr. W.D. Wis., March 23, 2018), and disagreeing with *In re Fishel*, 583 B.R. 474 (Bankr. W.D. Wis., March 30, 2018) and *In re Pratola*, 578 B.R. 414 (Bankr. N.D. Ill. 2017), the court held that, while Code § 109(e) is not jurisdictional, the court lacks discretion to decline to dismiss a case in which the Chapter 13 debtor's debts exceed the debt limits stated in § 109(e)) (text of opinion)

In re Malek, 2018 WL 1750089 (Bankr. D. Mont., April 10, 2018) (case no. 2:15-bk-61179) (Bankruptcy Judge Benjamin Philip Hursh) (denying the Chapter 13 debtor's motion under Code § 1307(b) to voluntarily dismiss his case, and instead converting the case to Chapter 7 under Code § 1307(c), the court said that the debtor's failure to list two properties for sale for 10 to 12 months of the approximately 18-month marketing period provided for in the debtor's confirmed plan was sufficiently "egregious behavior" to constitute bad faith, warranting denial of the debtor's motion under *In re Rosson*, 545 F.3d 764 (9th Cir. 2008)) (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: To be considered by the Standing Committee at its June 12, 2018, meeting, for authorization for publication for public comment in August 2018. See the Agenda for the Standing Committee's meeting.

Full text: See pages 205-215 of the Agenda for the Standing Committee's June 12, 2018, meeting.

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.

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:

No cases.

Certiorari petitions pending:

Deutsche Bank Trust Company Americas v. Robert R. McCormick Foundation, Case No. 16-317 (U.S. Sup. Ct., pet. for cert. filed Sept. 9, 2016)

An appeal from *In re Tribune Co. Fraudulent Conveyance Litigation*, 818 F.3d 98 (2nd Cir., March 29, 2016) raising the issue of whether that Code § 546(e), which prohibits the trustee from avoiding transfers that are "margin payment[s]" or "settlement payment[s]" "made by or to (or for the benefit of)" certain entities including commodity brokers, securities clearing agencies, and "financial institutions," precludes state-law, constructive fraudulent conveyance claims asserted by creditors rather than the bankruptcy trustee.

Distributed for the Court's conference of March 29, 2018. On April 3, Justices Kennedy and Thomas released a statement advising the parties that "consideration of the petition for certiorari will be deferred for an additional period of time" in order to allow the lower courts to consider the effect of the Court's decision in *Merit Management Group, LP v. FTI Consulting, Inc.*, 138 S.Ct. 883, 2018 WL 1054879 (Feb. 27, 2018), which held that, for the purpose of the safe harbor found in Code § 546(e), the only relevant transfer is the transfer that the trustee seeks to avoid.

Supreme Court docket Case filings on SCOTUSBlog

Sterba v. PNC Bank, Case No. 17-423 (U.S. Sup. Ct., pet. for cert. filed Sept. 15, 2017)

The Chapter 7 debtors have filed a petition for certiorari seeking review of *In re Sterba*, 852 F.3d 1175 (9th Cir., April 5, 2017), which held that, under federal choice-of-law rules, a creditor's claim based on a promissory note secured by real property in California was subject to the Ohio, rather than the California, statute of limitations.

Distributed for the Court's conference of June 21, 2018. The Solicitor General filed a brief on May 17 recommending that the Court deny certiorari.

Supreme Court docket Case filings on SCOTUSBlog

Certiorari petitions recently denied:

None.

General Resources

SCOTUSblog

R

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